To Be Argued By:
Alan D. Sugarman

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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.

BRIEF FOR PETITIONERS-APPELLANTS NIZAM PETER KETTANEH AND HOWARD LEPOW

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PRELIMINARY STATEMENT[1]

This is an appeal from the July 10, 2009 order and decision of the Supreme Court, New York County[2] dismissing an Article 78 proceeding challenging an August 26, 2008 decision[3] of the New York City Board of Standards and Appeals (BSA) granting variances to the respondent Congregation Shearith Israel.

Petitioner-Appellant Kettaneh is the owner of a brownstone located opposite and Petitioner-Appellant Lepow is the owner of a cooperative apartment located adjacent to the Congregation's site at Central Park West and West 70th Street in Manhattan. Petitioners challenged seven variances granted by the BSA to the Congregation for a 113.7[4]-foot high mixed-use community house and luxury condominium building. Although not apparent from the BSA Decision itself, the upper floor condominium variances account for over 90% of the variance floor area.[5]

The development site is in Manhattan, adjacent to the Congregation's historic landmarked Synagogue and Parsonage at the corner of Central Park West

[1] Petitioners' 4450-page Appendix on Appeal is cited as [A-1 to A-4450]. The BSA below filed a 5795 page administrative record [A-249], supplemented by additional documents. [A-360]. Petitioners filed 4200 pages of exhibits with their Article 78 Petition. [A-157].

[2] *Kettaneh v. Board of Standards and Appeals*, 2009 NY Slip Op 31548(U) (Sup. Ct. NY Co, July 10, 2009) (Lobis Decision). [A-13].

[3] *See* the 230-paragraph Resolution of the BSA, August 26, 2008 (Decision.) [A-52]. By stipulation, the parties cite to paragraph numbers applied to the Decision. [A-270].

[4] The BSA misrepresented the height as 105 feet. *See* note 21.

[5] The BSA misleads by implying that 50% of the variances are related to religious programmatic needs. BSA Decision, ¶ 33. [A-54]. *See also* [A-476-81] explaining the 90% figure.

and West 70th Street.[6] The site is within a landmark district and three-fourths of the site is subject to West Side "contextual zoning," the zoning applicable to these residential neighborhoods with narrow side streets. Contextual zoning limits maximum building height to 75 feet and requires upper-floor setbacks on a building's street side, so as to protect the light and air on the street and the character of the community.

The record shows that a conforming building would easily provide a reasonable return on investment to the Congregation, even excluding the $12.3 million of profit the Congregation would earn as to the site value.

For the purposes of judicial economy and although cause does exist, this appeal does not challenge the lower floor community house variances; nor does this appeal assert that the BSA should have use a leveraged/return on equity approach.[7] Nor do Petitioners argue on this appeal the failure of the Congregation to exhaust administrative remedies with the City Planning Commission (CPS) under ZR § 74–711 special permit – rather, Petitioners' appeal is confined to the

[6] *See* [A-182–4] providing three-dimensional color graphics of the site and proposed project.
[7] The Court below was incorrect in stating that the "petitioners' biggest complaint was that the Congregation's expert did not utilize the return on equity analysis" in determining the Project's rate of return." Lobis Decision at page 22. [A-35]. Petitioners' biggest complaint was the fallacious return on investment analysis and indeed Petitioners devoted a large part of their filings to that issue. [A-769 at line 21].

lack of jurisdiction by the BSA to provide relief from landmarking, as provided to CPC in ZR § 74–711.[8]

ISSUES PRESENTED

1. **Reasonable Return Acceptable to Congregation**

Whether the BSA may grant variances for a non-conforming building when the rate of return for a conforming building is nearly twice the rate acknowledged by the Congregation as satisfactory.

Not addressed by the court below.

2. **Reasonable Return of Entire Site[9]**

Whether in a mixed-use project, the Congregation must show as a basis for the BSA's (b) finding[10] that it is unable to earn a reasonable return on investment from an all-income producing conforming building (Scheme C) using the entire development site.[11]

Not addressed by the court below.

[8] The concept of "exhaustion of remedies" would imply that the BSA has jurisdiction to grant landmarking hardship relief, but that first an owner must apply to the CPC. Petitioners' contend that the BSA has no power to consider landmarking as a physical condition in any event, hence the concept does not apply.
[9] "Reasonable return analysis" and "feasibility report/study/analysis" are used interchangeably.
[10] References to the (b) finding etc. are to the findings required under ZR § 72-21. *See* page 12 below.
[11] "As-of-right building" and "conforming building" are used interchangeably.

3. Partial Reasonable Return Feasibility Study

Whether the BSA may calculate its reasonable return finding for a mixed use project (Scheme A) using a site value representing seven floors, rather than two, when only two floors are being developed for condominiums.

Not addressed by the court below.[12]

4. Use of Value of Undeveloped Adjacent Landmarked Site

Whether the BSA may calculate its reasonable return finding for a mixed use project (Scheme A) using a site value representing the value of undeveloped space in an adjacent building alleged to be undevelopable because of landmarking.

Not addressed by the court below.

5. Use of Landmarking as Hardship

Whether the BSA in granting variances is authorized by statute to take into account hardships relating to landmarking, a power assigned to the New York City Planning Commission.

Not addressed by the court below.

6. Use of Original Acquisition Cost In Reasonable Return Analysis

Whether a reasonable return analysis must consider the actual acquisition cost of the property, so that the $12.3 million profit earned by the Congregation as to the site would be included as part of the return on investment.

[12] The court below, without discussion, held that this approach was not arbitrary or capricious. Lobis Decision at 23, last two lines [A-36] but not whether the law permitted such an approach.

Not addressed by the court below.

7. **Absence of Physical Conditions Creating Hardships**

Whether the BSA may grant variances for condominiums in the absence of unique physical conditions as distinguished from unique conditions.

Not addressed by the court below.

8. **Zoning Regulations as a Physical Condition**

Whether the requirement of a unique physical condition has any meaning if zoning regulations themselves can be considered physical conditions.

Not addressed by the court below.

9. **BSA Following Own Written Instructions**

Whether the BSA may not apply, without explanation, its own written and instructions for the preparation of reasonable return analyses.

Not addressed by the court below.

10. **Reasonable Return Analysis Based Upon Spoliated Documents**

Whether the BSA may knowingly base its reasonable return findings upon intentionally spoliated construction cost estimates that are missing key pages of relevant and material costs.

Not addressed by the court below.

11. **Ignoring Blocked Lot Line Windows When Granting Variances**

Whether the BSA, in allowing a non-conforming building to brick up windows in the side-front of an adjacent building, was not required as a basis for

its (e) finding to investigate whether a lesser variance with setbacks not blocking the windows would still provide a reasonable return to the Congregation and to otherwise balance the equities as a basis for it (c) finding.

Not addressed by the court below.

12. Improper *Ex Parte* Meeting Held by BSA Chair and Vice-Chair

Whether under the circumstances it was proper for the Chair and Vice-Chair to have held the *ex parte* meeting with the Congregation's consultants and lawyers and then refuse to disclose what had taken place, and whether the Respondent Chair and Vice-Chair may participate in any remand.

Not addressed by the court below.

13. Satisfaction of SEQR and CEQR is Not Compliance with Finding (c)

Whether satisfaction of the requirements of SEQR and CEQR dispenses with the obligation of the BSA to consider all factors in ZR § 72–21(c) in ascertaining the impact of shadows on narrow streets created by a non-conforming building.

Not addressed by the court below.

14. Ignoring Condition Known to Require Variances

May the BSA in approving a project ignore conditions that it knows require variances under the Zoning Resolution, such as the 40-foot minimum separation between buildings.

Not addressed by the court below.

STANDARD OF REVIEW

There must be a rational basis for the decision of a zoning board supported by evidence in the record. *Vomero v City of New York*[13] and; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*.[14] For the BSA, there is a further explicit statutory requirement not found in other New York State zoning laws: BSA variance decisions are to be supported by "substantial evidence." ZR § 72–21.[15]

Generalized conclusory and unsubstantiated assertions are not evidence. The many BSA findings that a fact was asserted do not substitute for the requisite BSA finding as to the facts themselves.

STATEMENT OF FACTS

The BSA devoted large parts of its Decision to the community house variances and issues irrelevant to the condominium variances, yet 90% of the extra floor area permitted by the variances granted to the Congregation is for the luxury condominiums.[16] The community house variances are not challenged in this appeal. The key issue raised in this appeal is the fallacious and improper site value used by the Congregation in its feasibility studies.

A. The Development Site

[13] *Vomero v City of New York*, 13 NY3d 840 (2009).
[14] *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 (2004).
[15] "[E]ach finding shall be supported by substantial evidence." ZR § 72-21. [A-789]. Zoning laws in other New York jurisdictions do not require "substantial" evidence.
[16] *See* [A-476-81] showing the variance spaces on each floor and the computations.

The development site consists of three brownstone lots on West 70th Street adjoining the Congregation's Synagogue on Central Park West. Adjoining the Synagogue on Central Park West is the Parsonage, a five-story townhouse that is being rented currently as a luxury single-family residence.[17] Having originally owned the lots, the Congregation sold and then in 1949 and 1964 repurchased the lots. One brownstone was demolished by the Congregation, yielding a vacant lot. The other two brownstones were reconfigured to create a community house. The community house currently is used by both the Congregation and a tenant private school (unaffiliated with the Congregation), which pays as much as $500,000 per year in rent to the Congregation.[18]

The existing community house building is to be demolished for $100,000.[19] After demolition, the site is essentially a simple 64- by 100-foot rectangular lot — in a prime Manhattan residential neighborhood.

The site lies in two zoning districts along West 70th Street. Adjacent to the Synagogue on the east, a 17 feet portion of the 64-foot wide site (or 26.6%) is in the R10A zoning district, having a 185-foot height limit.[20] On the west, a 47 feet portion (or 73.4 %) is in the R8B contextual zoning district, having a 75-foot height limit. Immediately to the right (west) is a cooperative apartment building, 18 West 70th Street, with lot-line windows overlooking the site.

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[17] [A-3059]. Lobis Decision at 13. [A-26].
[18] [A-3561]. In a new building, rent would increase to $1,281,000. [A-2108].
[19] *See* note 114 below.
[20] *See* As-of-Right Zoning Calculations. [A-1208]. *See also* BSA Decision at ¶ 87. [A-56].

The development site is 100 feet deep.

B. The Proposed Development

The Congregation proposed a 113.70-foot[21] tall mixed-used building, with a subterranean 6400-square foot banquet hall, a modern school facility and five floors of luxury condominiums atop the community space.

A conforming mixed-use building, described by the Congregation as Scheme A, would have six floors and rise to 75 feet; it would include two, not five floors of condominiums. In this building, the ground floor would rise 23 feet. Accordingly approximately 5/7ths of bulk would be used by the community facility, and 2/7th (31%) of bulk would be used by the condominiums.

A conforming building, if devoted to residential and other income producing uses, described by the Congregation as Scheme C, would have seven floors, also rising to 75 feet.[22]

C. The Congregation and Its Landmarked Synagogue

The Congregation is a distinguished institution, with roots dating to 1654. During the American Revolution, the Congregation was influential in providing financial support to the Colonial effort. In 1897 the Congregation completed the current Synagogue, an individual landmark.

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[21] The BSA decision inaccurately states 105 feet. ¶1. [A-52]. The DOB objection #6 states: "Proposed Maximum Building Height does not comply. 113.70' provided instead for 75.00' contrary to Section 23-633." [A-1565]. The BSA inaccurately paraphrased this language in ¶1]. The Approved plans [A-3871] rise 113.70 feet.. .

[22] The actual version of Scheme C provided by the Congregation was asserted to be all-residential, but in fact included community house space. [A-2794].

Today Congregation members remain distinguished and influential and include important judges, lawyers, political figures, real estate developers and philanthropists.

At the LPC hearings, members testifying included Jack Rudin, real estate developer[23] Jack Stanton, respected philanthropist, and;[24] Louis Solomon, former law partner of Corporation Counsel Cardozo.[25]

While commendable, none of this relates to whether the Congregation should be awarded variances.[26]

D. Certificate of Appropriateness from LPC

The Congregation in 1983 proposed a 42-story, 488-foot apartment tower, a proposal later dropped. Subsequent proposals were made and dropped as well.

In 2001, the Congregation proposed a 14-story condominium project, requiring approval by the Landmarks Preservation Commission (LPC.) The Congregation also sought a special permit under ZR § 74–711 for relief from landmarking hardships, requiring the LPC to recommend relief to the City Planning Commission (CPC.) The special permit would have restricted further

[23] Transcript of LPC Hearing, November 26, 2002. [A-926].
[24] Transcript of LPC Hearing, July 1, 2003. [A-993]. Stanton Announces $100 Million Gift to Yeshiva University. [A-2966].
[25] [A-4380] and [A-4389.]
[26] Considerable portions of the Congregation's statements to the BSA were devoted to the history of the Congregation. [A-1174-80].

development over the landmarked structures.[27] The BSA has no role under ZR § 74–711.

E. The § 74–711 Special Permit Request is Dropped

At LPC, the Congregation dropped its § 74–711 request,[28] and reduced the height of the proposed building. The Congregation still needed a Certificate of Appropriateness from LPC. Having dropped its § 74–711special permit application, the BSA accordingly would require variances from the BSA under § 72-21.

Ultimately, LPC approved a Certificate of Appropriateness in March, 2006, with LPC Commissioner Rebecca Gratz , who had been a member of the Congregation, voting in opposition.[29] The Certificate did not address zoning issues.

F. Primary Objective At LPC - Economic Engine Not Program Needs

At the LPC, the Congregation stated that its principal objective was to provide an "economic engine" to the Congregation, *not merely* to satisfy its religious program needs. [30] There was no mention of a need for access and circulation nor reference to the toddler program that would later be a central part of

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[27] Transcript of Community Board 7 (CB7) Proceeding, October 17, 2007, page 135. [A-2006].
> MS. NORMAN: Would it be possible then the synagogue would come back at a later date and suggest that they need to use those air rights to build above the parsonage.
> MR. FRIEDMAN: Anything is possible. … That's what the 74-711 was all about. It just didn't happen.

[28] *See* discussion concerning the Congregation's § 74-711 application at page 63 below.
[29] Transcript of LPC Hearing, March 14, 2006, page 27 [A-1071]. *See also* [A-3078-84].
[30] *See* statements re economic engine. [A-2922–43].

its community house variance claim. [31] At the BSA, the Congregation would need to conjure up "magic words"[32] not just to support the community house variances, but to satisfy the five findings for the condominium variances under ZR § 72-21.

G. The Five Findings Required to Be Made Under ZR § 72-21

The BSA is required to make five findings for each variance granted, under ZR § 72-21 (a) through (e).

(1) Finding (a) - Hardship Resulting from Unique Physical Condition

Finding (a), known as the physical condition finding, requires that there be a hardship created by a unique "physical condition" arising out of strict compliance with the zoning resolution. For non-profit uses, a compelling programmatic need perhaps may substitute for a physical condition.

(2) Finding (b) - A Conforming Building Cannot Earn a Reasonable Financial Return

Finding (b), the reasonable return finding, requires that the owner show there is no reasonable possibility that a conforming (as-of-right) building will bring a reasonable return to the applicant. Under BSA rules, an applicant must prepare

[31] Transcript of LPC Hearing November 15, 2005 [A-1041–42] ("[E]ssentially the second floor, third floor, and fourth floor will be some configuration of some classrooms and office …")
[32] Transcript of March 31, 2009 Hearing Before Justice Lobis, Counsel for Congregation states at lines 22-23: ("You see the magic words.") [A-766].

"feasibility studies."[33] For a non-profit project, this finding need not be addressed.[34]

(3) Finding (c) - Use of Adjacent Property Not Substantially Impaired and Neighborhood Character Not Altered

Finding (c) is the neighborhood impact finding that the "variance, if granted, will not alter the essential character of the neighborhood or district in which the zoning lot is located; will not substantially impair the appropriate use or development of adjacent property, and; will not be detrimental to the public welfare."

(4) Finding (d) - Hardship Not Self-Imposed

Finding (d) is the self-imposed hardship finding that the hardship claimed may not have been self-imposed.

(5) Finding (e) - The Variances Granted Must Be the Minimum Required to Afford Relief

Finding (e) is the so-called minimum condition finding that the variance is the minimum required to afford relief. To the extent that the hardship asserted is the reasonable return hardship of finding (b), economic feasibility studies are needed to show that the approved project would not result in an excessive financial return to the applicant.

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[33] *See* [A-820-220].

[34] The Congregation had asserted the BSA may not consider reasonable return where a non-profit seeks a variance for a mixed-use project. *See* Letter from Congregation's Counsel to BSA June 17, 2008 [A-4026-7]. The Congregation did not file a cross-appeal herein on the BSA's rejection of that argument. BSA Decision at ¶¶ 32-36. [A-54].

H. The Improper November, 2006 *Ex Parte* Meeting of the Congregation with the BSA Chair and Vice-Chair

Prior to filing its application with the BSA, the Congregation in October, 2006 sought and obtained an improper *ex parte* private meeting with the Chair and Vice-Chair of the BSA. The BSA kept the meeting secret from opponents who had already written to the BSA.[35] The same building drawings approved by the LPC and soon-to-be-filed with the BSA were presented at the meeting.[36]

In response to a formal request that the Chair and Vice-Chair recuse themselves,[37] the BSA General Counsel admitted that if such a meeting occurred after an application was filed, it would be improper.[38] The BSA refused to disclose what transpired therein, asserting attorney-client privilege.[39]

I. First DOB Objection Letter Requiring Eight Variances

The Congregation was required to submit its plans to the New York City Department of Buildings (DOB). The DOB would then deny the permits stating its objections, which denial would be appealed to the BSA. The DOB denied the Congregation's application and on or about March 27, 2007 and issued an objection letter listing eight variances required from the BSA.[40]

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[35] Letter from Petitioners' Counsel Re Status of Congregation Variance Application September 1, 2006 [A-1078]. BSA Memorandum Scheduling Ex Parte Meeting, November 8, 2006 [A-1135].
[36] Building Plans dated October 30, 2006, Presented By Congregation to BSA Chair and Vice-Chair At Improper Ex Parte Meeting November 3, 2006 [A-1094–1134] enclosed by letter dated November 3, 2006 [A-1093].
[37] Letter Requesting Recusal April 10, 2007. [A-1338]. *See also* [A-1471].
[38] [A-2339].
[39] [A-1471] and [A-1151].
[40] DOB Objection Sheet March 27, 2007. [A-1169].

The condominium-related objections were: maximum building height (#6), upper-floor setback (#7), base height in the front of the building (#5), initial front setback (#4) and required separation between buildings of 40 feet (#8.)[41]

The community house variances provided an extra ten feet of rear setbacks (#1, #2 and #3.)[42] Although meritorious grounds for challenges exist, in this appeal Petitioners do not challenge the community house variances.[43]

J. Congregation Delayed One Year to File With BSA

On April 1, 2007, a year after the LPC action, the Congregation submitted its variance application to the BSA. Having abandoned its §74-711 application at LPC and CPC, the Congregation needed to create a case for variances cognizable under ZR § 72–21. The application filed by the Congregation was defective procedurally because the DOB action was stale, ultimately forcing the Congregation to refile in September, 2007.

K. Deficiencies in Initial April, 2007 Application to BSA

BSA staff then detailed many deficiencies in a letter of objection.[44]

Among the deficiencies in the initial application:

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[41] The locations of the variances on each floor are shown at Petitioners Ex. M-1 at [A-476]. No variances were required for the 23-foot high first floor.

[42] *See* Proposed Building Street Wall Sections, Section R8B. [A- 1241].

[43] The Congregation concocted programmatic needs to satisfy the BSA requirement. Initially, floors one and two were for "Rabbinical and executive offices." [A-1184] and [A-1607]. Later, the Congregation would show a second floor devoted to classrooms for toddlers. [A-3881]. The claim that the caretaker's apartment must be on the fourth floor was concocted as well, since it could have easily been located on the fifth floor.: "[F]easibility further requires that the caretaker apartment be located at the fourth floor level rather than on a higher residential floor which carry a premium..."[A-4194]

[44] BSA Notice of Objections to Congregation dated June 15, 2007. [A-1491].

(1) All-Income Producing Feasibility Study Not Provided

The Congregation did not provide the required economic feasibility analysis of all of an all-income-producing, conforming "as-of-right" building (the so-called Scheme C.)[45]

(2) Assigned seven floors of site value to just two floors

The Congregation assigned the property value of a seven-floor structure to the two floors of condominiums, vastly inflating site value and vastly reducing return on investment. [46]

(3) Did not describe the bricking-over of lot line windows.

The Congregation failed to disclose that the proposed, non-conforming building would brick up lot line windows in an adjacent building, whereas a conforming building would not. The Congregation had not disclosed this to the LPC.[47]

(4) The 40-foot separation under ZR § 23-711 not shown

The Congregation's drawings did not reflect the DOB's eighth objection. [48] Under ZR § 23-711, the DOB required a 40-foot separation zone on the upper floors between the Synagogue and the residential buildings.[49] Opposition planning

[45] *Id.*, Objection 37. [A-1496].
[46] *See* extended discussion below.
[47] BSA Objection 22 [A-1494].
[48] BSA Objection 21 [A-1494]. Objection 21 states: "Please note that ZR § 23-711 prescribes a required minimum distance between a residential building and any other building on the same zoning lot."
[49] New York City DOB Objection Sheet, March 27, 2007. [A-1169].

expert Simon Bertrang agreed with the other experts, DOB, and BSA staff.[50] The Congregation did not assert the inapplicability of ZR § 23-711, but just failed to show the separation zone on its drawings.

L. No Variances Required for Access and Circulation

To the BSA, the Congregation asserted that variances were needed to resolve circulation and access issues and were the heart of its application.[51] This was proven to be false, yet the BSA did not ask the Congregation to clarify or correct the record[52] and then referred to the false assertion in its Decision.[53]

Yet, as the BSA knew, the Congregation's architect had admitted that which was obvious from the facts: "Mr. Morrison [opposition architect] correctly points out that both the as-of-right and proposed schemes relieve the now untenable access to the synagogue. Both schemes remedy the circulation through the addition of an ADA compliant elevator…"[54]

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[50] Memorandum from Simon Bertrang. [A-1563].
[51] *See* [A-1175], [A-1180], [A-1181], [A-1184], [A-1190], [A-1194], [A-1200], and [A-1201].
[52] Transcript of BSA Hearing of June 24, 2008, page 15, line 8. [A-4117]. Counsel for Petitioners confronted the BSA Board:

> "Can the applicant explain how a building strictly complying with the Zoning Resolution, does not address the access and accessibility difficulties; a hardship described by the applicant as the heart of its application."

See also [A-4092].
[53] BSA Decision, ¶¶ 41, 48, 61 73. [A-52 to A-65].
[54] February 4, 2008 Letter from Congregation Architect Charles Platt. [A-3097] reproduced at [A-214]. *See also* Morrison letter. [A-2892].

Even after this admission, the Congregation still continued with the false claim.[55]

Because the condominium floors tower above the Sanctuary, there can be no conceivable relationship between the claimed access and circulation problem to the Synagogue and the condominium variances. Therefore, any reference to this false assertion without acknowledging its falsity has no place in responsive papers.

M. The Opposition Was Far More Than Generalized Community Opposition

Zoning boards may not refuse variances based upon "generalized community opposition." Here the opposition groups posed detailed objections in reasoned opposition statements to the BSA.[56] Opponents included major figures in New York City land use – such as Norman Marcus. Opposition real estate financial expert Martin Levine provided seven lengthy reports dissecting Freeman's work. Planners, lawyers, architects and preservationists providing detailed professional objections and criticism of the apparent BSA intent.

The BSA ignored the more substantive criticisms, even criticizing opposition positions in fact not taken by the opponents, yet avoiding detailed positions that the BSA was unwilling or unable to address.

N. Five-Month Delay in Curing Defective Application

[55] *See* [A-4219]; *See also* letter from Congregation's Counsel to BSA June 17, 2008. [A-4025] [A-500]; and Transcript of March 31, 2009 Hearing Before Justice Lobis. [A-752-3].
[56] *See* as examples [A-186], [A-1501][A-1816], [A-2875],[A-2005], [A-3136], [A-3959], [A-3949], A-4090], [A-4254], and [A-4370].

On September 10, 2007 the Congregation filed a new application based upon a new objection notice from DOB, which notice -without explanation - omitted the Eighth Objection requiring the 40-foot separation.[57]

O. Deficiencies Still Not Cured in New September, 2007 Refiling

The Congregation's new application remained deficient. The Congregation claimed to have presented an as-of-right seven-floor, all-residential building, but the analysis was not of an all-residential building and ignored other commercially valuable space. The Congregation continued to apply seven floors of value to two floors of site, understating the Scheme A and Proposed Scheme rates of return.

On October 12, 2007, BSA staff delivered its last letter of objection repeating many of its earlier objections.[58] All BSA staff letters were to cease after the November 27, 2007 BSA hearing.

P. Community Board 7 Rejects the Congregation's Financial and Program Claims

As required by the Zoning Resolution, the September, 2007 application was then submitted to Community Board 7 (CB7). At the CB7 committee hearing, Congregation's counsel boasted that that the project had the "imprimatur" of the

[57] [A-1169]. The DOB provided no explanation for the removal of the Eighth Objection The BSA falsely states in footnote 1 of its Decision that the objection was removed "after the applicant modified the plans." [A-52]. The BSA and Congregation cannot cite to any evidence in the record describing the exact modifications that related to the 40-foot separation.

[58] BSA's Second Notice of Twenty-Two Objections To Applicant Congregation October 12, 2007. [A-1863].

Bloomberg administration.[59] The CB7 under chair Linda Rosenthal and its subcommittee under the chairs of attorney Richard Asche and architect Page Crowley carefully reviewed the Congregation proposal. After two subcommittee hearings[60], a full board hearing[61] and private sessions with the Congregation, CB7 voted in December, 2007 to reject all the variances.[62]

CB7 found that "CSI [the Congregation] does not claim that the zoning lot is irregular in shape."[A-2634]; "height and setback variances are not necessary to permit CSI to meet its programmatic goal." [A-2635], the proposed building would "substantially impair the use of a portion of the adjacent property" [A-2635]; and "it was an abuse of the variance process to permit one landowner to exceed zoning restrictions at the expense of its neighbors." [A-2635]. CB7 heavily criticized as inconceivable the failure of the Congregation to include the value of the basement and subbasement in the analysis of Scheme C. [A-2636]. CB7 questioned whether the Congregation was entitled to a reasonable return on the entire value of its site, and noted that 6% was a reasonable return. [A-2636].

While the Community Board was considering the proposal, the BSA went ahead and held it first hearing.

Q. BSA Chair: Congregation Puts BSA in a "Hard Place."

[59] Manhattan Community Board 7 Land Use Committee Meeting Transcript, dated October 17, 2007. [A-1878].
[60] [A-2255].
[61] [A-2640].
[62] [A-2634]. The Community Board committee had rejected the condominium variances, but accepted the assertions of the Congregation as to the lower floors. [A-2637].

The first BSA hearing was held November 27, 2007. The Chair of the BSA complained to the Congregation's counsel that the Congregation had put the BSA in a "hard place."[63]

> So, we're put in this *hard place*. Typically, when you have a situation that goes through Landmarks where you're asking for height and setback waivers and they're not driven by hardship, there's another venue and I know that you just mentioned 74–711. It - - maybe it was foreclosed to you. That's unfortunate, but we're here looking at this case and it's just - - it's been very hard for us to get our hands around this (emphasis supplied).

The BSA commissioners noted at the same place that the BSA could not provide variances based on the economic engine argument.

R. BSA: Site Value Should Only Include Space a Developer Could Use

At the November 27, 2007 hearing, the BSA objected to the Congregation's use of the site value for all seven floors of an as-of-right building being applied to the site value for two floors of condominiums in the as-of-right mixed-use building. Thus, the Chair criticized the use of the entire site value when preparing the two-floor condominium partial feasibility study. The Chair was explicit:

> CHAIR SRINIVASAN
> Freeman needs to explain to us what he's done on his financials. We've seen it. I think we have some concerns which we raised yesterday and either he can go back and look at that or we can state them for the record, but I think some of the issues have to do with how the site is valued and *how a good portion of what is anticipated as the developer paying for that site is not going to be used*

[63] Transcript of November 27, 2008 BSA Hearing, page 23, line 510.. [A-2500]. See entire discussion at [A-2500 -05].

> *by the developer because it's being used by the synagogue*. So, it's almost like you should take that out of the equation and then you have this value on this property without that 20,000 square feet that's being used for the synagogue. (emphasis supplied)[64]

Freeman would never remove from the site value portions that a developer could not use, despite having claimed to do so. This resulted in the understatement of rates of return. Yet the Board *inexplicably* never again publicly pressed Freeman on this issue, despite repeated objections by the opposition.

S. The BSA Holds Further Hearings

After November 27, 2007, the BSA held several more hearings, and the Congregation submitted a flood of additional and mostly confusing filings. The Congregation submitted five different versions of its Statement in Support, fourteen separate submissions by its economic consultant and hundreds of pages of drawings.

The BSA reviewed various versions of the proposed building and agonized as to the appropriate valuation per square foot, while blindly ignoring the inflated number of square feet in the site value computations. Similarly, the BSA never forced the Congregation to submit an analysis of a true all-income producing conforming building.

[64] Transcript of BSA Hearing November 27, 2007, page 27, line 592. [A-2504].

After the November 27, 2007 hearing, the Board seemed intent on providing the requested variances but did not want a record to be created to reflect the lack of a basis for the variances.

T. The Feasibility Studies

For the upper-floor condominiums, under§ 72–21 (b), the Congregation needed to show that the development site, if used for a conforming building, was *not* feasible, *i.e*. would *not* provide a reasonable financial return to the Congregation. To prepare the feasibility studies, the Congregation turned to Jack Freeman, who specialized in such studies. Freeman would focus on inflating costs to depress return on investment.

Each Freeman study of a scheme would have several components: a textual report by Freeman, annexed spreadsheets of computations, real estate valuation studies, and construction cost estimates by McQuilkin Associates, Inc. For each scheme, 17 pages or so of architectural drawings also would be provided separately by the Congregation's architects Platt Byard Dovell White.[65]

Freeman's focused on manipulation of the site valuation. Freeman also manipulated allocations of construction costs and used other more subtle scale-tipping techniques such as charging construction interest as if the full cost of construction was incurred on day one (rather than over the course of construction)

[65] *See* for example, the Scheme A drawings dated March 27, 2010. [A-1207].

and assigning common costs appropriate for a five or seven floors of condominium to just two condominium floors.[66]

U. The BSA Feasibility Study Instructions

For the preparation of financial feasibility studies, the BSA has promulgated specific requirements, Item M of Detailed Instructions for Completing BZ Application.[67] These Instructions are the only BSA regulations or rules relating to feasibility studies.[68]

Paragraph 5 of Item M states:

> 5. Generally, for cooperative or *condominium development proposals,* the following information is required: market value of the property, acquisition costs and date of acquisition; … net profit (net sellout value less total development costs); and percentage return on equity (net profit divided by equity)(emphasis supplied).

Because the Congregation submitted a "condominium development proposal," this paragraph without question applied, but was ignored by Freeman.[69]

(1) Acquisition Cost Not Provided

Freeman did not provide in his report the actual acquisition costs for the site – the amounts paid by the Congregation for the sites. The Instructions distinguish between the "market value" of the property and the "acquisition costs." Freeman

[66] Expert Opinion Martin B. Levine of July 29, 2008. [A-4354].
[67] [A-820].
[68] [A-3703].
[69] Fifth Expert Opinions of Martin B. Levine dated June 10, 2008. [A-3967–71]: "The BSA guidelines for conducting a financial feasibility are fully consistent with the methodology employed by investors, developers and analysts in the market."

conflated the two terms, using the term "acquisition cost" to apply to his estimates of "market value", so that he could claim that he had provided acquisition cost. Nowhere in any submission by Freeman is there a reference to the actual acquisition costs in 1949 and 1965.

The court below stated that the deeds had provided the costs, while not addressing the instructions or related judicial precedent.[70] If the deeds do show actual acquisition costs, then the Congregation may have paid as little as $12,000 for the site.[71] Under Freeman's approach, the Congregation would receive $12.4 million for the site, no part of which was considered by Freeman to be profit or return on investment.

(2) Spoliation – The Missing Construction Cost Allocations

Item M-6 of the BSA's Detailed Instructions requires that construction cost estimates be signed and sealed.[72] The estimates submitted by the Congregation and Freeman not only were not signed nor sealed, but are incomplete documents missing key pages. Freeman submitted the estimates for the Scheme A and

[70] The court below stated that the deeds filed by the Congregation provided the acquisition cost thus satisfying M-5. Lobis Decision at p. 22. [A-35]. Were the court correct, Respondents would be able to provide the dollar figure for the acquisition cost. Opposition professional Katherine Davis prepared an estimate of the acquisition cost updated to present value and arrived at a current value of approximately $1 million. This analysis did not subtract the value of use and rent collected by the Congregation during the ownership period, which some economists would have subtracted. Ms. Davis computed a return on equity of as much as 5500%. Davis Letter, June 10, 2008 [A-3918]. The Congregation did not rebut Ms. Davis' computations.
[71] Deed for 10 West 70th Street dated May 28, 1965 [A-2761]: consideration shown is $10 plus assumption of $11,750 mortgage. Deed for 8 West 70th Street, August, 30, 1949 [A-1329] and [A-1332]; consideration shown at $1 and other good and valuable consideration. The total consideration shown in the deeds is then $11,762.
[72] [A-822].

Scheme C studies, but deliberately removed 13 of 15 pages in one, and 10 of 12 pages in the other,[73] and then for months refused the demands of opposition groups that they be supplied.

Scheme A and Scheme C include both community space and condominiums,[74] and therefore construction costs must be allocated between the two components. If costs are over-allocated to the condominiums, then the rate of return would be improperly decreased.

Freeman concealed his allocations for construction costs by removing the pages for Scheme A and Scheme C, though Freeman did provide complete reports his various proposed schemes. When challenged by opponents, Freeman falsely asserted that he had submitted the missing pages.[75] When confronted with his failure to complete the record, Freeman's excuse was that the BSA had not asked for the missing pages; yet it was the Congregation's responsibility to create its own as well as the BSA's duty no to make findings on an incomplete record.

That Freeman did not submit those pages is clear: the BSA and the Congregation in their Article 78 answers were unable to identify the reports in the

[73] The construction estimate for Scheme A [A-2797] is missing pages 3-15; for Scheme C [2804] is missing pages 3-10.

[74] As a supposed all-residential scheme, Scheme C should not have included community space, but it did.

[75] In his Tenth report of June 17, 2008, Freeman falsely claimed "the complete construction cost estimates are attached." [A-4030]; some complete reports were attached, but not the key Scheme A and Scheme C estimates. When opponents objected [A-4119, line 20], Freeman responded falsely on July 8, 2008, at page 4, that he had provided the "full details" on June 17, 2008. [A-4226].

record.[76] This Court may properly infer that Freeman misallocated the construction costs based upon his refusal to provide the complete documents.

Without allocation information, it is not possible for anyone including the BSA to review the feasibility studies for those schemes.[77] As a consequence, there was no basis for the BSA findings based upon the feasibility studies.

(3) Failure to Provide the Return on Equity Analysis Required by BSA Instructions

Petitioners on this appeal *are not asserting,* for judicial economy reasons, that the BSA should have applied a return on equity analysis in reviewing the feasibility studies, because even a proper return on investment analysis shows a reasonable return. The issue on the appeal is the BSA failing to require adherence to its own regulations. The return on equity information should have been provided in accordance with the rules, and would be a factor in the value judgment as to whether the land use regulation improperly impairs the use of value of the property to the Congregation.

In raising this issue, Petitioners are seeking to demonstrate that the BSA acted arbitrarily and capriciously in failing (a) to require the Congregation to comply with the BSA's own regulations and (b) to explain that failure.

V. The Three Significant Feasibility Analyses: Inconsistent Terminology

[76] *See* Petition ¶189-190. [A-117] and Petitioners' Reply, ¶ 6. [A-416]; ¶18. [A-419], and; ¶¶ 76-82 [A-437-38].

[77] As Mr. Levine states in his report of July 29, 2008: "Review of the construction costs is made extremely difficult as the cost estimates for the very important AOR Schemes A and C are each missing 13 pages." [A-4361].

Freeman would submit to the BSA analyses of many different building schemes.[78] Yet, only three of the schemes are of any significance: Scheme A, Scheme C, and the Proposed Scheme. Confusingly, the Congregation did not refer to them in consistent terms.

(1) The Three Important Feasibility Studies — Scheme A, Scheme C and the Proposed Scheme

- Scheme A - a conforming as-of-right 75-foot mixed use building with two condominium floors.

- Scheme C- a conforming as-of-right 75-foot building devoted to residential and income production. After requests by BSA staff, the first version of Scheme was submitted on September 10, 2007. Although purporting to be an all-income producing building, it was not as described below.

- The Proposed Scheme - the approved 113.7-foot high building with a four-floor community house and five floors of condominiums.

[78] *See* for example, Mr. Freeman's Ninth Submission of May 13, 2008 analyzing three proposed schemes. [A-3824].

(2) The Congregation Created Confusion by Inconsistent Reference to As-of-Right and Proposed Schemes

Freeman and the Congregation's attorneys and the Congregation's architect inconsistently described these three different schemes creating confusion.[79]

Scheme A, Scheme C, and Proposed Scheme are the terms consistently used by the Congregation's architect and are the terms used herein. Freeman in his fourth submission of December 21, 2007 in one place uses the descriptors Scheme A and C,[80] but then did not use the terminology in the spreadsheets in the very same document.[81]

As a consequence of this confusion for which both the BSA and the Congregation are responsible, and the failure of the BSA to attempt specific citation to specific studies, the BSA Decision's references to the feasibility studies are too ambiguous to qualify as proper findings and to allow judicial review.[82] Where the findings are so ambiguous as to preclude review, then the court may reject the findings**.**

W. Summary of Freeman's Manipulation of Site Value Used in the Various Reasonable Return/Feasibility Studies

[79] Scheme A [A-1617] is referred to variously by Freeman as the "as-of-right scheme" [A-1207], "Revised As of Right Residential Development" [A 1655], and "Revised As of Right Community Facility/Residential Development". [A-1652].
[80] [A-2972] and [A-2974].
[81] [A-2780]. In Freeman's Eleventh submission of July 8, 2008, Freeman provides an analysis spreadsheet without indicating that the first column was a Scheme A analysis, describing instead a "Revised As-of-Right Development." [A-4224] and [A-4230].
[82] The BSA Decision's ambiguous references to the feasibility studies accordingly are too ambiguous to qualify as a basis for proper findings. *See BSA* Decision. ¶¶ 127, 128, 129, and 147. [A-59-61].

Freeman was able to understate the rate of return simply by overstating the site value.[83]

- By manipulating higher site values, the economic return on investment is artificially reduced.
- For the two-floor scheme analysis. Freeman used a fallacious site value reflecting seven floors of residential development, not two.
- The return on investment for the two condominiums in the Scheme A building accordingly was grossly understated.
- For the Proposed Scheme, Freeman used the same inflated site value as used in Scheme A.
- Accordingly, the 10.93% return on investment for the approved Proposed Scheme was grossly understated.

Freeman during the 18-month BSA proceeding would present many different site valuations as he struggled vainly to arrive at a defensible valuation of the site that would result in a reasonable return.[84]

One way to manipulate the market value would be inflate the valuation per square foot. Because of the BSA's familiarity with such overvaluation, the BSA

[83] The BSA rules distinguish between "market value of the property" and "acquisition costs". [A-821]. Freeman conflated the two terms.

[84] *See* [A-487]. Freeman provided the following wildly varying site value estimates:

- $18,944,000, First Freeman Submission, March 28, 2007. [A-1290].
- $17,050,000, Third Freeman Submission October 24, 2007. [A-2105].
- $14,816,000, Fourth Freeman Submission, December 28, 2007. [A-2774].
- $13,384,000, Seventh Freeman Submission, March 11, 2008. [A-3332].
- $12,347,000, Ninth Freeman Submission, May 13, 2008. [A-3818-9].

seemed to focus on the square foot valuation figures used as an input. But, more creatively, Freeman manipulated the site value by manipulating the number of square feet while the BSA focused on valuation per square foot.

X. Inflating the Two-floor Site Value Skews the Return for Both Scheme A and the Proposed Scheme

Inflating the site value for the two floors affects not only the two-condominium Scheme A analysis, but also the five- condominium Proposed Scheme as well. It is not necessarily intuitive that it is proper to use the same site value for both schemes. Yet, the site value component of the "investment" remains the same in the variance-requiring, Proposed Scheme as in the conforming scheme. In other words, the question is how much larger does a non-conforming building need to be to obtain a reasonable return, assuming the site value is the same value used in a conforming building.

Petitioners do not contest Freeman's use of the same value of $12,357,000 for Scheme A and the Proposed Scheme as shown on his concluding final summary of July 8, 2008.[85]

Petitioners do however contest the grossly-understated site value $12,357,000. Notwithstanding the admonitions of the BSA Chair, it is abundantly clear that Freeman used the site value for the seven floors of condominiums, rather than reduce the site value to two floors. The $12,357,000 value is applied by

[85] [A-4230].

Freeman to only 5316 square feet of buildable space for the two condominiums, or $2300 a square foot,

Petitioners also object to the failure of Freeman in his July, 2008 concluding summary to show a third column, the summary of Scheme C— the supposedly all-residential scheme. For Scheme C, it is clear that the site value to use would be the value of the entire development site, as would be done in a usual feasibility study.

Freeman refused to update Schedule C, not only because it would show a reasonable return on investment, but also because Freeman would have to disclose his site value for the entire development site which, based on Freeman's earlier submissions, would also be the same $12,357,000. In Freeman's prior schedules showing all three schemes, he used the same "acquisition cost" for all three scenarios: $17,060,000 in his October 24, 2007 summary[86] and $14,816,000 in his December 21, 2007 summary.[87]

Had Freeman submitted a revised Scheme C and shown it on a spreadsheet together with Scheme A and the Proposed Scheme, it would be possible to compare the "site value/acquisition costs".

The obvious conclusion is that Freeman deliberately omitted a Scheme C analysis from his July, 2008 final summary and deliberately failed to even update the analysis, hiding what he had done and avoiding revealing (i) that a Scheme C building would have generated a reasonable rate of return and (ii) that he was

[86] [A-2107].
[87] [A-2780]

continuing to overstate the site value for the two floors and consequently understating the rates of return for Scheme A and the Proposed Scheme.

Y. The Site Value Was Never Reduced in Proportion to the Space Occupied by the Community Facility.

The BSA in its Decision[88] noted that it had "asked the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of-right development." There is no factual basis for this statement in the BSA decision. At the time of the November 27, 2007 hearing, Freeman was using a valuation for the entire building of $17,500,000. Freeman next submitted a two-floor Scheme A analysis on December 21, 2007 but reduced the site cost for the two floors only from $17,500,000 to $13,384,000.[89] A proper proportionate reduction would have yielded a site value for the two floors of approximately $5,000,000, not $13,284,000. Indeed, the Chair of the BSA had guessed that the over-valuation for the $17,500,000 was in the range of $10,000,000.[90]

Z. Change in Valuation Methodology By Assigning Value of Unused Parsonage Development Rights

By May, 2008, it had become evident that Freeman's site value for the Scheme A was indefensible – plainly, it was not possible for Freeman to show a

[88] *See* BSA Decision, ¶ 128-9. [A-60]. Here, the BSA falsely suggests that the site valuation methodology described here is the methodology upon which its (b) finding was based.
[89] *See* exhibit describing various valuations by the Congregation. [A-487].
[90] "10 million worth is really just paying for the synagogue." November 27, 2007 BSA Transcript, page 27, line 702. [A-2504].

computation where he had to compute the value of the two floors of condominiums by multiplying the square feet by a valuation per square foot.

Freeman adopted two new strategies.

First, he would provide no further analysis of the all-residential Scheme C for that would among other things disclose his valuation of the entire development site and would expose the fact that he was still using the same value for just two floors. Further analysis would also show that Scheme C would earn a reasonable return.

Next, Freeman would abandon traditional valuation methodologies and not even bother valuing the two floors at all. Instead, in his Ninth Submission of May 13, 2008, Freeman use a bizarre, novel approach involving valuation of the remaining allowable development over the Congregation's adjoining Parsonage building on Central Park West.

Probably not coincidentally, Freeman arrived at essentially the same valuation as his previous faulty valuation. So Freeman did not so much change the number, but asserted a new rationale to reach the same conclusion. In his March, 2007 analysis he estimated the site value of $13,384,000 – the new number with the new methodology was $12,347,000.

The Congregation's architects prepared for him a diagram showing 19,094.20 square feet of floor space above the parsonage that the Congregation

would not be able to develop (so it claimed) because of landmark regulation.[91] Freeman then adjusted the 19,094 square feet to 19,755 square feet and multiplied that figure by a value per square foot of $625 to arrive at a valuation of $12,347,000.[92]

Next, Freeman took this valuation of the development rights over the parsonage and used *that* as the "acquisition cost" for the two floors of condominiums on the adjoining development site.[93] Freeman applied this value of 19,755 square feet to the 5,316 square feet for the two condominium floors.

(1) Valuing the Two-Floor Condominium Site Based Upon the Unused Parsonage Space Not Disclosed in BSA Decision

The BSA does not disclose that its (b) and (e) findings were based upon, not the value of the two-floors, but Freeman's new approach using the Parsonage's claimed undeveloped air rights value (not the transfer of air rights themselves to allow changes in bulk or height.)[94] Indeed, by referring to its request that Freeman

[91] *See* Parsonage Air Rights - Transfer Value From Landmark In Support of Reducing Reasonable Return, May 13, 2008. [A-3861]. *See also* Freeman's Ninth Submission. [A-3818].

[92] Freeman states in his Ninth Submission of May 13, 2008. [A-3818-9].

> The available floor area on the Parsonage portion of the site (19,094 sq. ft.) exceeds the area needed (10,321 sq. ft.) to replace the non-complying area on the 70th Street lot. Therefore, in the current consideration, we have assumed that the 19,755 sq. ft. could be achieved by utilizing the as of right buildable floor area from the parsonage portion of the site. Utilizing the comparable sales value of $625/sq. ft. determined by the comparable sales analysis described above, the acquisition cost is 19,755 sq. X $625/sq. ft., equal to the amount of $12,347,000.

[93] Freeman's tenth submission of June 17, 2008 includes a spreadsheet Schedule A1, showing the reasonable return analysis for the Scheme A two-floor condominium analysis consisting of 5,316 square feet of sellable condominiums. [A-4034].

[94] To be clear, the Congregation is able to construct requires no transfers of air rights to build the proposed building.

eliminate the floor value of the community space (Decision ¶ 128), the BSA misrepresented the basis of its (b) finding. The BSA findings were not based upon the studies referred to Decision ¶ 128-130; to the contrary, the BSA's ultimate conclusory finding at Decision ¶ 148 was based upon the Parsonage valuation, one that was not only irrational, but implicitly was based upon alleged landmarking hardship.

(2) Freeman's Parsonage Valuation Method Results in a Site value of $2300 per Square Foot Not $625 per Square Foot.

Freeman claims to use a site value of $625-$750 per square foot for the two-floor partial analysis of the two floors of condominium space. Yet, instead of valuing 5,316 square feet[95] of the condominium site at $625 a foot, but he valued 19,755 square feet of space above the Parsonage at $625 per foot, or $12,347,000. Notwithstanding, Freeman deceptively denied using $2300 a square foot.[96]

Opposition expert Martin Levine described Freeman's approach as "completely irrational. No rational developer would ever accept that the market value of this space is in that stratosphere. "[97]

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[95] *See* Petitioner Exhibits re Value Of The Two Condominium Floors In As-Of-Right Scheme A, [A-489] and Location Of The Two Condominium Floors In As-Of-Right Scheme A Building. [A-488].

[96] Freeman claimed on August 12, 2008, that "This is a misstatement of the facts. At no time did [I] state or imply that the value of the site is $2,333 per square foot of building area." Freeman then asserts that the value he used was $625 per square foot. [A-4430]. This is pure sophistry.

[97] [A-4356]

Freeman shows a site value of $12,374,000 for the two-floor site and a projected income from "sale of units" of $12,702,000 on the same two floors.[98] As to that, Levine stated:

> This is perfectly illustrated by the absurdity of the financial projections which show that the sale of finished condominium apartments is almost equal to the cost of the land alone.[99]

In conclusion, there is little question that Freeman's site valuations used in the Scheme A and Proposed Scheme feasibility studies were grossly overstated and a product of Freeman's sleight of hand. The results are irrational. The BSA did not disclose in its decision that it was relying upon the Parsonage valuation, suggesting that it had relied upon standard valuation methodologies. Even if Freeman's approach were rational, it would still have been based upon a landmarking hardship as to which the BSA has no jurisdiction.

AA. The Congregation Admits that 6.55% is a Reasonable Return on Investment

In his first feasibility report, Freeman opined, as the Congregation's "economic expert", that a return on investment of 6.55% was acceptable for the project:[100]

> "The Proposed Development provides a 6.55% Annualized Return on Total Investment. …*The returns*

[98] [A-4230].
[99] Seventh Expert Opinion Letter of Martin Levine July 29, 2008, third full paragraph. [A-4357].
[100] First Freeman Frazier Submission March 28, 2007. [A-1294]. *See* Exhibit, Congregation admission that rate of return of 6.55% is acceptable. [A-484].

> *... would ... be considered acceptable* (emphasis supplied)."

Freeman's second report of September 6, 2007 states similarly that 6.59% is an acceptable return.[101]

Consistently, Freeman further opined in his Ninth Report that 3.82% and 0.93% were *not* feasible returns.[102]

BB. The BSA's Arbitrary Failure to Justify the Return of 10.93%

The BSA decision provides no discussion at all as to how it concluded that a 10.93% return on investment was appropriate, and indeed its Decision did not disclose the 10.93% return. This figure may be found only in Freeman's feasibility study.[103] The only evidence in the record as to the minimum return required for the Congregation is the statements of Freeman that 6.55% and 6.59% were satisfactory. The BSA does not even explicitly state in its Decision that 10.93% is the minimum return, except implicitly by making its finding (e), which also does not even mention the subject of reasonable return.

The Community Board opined that a 6% return was adequate. [A-2636]. An unleveraged return of 10.93% is incredibly generous, exceeding the too-good-to-be-true 10% returns offered by the Madoff Ponzi scheme.

CC. A Conforming All-Residential Building Yields a Reasonable Return

[101] [A-1653].
[102] [A-3819–20].
[103] *See* second column of spreadsheet in Eleventh Freeman Submission of July 8, 2008 [A-4230]. The first column is the Scheme A analysis. Freeman deliberately omitted including a recapitulation of the Scheme C analysis in this "final" spreadsheet.

The BSA was required to consider first whether a conforming, all-residential condominium structure would provide a reasonable return. If such a conforming building provides a reasonable return, then a non-profit is not entitled to variances to allow a larger building.

(1) Scheme C As Submitted Was Less Than An All-Residential Building

After a request by the BSA staff, the Congregation in September 2007 submitted an "all-residential" Scheme C analysis, which was updated in December, 2007. Scheme C as presented was not indeed "all-residential." as acknowledged by Freeman's accompanying notes [104] and again in his submission of August 12, 2008 [A-4430].

Nor does the presented scheme C take into account income that could derive from the valuable 6400-square foot sub-basement and the related basement.[105] Levine estimates a minimum of 11,000 square feet of valuable, income-generating real estate was omitted by Freeman.[106]

[104] "The new development consists of a ground floor residential and synagogue lobby and core, and floors 2-7 would be for sale condominium units."[A-2794].
[105] The site would accommodate not one, but two 6400 floors below the street level with standard 10 foot heights.
[106] Opposition Valuation Expert Levine elaborates on this in his Seventh Expert Opinion Letter of July 29, 2008. [A-4355].

Because, as Freeman admits, the Congregation did not submit a true as-of-right all-residential building analysis, there is no factual basis for the BSA finding that such was submitted.[107]

Freeman's excuse was that the he did not revise the report, either to update the site value or to include an investment return from the first floor and basements, because the BSA had not asked him.

> Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.[108]

(2) The Return On Investment for Scheme C was Not Recomputed When Freeman Changed the Site Value.

Freeman's first Scheme C analysis of September 6, 2007 used a site value of $18,944,000. [A-1665]. His revised Scheme C analysis of December 21, 2007 used a site value of $14,816,000. [A-2780].

Without revising the analysis of Scheme C, On March 22, 2008, Freeman further revised his site value downward to $13,384,000 [A-3343] and again on May 13, 2008 downward to $12,347,000. [A-3823]. Because a reduction in site value would increase the rate of return and because the rate of return Freeman computed on December 21, 2007 was 3.83%, opponents asked that Scheme C be recomputed. Freeman would not do so.[109]

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[107] BSA Decision, ¶ 129. [A-60].
[108] Twelfth Freeman Frazier Submission Re Reasonable Return August 12, 2008. [A-4430].
[109] "We note that the BSA did not request a submission of an analysis of a revised Scheme C." [A-4229].

Where the BSA Decision at ¶ 138 states that Freeman submitted a revised as-of-right estimate based on the revised estimated value of the property for "the" as-of-right building, clearly Freeman had not revised the analysis of the so-called all-residential as-of-right Scheme C.[110] Thus, there is no basis for this finding or the ultimate (b) finding.

DD. The BSA Admits in Its Article 78 Answer that Scheme C Earns a Return of 6.7%.

The BSA acknowledged in ¶ 292 of its Article 78 Answer, [111] that the December, 2007 Scheme A rate of return should have been recomputed. So, the BSA revised Freeman's computation using the lower site value and arrived at a return on investment of, not 3.6%, but 6.7%. This return on investment exceeds the 6.55% that Freeman had explicitly stated represented a return on investment exceeding that which the Congregation admitted was adequate. Had a true all-residential scheme been analyzed, as discussed above, the return would have far exceeded even 6.7%.

EE. The Condominium Variances are Not the Minimum Variances Required To Provide a Reasonable Return.

[110] BSA Decision ¶ 138. [A-52].
"WHEREAS, the applicant also submitted a revised analysis of the as-of-right building using the revised estimated value of the property; this analysis showed that the revised as-of-right alternative would result in substantial loss."

[111] Article 78 BSA Answer to Article 78 Petition, ¶ 292. [A-335], *See* Petitioners' Reply to BSA Answer ¶ 43-51 at page 16.. [A-428].

Overstatement of site value in the two-floor scheme grossly overstates site value in the proposed building, grossly understating the rate of return. Clearly, the 10.93% return on investment for the approved building is grossly understated.

There is thus no evidence in the record to support the BSA's finding that the condominium variances are the minimum variances required. In other words, had Freeman utilized a proper site value for the Proposed Scheme analysis thereby increasing the return, the condominium floors could have included front setbacks or courtyards yet the final building would still achieved in excess of a 10.93% return.

As well, creating a courtyard in the front of the building would have avoided the bricking up of the windows in the front of the side of the adjoining building at 18 West 70th Street. This would have reduced the Congregation's return slightly, but the Congregation would have still received a generous return. Yet, the BSA never sought to analyze such a modification.

FF. Evidence of "Physical" Conditions Not In Record.

The BSA was required by ZR § 72-21(a) to find, for the condominium variances that there exists a "physical" condition creating a hardship that can only be resolved with a variance. As to those variances, the BSA and Congregation did not provide evidence of any physical condition creating hardships that cannot be resolved by a conforming building.

(1) The Dimensions for the Development Site are Regular

The development site is a large regularly-shaped lot that can accommodate a basement and subbasement. Community Board 7 noted: "CSI does not claim that the zoning lot is irregular in shape."[112]

(2) Access and Circulation are Not Hardships Related to the Variances

Access and circulation issues do not constitute qualifying physical conditions for three reasons: (1) an as-of-right building resolves the hardships; (2) the BSA made no finding that variances were required to resolve the hardships, and (3) the BSA did not claim that access and circulation relates to the condominium variances.

(3) Obsolescence Not A Hardship Relating to the Condominium Variances

As to the "obsolescence" being a physical condition, a careful reading of the BSA decision shows that the BSA relied upon obsolescence as a physical condition *only for the community house variances*, not for the condominium variances.[113] Even then, the BSA was incorrect in even referring to obsolescence since the community house was being demolished at an insignificant cost.[114]

[112] [A-2634].
[113] BSA Decision ¶ 41, ¶ 69, ¶ 72, ¶ 75, ¶ 76. [A-54-A-56].
[114] *See* Building Demolition Costs of $103,500 and a Total Construction Cost of $17,842,426. [A-4068].

(4) The Split Zoning Lot is Not A "Physical" Condition

In the case of the split lot, the BSA attempted to rely upon the zoning regulations themselves as if they were physical conditions. Here, in 73.4% of the height is restricted to 75 feet (R8B) and in 26.6% of the lot height is restricted to 185 feet (R10A.)

But other zoning regulations such as the "sliver law" would limit a tall building on the 26.6% portion in R10A. BSA Decision, ¶94. [A-52].

The other zoning regulation prohibiting a tall building on the R10A sliver is the requirement of a 40-foot separation between a residential and non-residential building on the same zoning lot.[115] Even though the DOB oddly removed its objection as to this requirement, there was a consensus that such a separation had to be provided, and no one has been able to offer a reason as to why it does not apply.

The BSA Decision[116] refers to "several Zoning Resolution provisions" that "recognize the constraints created by zoning district boundaries" and refers to ZR § 73-52.[117]

Section 73-52 provides relief only in the case of "use" variances. The BSA applied it to the Congregation's request for a "bulk" variance. Further, Section 73-52 applies where the less restrictive part of the lot is more than 50% of the lot.

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[115] *See* discussion at of 40-foot separation at page 16
[116] BSA Decision, ¶ 98. [A-58].
[117] ZR § 73-52 is reproduced at [A-864].

Here, the less-restrictive part (allowing a taller building) of the development site is only 26% of the development site. The BSA has simply and improperly, in major ways, rewritten ZR § 73-52.

Two separate zoning regulations prohibit a tall building on the R10B portion of the site, not just the sliver regulation applying in this split lot.

The Congregation asserted that these constitute a physical condition. Clearly, they are nothing more than the zoning regulation itself.

(5) Landmarking Hardship is Not a Physical Condition Hardship – or A Hardship Cognizable To Support a BSA Variances

As discussed below, the impact of landmarking laws cannot be considered to be a physical condition or other hardship that may be used by the BSA to support a variance. Not only is it not a physical condition, but the BSA has no authority to consider landmarking as a basis for a variance.

GG. The BSA Deliberately Blinded Itself to the Facts.

After the November 27, 2007 hearing, the BSA made great efforts to avoid any further questions to the Congregation which would elicit responses preventing the BSA from granting the variances.[118] Had the Congregation actually provided a proper analysis of an all-residential conforming building, or had the Congregation

[118] The BSA exhibits the same type of deliberate blindness by a zoning board as criticized in *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007).

> "In sum, the record convincingly demonstrates that the zoning decision in this case was characterized not simply by the occasional errors that can attend the task of government but by an *arbitrary blindness to the facts*. As the district court correctly concluded, such a zoning ruling fails to comply with New York law." (emphasis supplied)

truly revised its base site value/acquisition cost to a rationally-derived value of the two floors, the condominium variances would have been impossible to grant. The BSA Commissioners simply sat embarrassed, mum in their chairs, rather than ask the obvious.

Counsel for Petitioners confronted the BSA Chair at the last public hearing held June 24, 2008, identifying some questions the BSA refused to ask.[119] The BSA's response was to arbitrarily proceed *without* requiring that the Congregation provide the missing information and complete the incomplete analysis.

HH. By All Appearance, A Tacit Understanding Was Established After the November 27, 2007 Hearing: The BSA Would Not Ask and the Congregation Would Not Tell.

By all appearances, the Congregation and the BSA reached a tacit, collusive understanding that, unless specifically requested by the BSA, the Congregation would not volunteer an updated or correct analysis of an all-income-producing building. On the other hand, the BSA would blind itself and not ask the Congregation to do so. As Freeman states in his final submission of August 12, 2008:[120]

> As noted on page 7 of the July 8, 2008 Response, the BSA did not request a submission of an analysis of a revised Scheme C. Subsequent to its receipt of this material into the record, *the BSA did not ask for any additional information* regarding this matter (emphasis supplied).

[119] Transcript of BSA hearing of June 24, 2008. [A-5115]. *See also* Post-Hearing Statement in Opposition. [A-4377].
[120] Freeman's Twelfth Submission, August 12, 2008. [A-4429-30].

Given that the BSA knew a reviewing court might well defer to the BSA, an ask-no-questions approach would help insulate the BSA from judicial review because contradicting facts presented by the Congregation would not appear in the record.

The Congregation had full opportunity and obligation to prove its own case, whether asked to by the BSA or not, and took the risk of an incomplete record.

II. A Conforming Building Would Block No Windows in the Adjoining Cooperative Apartment Building.

Immediately to the west of development site is a nine-story cooperative apartment building at 18 West 70th Street. The upper windows in the east wall of 18 West look out over the Synagogue and the development site, toward Central Park. In this east wall, there are seven windows that the condominium variance cause to be blocked by the initially-proposed building: four in the front (north) — and three in the rear (south), but would not be blocked by a conforming building.[121] The BSA decision erroneously and materially confused north and south when referring to the courtyard. [122]

In a variance proceeding, the impact of the variances on adjoining property owners is to be considered and balanced by the BSA under ZR §72–21(c). Here, the BSA blinded itself to the adverse impact of the proposed building upon the

[121] Included is an apartment owned by Petitioner Lepow.

[122] The BSA decision was incorrect in describing the courtyard in the "*north rear*." The courtyard was required by the BSA in the rear of 18 West, which is the *south* side of the building. The windows bricked over and ignored by BSA are on the north side of the building — in the front. The BSA Decision makes this error twice, at ¶ 29 [A-53] and at ¶ 209 [A-64].

owners of the apartment whose windows (on the front-north) would be blocked by the proposed building as approved. Though repeatedly confronted with the fact that the proposed building as approved would result in four windows being bricked up, the BSA consistently ignored these windows, writing a decision that artfully tried to conceal this fact.

The Congregation will argue that the owners of the condominiums in 18 West 70th have no legal right to their views of Central Park or their light and air, and that there are no light and air easements. The latter statement is true, but totally irrelevant. The Congregation is being provided with variances for which it has no legal rights either, and these variances are being provided solely to provide income for the benefit of the Congregation and, indirectly, of its membership.

The Congregation, in its final Statement in Support, states:[123]

> CSI has endeavored to minimize any potential impact on the adjacent westerly building by providing terraces on floors 6-8 the produce a fully compliant outer court.

This is only partly true, because the terraces, added after the initial application, only protect the rear-south lot windows of 18 West 70th Street, not the front-north lot windows.

For its part, the BSA in its decision states:[124]

> [¶ 132] WHEREAS, the Board also requested the applicant to evaluate the feasibility of providing a

[123] Congregation's Fifth and Last Version of Statement in Support, July 8, 2008, p. 43. [A-4209].
[124] BSA Decision, ¶ 132. [A-52].

> complying court to the rear above the fifth floor of the original proposed building; and
>
> * * *
>
> [¶ 192]WHEREAS, nonetheless, the Board directed the applicant to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows than originally proposed; and
>
> [¶193] WHEREAS, the applicant submitted revised plans in response showing a compliant outer court;

The BSA does not explain why it did not require the Congregation to provide a feasibility study as to providing courtyards or setbacks as to the front-north of the adjoining building. The BSA Decision just ignores this inconvenient fact.

No doubt, a courtyard on the north may have slightly reduced the rate of return from 10.93%,[125] but the Congregation had already agreed that a rate of return of 6.6% was acceptable. Thus, there is no evidence at all that the variance provided was the minimum variance required under ZR §72–21(e) and clearly the proposed building has a negative impact on the surrounding buildings.

JJ. Impact on Sunlight and Shadows Under ZR § 72-21(c)

The BSA Decision at ¶¶ 195-201 limited its review to shadows cast in open spaces as specified in the CEQR, and so limited its ultimate finding to open spaces,

[125] As discussed elsewhere, the 10.93% return would be substantially higher if the site value had been reduced to the value of two floors, not seven floors.

with no finding as to shadows on streets or the buildings opposite the development site.

The mid-block zoning regulation (minimizing shadows in the surrounding neighborhood by limiting height and requiring set-backs) is a statutory provision separate and apart from the CEQR. The BSA did not gather the evidence and make the findings required for the (c) finding. The BSA seemed to believe that it only need review legally protected rights, absolving itself of the review and balancing required by ZR §72-21(c).

In the Congregation's initial application, shadows were ignored. After objections by opponents, the BSA asked the Congregation for a shadow study, but only for the public space in Central Park. The BSA was under the misapprehension that under ZR §72-21(c) only studies required by CEQR need be performed.

After opponents provided three-dimensional street-level drawings illustrating the impact on the narrow streets and opposing buildings, the BSA reluctantly asked for further studies of West 70th Street, which the proposed building would adversely affect. The Congregation retained AKRF, a consulting firm used by developers, which provided only a cursory study submitting hard-to-decipher overhead drawings purporting to show shadows cast on buildings —

drawings which were inconsistent with real-world photographs provided by opponents.[126]

Petitioner Kettaneh's brownstone will be directly impacted as to winter sun, all so as to provide income-generating variances to reduce the need for Congregation members to support their institution.

The failure of the BSA and AKRF to detail the impact of shadows and sunlight is fatal. AKRF has adamantly refused to provide street-level graphics and photographs similar to those offered by opponents to establish the impact.[127]

Yet, in its Decision, the BSA made no findings as to the impact of shadows on West 70th Street. Rather, the BSA improperly limited its findings to the CEQR findings.

KK. The BSA Decision of August 26, 2008

The BSA approved the variances at a short meeting on August 26, 2008, without voting upon specific findings and without presentation of the proposed decision. There is no record that any particular commissioner even reviewed the decision as written.[128]

ARGUMENT

A. The BSA Findings are Supported Neither by Fact, Law, nor Rationality

[126] *See* Comparison of Photographs of Shadows with Shadow Study. [A-248].
[127] Comparison of Photographs of Shadows With Shadow Study. [A-248]. *See also* Shadow Impacts. [A-3086].
[128] BSA Transcript August 26, 2008. [A-4449].

The Statement of Fact above has detailed the abundant deficiencies of the BSA findings and need not be repeated, for the lack of evidence to support the various findings is clear, as is the irrationality of the findings. No deference is to be given to administrative decisions that are outside the bounds of reason or where the administrative body did not make a good faith attempt to assemble the relevant information, even if there are slivers of evidence. There is ample and indeed conclusive evidence of the BSA's deliberate blindness –such as allowing the Congregation to delete missing pages for the construction report.

No complete analysis of an all-income producing building was conducted, but even the badly flawed analysis of Scheme C that was performed shows that the return exceeded the 6.55% the Congregation stated was acceptable.

Even worse, the BSA based its (b) finding upon facts and factual findings different from those cited in its decision. The (b) finding was based upon Freeman's new site valuation" method" of May, 2008 using the value of undeveloped rights over the Parsonage, not the value of the site. Yet, the BSA never mentions that in its Decision, but rather cites facts and makes quasi-findings indicating that the BSA was relying the standard and initial valuation approach – multiplying the number of square feet in the developable area times the valuation per square foot. But, the BSA ignored this approach once it accepted Freeman's May 13, 2008 new approach.

There is no attempt by the BSA to explain why the same site value used as the basis for the two-floor condominium analysis was also used for the seven floor residential as-of-right building. The BSA did not explain why it accepted a site value for the two-floor condominium site that with a value of $2300 per square foot, which is a value that exceeded the sale price of the fully completed condominiums. The BSA did not explain why it did not require Freeman to update the site value in the supposed all-residential Scheme C building analysis, nor require Freeman to provide an analysis of a legitimately all-residential structure.

A very recent case, *Pantelidis,*[129] from New York County Supreme Court and affirmed by the Court of Appeals, involved not only a reversal by the Supreme Court of the decision of the BSA, but a Supreme Court hearing to determine facts, rather than the remand to the BSA. The Appellate Division made clear that not every issue before the BSA required deference to the claimed expertise of the BSA.

Judicial deference to administrative authority and expertise is an important principle. However, reviewing the evidentiary deficiencies of the BSA findings in this case does not require resolution of highly complex technical issues. Although the Congregation has attempted to make a simple subject complex, this does not foreclose review by the court. The manipulation of the site value is apparent with the application of common sense and simple arithmetic. Neither do the issues here

[129] *Pantelidis v. New York City Bd. of Stds. & Appeals*, 43 A.D.3d 314 at 317 (1st Dep't 2007), aff'd 10 N.Y.3d 846 (2008), aff'g 10 Misc. 3d 1077A (Sup. Ct. N.Y. Co.).

involve facts so complex and technical that the Court must defer to the BSA in every respect, especially where common sense dictates to the contrary.

B. The BSA Must Consider Whether the Entire Property Would Generate a Reasonable Financial Return.

The reasonable return analysis must consider the entire property. The §72-21(b) finding may not use only a slice of the property where only two floors of a seven-floor as-of-right structure are analyzed. And, if the BSA is to accept such an approach, the site value must reflect the actual real estate rights that are under development, not the entire site and certainly not the undeveloped rights over an adjoining building.

Neither the court below nor the BSA addressed this issue although it was explicitly raised by Petitioners.[130] The following precedents require consideration of a reasonable return analysis for the entire project (Scheme C), not just the partial two-floor Scheme A: *Penn Cent. Transp. Co. v. New York City;*[131] *Northern Westchester Professional Park Associates v. Bedford;*[132] *Koff v. Flower Hill*[133]

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[130] The court below stated: "It cannot be found to be arbitrary and capricious to use a return on profit model for that portion of the Project that consists solely of residential condominiums." Lobis Decision at 23. [A-36]. The issue is whether the BSA action was authorized by law or supported by evidence, or rational, not just whether it was arbitrary and capricious. The court below ignored completely the improper use of seven floors of value for two floors of development or alternatively the value of the undeveloped space over the Parsonage. It is also not clear what the court meant by "return on profit", a phrase not ordinarily, if at all, used in this context.

[131] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978).

[132] *Northern Westchester Professional Park Associates v. Bedford*, 60 N.Y.2d 492, 503–504 (N.Y. 1983).

[133] *Koff v. Flower Hill*, 28 N.Y.2d 694 (1971).

Concerned Residents v. Zoning Bd. of Appeals;[134] *Spears v. Berle;*[135] *Citizens for Ghent, Inc. v. Zoning Board of Appeals of Town of Ghent*[136] and *Concerned Residents of New Lebanon v. Zoning Board of Appeals of Town of New Lebanon.*[137]

The concept that variances from zoning regulations may be granted where the property owner cannot use his property or earn a reasonable return is grounded in longstanding land regulation law. ZR § 72-21(b) merely codifies these longstanding principles applied in United States jurisprudence and reflects the due process clause as to the taking of property without cause or due process.

The Congregation may either elect to meet its programmatic needs or to earn a reasonable return from its property. Nothing in law or due process suggests the Congregation is entitled to do both simultaneously. If using the entire development site for income production would yield a reasonable return to the Congregation, then the condominium variances should not have been granted.

C. The BSA's § 72–21 (b) Finding that an All-Residential As-of-Right Project Would Not Earn a Reasonable Return Is Not Supported by the Evidence

As fully discussed above, even the incomplete and flawed Scheme C analysis of an as-of-right income-producing, all-residential building would provide

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[134] *Concerned Residents v. Zoning Bd. of Appeals*, 222 A.D.2d 773, 774–775 (3rd Dep't 1995).
[135] *Spears v. Berle*, 48 N.Y.2d 254, 263 (N.Y. 1979).
[136] *Citizens for Ghent. Inc. v. Zoning Board of Appeals of Town of Ghent*, 175 A.D.2d 528, 572 N.Y.S.2d 957 (3rd Dep't 1991).
[137] *Concerned Residents of New Lebanon v. Zoning Board of Appeals of Town of New Lebanon*, 222 A.D.2d 773, 634 N.Y.S.2d 825 (3rd Dep't 1995).

a reasonable financial return to the Congregation. The BSA admitted as much in its Article 78 answer. Further, it is abundantly clear that (a) the Scheme C analysis did not value all of the income producing space available; and, (b), if it had done so, then the return on Scheme C would have been even greater.

The BSA (b) finding assumes that an analysis of an all-income producing building was indeed prepared by Freeman. As convincingly shown in the fact statement above, Freeman did not do this and admits to not having done this. Thus, without this factual underpinning, the BSA's (b) finding for the condominiums is not supported by evidence.

D. In the Absence of a Rational Site Value for the Two Floor Condominium Site, the BSA Findings as to Scheme A and the Proposed Scheme Must Be Rejected.

As described above, it was irrational for the BSA to base any variance decision upon a reasonable return analysis that in reality assigned a site value of $2300 per square foot, while the Congregation and Freeman falsely claimed that Freeman was using a valuation of only $625 to $750 per square foot. It is further apparent that Freeman never reduced the site value to only the two floors under question, but continued to use the site value for the entire building.

Thus, the partial two-floor Scheme A analysis should be completely rejected on the basis of this single yet highly significant distortion in the computation of site value. Similarly, the Proposed Scheme analysis, which uses the same faulty site value, can be no basis for the (e) finding.

The two-floor condominium analysis is flawed in other ways as well, including the reliance upon a construction cost analysis that omitted key pages, which Freeman refuses to produce. In normal courtroom litigation, Mr. Freeman's omission of pages would be characterized as spoliation.[138] The construction estimate documents in their entirety should be rejected and the feasibility studies based thereon should be rejected. That means the BSA had no evidentiary basis for its reasonable return finding.

Because, the BSA was not genuinely engaged in "reasoned decision making", its findings should be rejected.[139] The BSA decision was reached in an arbitrary and capricious manner.[140]

E. The Acquisition Cost for the Property Is to Be Considered in Ascertaining Whether a Reasonable Return May Be Obtained.

By ignoring the amount paid by the Congregation for the three brownstone development sites in 1954 and 1965, the BSA ignored the profit that would be earned the Congregation by the "receipt" of the $12.4 million for the site "acquisition cost." Under the Freeman methodology, this profit of $12.4 million to the Congregation was ignored entirely, and not even mentioned in the BSA

[138] Spoliation: intentional or negligent withholding, hiding, alteration or destruction of evidence relevant to a legal proceeding. The fact finder may conclude that the evidence would have been unfavorable to the spoliator. *Ortega v. City Of New York*,.9 N.Y.3d 69 (2007); Black's Law Dictionary, 1437 (8th ed. 2004).

[139] *Gulf States Utilities Co. v. Federal Power Commission*, 518 F.2d 450, 458–59 (D.C. Cir. 1975).

[140] *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974).

decision. Yet, this cash receipt is not shown by Freeman as profit and is in fact concealed by failing to mention the acquisition cost in 1954 and 1965.

Applicable case law requires the acquisition cost be considered by the zoning board.[141] Furthermore, Item M-4 of BSA's Detailed Instructions specifically required of the Congregation the acquisition cost and acquisition date.[142] The BSA cannot depart from its formal written instructions merely because they may not have been adopted as regulations.[143] The BSA and Freeman completely ignored the actual acquisition cost, and the BSA neglected to discuss this fact in its decision.

During the time the Congregation owned the property, it received value in the form of use and rent, including for some years the over-$500,000-per year rent received from the Beit Rabban school. Thus, a return on investment for the Congregation would include factoring in the original acquisition cost, the value of the use, the rent received and the amount received as the market value on the hypothetical sale to the hypothetical developer.

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[141] *Douglaston Civic Assn. v. Galvin*, 36 N.Y.2d 1, 9 (N.Y. 1974), *Curtiss-Wright Corp. v. East Hampton*, 82 A.D.2d 551, 553–554 (N.Y. App. Div. 2d Dep't 1981) *Northern Westchester Professional Park Associates v. Bedford*, 92 A.D.2d 267, 272 (N.Y. App. Div. 2d Dep't 1983). *Sakrel, Ltd. v. Roth*, 176 A.D.2d 732, 737 (N.Y. App. Div. 2d Dep't 1991) ("the failure of the petitioner to divulge its purchase price is fatal"); *Varley v. Zoning Bd. of Appeals*, 131 A.D.2d 905, 906 (N.Y. App. Div. 3d Dep't 1987).

[142] "Generally, for cooperative or condominium development proposals, the following information is required: market value of the property, *acquisition costs and date of acquisition*. (emphasis supplied)" [A-821].

[143] *Allied Manor Road LLC v. Grub*, 2005 N.Y. Misc. LEXIS 3440; 233 N.Y.L.J. 75 (Civil Ct., Richmond Co. 2005); *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 41 (1st Cir. 1989) (Breyer, J.).

F. Since There Are No Unique Physical Conditions Creating a Hardship, the BSA's § 72–21 (a) Condominium Finding Must Be Voided.

The Court of Appeals in the recent *Vomero* case has made clear that the express words of ZR § 72–21 (a) are to be followed by the BSA, and that the BSA cannot create its own statute. Although, in *Vomero*, the Court of Appeals case focused on uniqueness, the Appellate Division dissent discussed both the uniqueness and physical condition requirement. Following the *Douglaston cases,*[144] courts interpreting § 72–21(a) have been careful to require an actual physical condition. Even in *SoHo Alliance,*[145] the court was careful to describe actual physical conditions, rather than non-physical conditions such as landmarking hardships and zoning regulations.

The Respondents below cited cases involving the interpretation of ZR § 72–21 (a) as applied to religious, educational and other non-profits, such as *Guggenheim.*[146] Yet those cases, whether decided correctly or not, are inapplicable when considering the application of ZR § 72–21 (a) to for-profit variances. *Guggenheim* does not modify the requirement for a *"physical"* condition when a condominium variance is at issue.

[144] *Douglaston Civic Assoc. v. Galvin*, 36 N.Y.2d 1 (1974) and *Douglaston Civic Association v. Klein*, 51 N.Y.2d 963 (1980).
[145] *SoHo Alliance v. New York City Bd. of Stds. & Appeals*, 95 N.Y.2d 437, 441 (N.Y. 2000).
[146] *Guggenheim Neighbors v. Bd. of Estimate*, June 10, 1988, N.Y. Sup. Ct., Index No. 29290/87.

It is clear that a physical condition is required to satisfy the (a) finding for the residential variances. Other "conditions" such as landmarking or programmatic needs are not applicable for this purpose.

Nor can a zoning law itself be the physical condition. Were the impact of zoning a physical condition, then in all variance cases a finding could always be made as to the existence of a physical condition. Thus, a split lot is not a physical condition.

(1) New York Cases Applying State Law Are Not Relevant to the (a) Finding, Since New York Law Has No Requirement of a Physical Condition.

New York City's variance law requires that there be a "physical" condition in order to make the (a) finding. No such requirement is provided by State law applicable outside of New York City.[147] Thus, cases like *Commco*,[148] *Dwyer*,[149] and *Fuhst*[150] are wholly inapplicable. New York City zoning cases mistakenly relying upon these and similar cases to avoid the physical condition requirement are questionable precedent.

[147] Town Law Section 267-b-2-(b) [A-855].
[148] *Commco, Inc. v. Amelkin*, 109 A.D.2d 794 (2d Dep't 1985) (Town of Huntington).
[149] *Dwyer v. Polsinello*, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (Rennsalaer County)
[150] *Fuhst v. Foley*, 45 N.Y.2d 441, 444 (1978) (Town of Greenburgh).

(2) There is no Obsolescence That Constitutes a Cognizable Physical Condition For the Condominium variances, or Indeed for any Variances.

Although the BSA referred to obsolescence in the context of the community house variances, it did not do so as to the condominium variances. [151] Nonetheless, the Congregation has cited obsolescence as a hardship to support the condominium variances.

Even so, the obsolescence asserted here cannot be physical conditions creating hardships not resolved in a conforming building, because a conforming building resolves the issues with no unusual demolition costs. In certain situations, particularly use variances, if a building is determined to be obsolete and too impractical to demolish or alter, then a physical condition has been found to exist, such as in *Homes for the Homeless.*[152] Here, though the existing community house is asserted to be obsolete, it can be easily demolished at low cost. Thus, cases like *97 Columbia Heights* are not apposite. The BSA's brief filed in *Homes for the Homeless* makes clear that obsolescence in a building to be demolished is not a cognizable physical condition.[153] Obsolescence therefore cannot be a "physical" condition in this situation.

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[151] *See* discussion at note 114 above

[152] *Homes for Homeless, Inc. v. Bd. of Standards and Appeals*, 24 A.D.3d 340 (1st Dep't 2005), rev'd, 7 N.Y.3d 822 (2006).

[153] Memorandum of Law dated April 30, 2004 filed in the Supreme Court by BSA in *Homes for the Homeless.* [A-1010].

As noted, the BSA did not use "obsolescence" as a basis for the (a) finding for the condominiums. Respondents will cleverly cite to cases that use obsolescence as a physical condition and then claim the community house is obsolete and then muddle the issue and somehow claim that obsolescence was a physical condition for the condominiums (a) finding. Even so, under the case law, an easy-to-demolish obsolete building does not rise to the level of a hardship-causing condition.

G. The BSA Has No Power or Jurisdiction to Use Landmarking as a Factor in Providing a Variance.

The BSA used the existence of landmarking requirements on the development site and adjoining buildings on the Congregation's site in two ways (1) to support its physical condition findings for the condominium variances (as discussed above), and (2) to value the 5,316 square feet of the two condominium site by assigning as the site to be valued 19,755 square feet of undeveloped (because of landmarking) space above the adjoining Parsonage [154]

Freeman's theory apparently was that the landmarking laws limited development over the parsonage, and thus the value of the area not developable should be transferred to the two floors of condominiums. Then, the Congregation reserved the right to build over the Parsonage.[155] The fly in the ointment for the

[154] *See* discussion re Parsonage Development Rights at 33 above.

[155] *See* note 27 above. The court below noted that "There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage." Lobis Decision at page 32. [A-45]. Yet the court below did not address the issue of whether the BSA had any

Congregation and the BSA is that nothing in the statute authorizes the BSA to use landmarking hardships in granting a variance –nothing at all.

There is no question at all that Freeman in May, 2008 suddenly abandoned the normal way to value the site, and came up with this contrivance – and that the BSA failed to note such in its Decision.

BSA has no power or jurisdiction to issue variances based upon landmarking as a hardship, whether using landmarking as a hardship or illegally "transferring" land value from a landmarked site. Clearly, only the City Planning Commission has these powers.

(1) The Congregation Withdrew Its Application to the LPC and City Planning Commission for Relief from Landmarking Hardships Under § 74-711.

The Congregation had initially applied to the LPC for relief from landmarking hardships under ZR §74–711, which would have required City Planning Commission action. But the Congregation withdrew its application when it became apparent that such relief would not be supported by the LPC or perhaps even by the City Planning Commission.[156]

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jurisdiction at all as to relief from landmarking hardships. Nor did the court discuss how the BSA had used the site value above the landmark encumbered Parsonage to value the two-floor condominium site.

[156] The Congregation falsely suggested that LPC *denied* the § 74-711 application to the LPC. Letter from Congregation's Counsel to BSA June 17, 2008 [A-4025] ("[The Congregation's] request for Landmarks cooperation on a ZRCNY Sec. 74-711 special permit was denied,") To the contrary, Shelly Friedman (counsel for the Congregation) advised the LPC at a hearing that the Congregation was withdrawing its § 74-711 application. Transcript of LPC Hearing, November 15, 2005. [A-1027–28]. ("We have withdrawn that aspect of the litigation," p.9, l. 19-20*). See also* Applicant's Fifth Statement in Support of July 8, 2008. [A-4182].

If the LPC itself had recommended a special permit, the LCP would make a recommendation to the City Planning Commission. The City Planning Commission, if it agreed to relief, would then impose restrictions on the Congregation site; for example, restricting future development on the Synagogue and Parsonage sites. The BSA not only exercised powers it did not have, but it then provided relief to the Congregation without imposing any conditions whatsoever as contemplated by the zoning resolutions contemplated when the City Planning Commission provides relief.

(2) Zoning Resolution Provisions Authorizing Landmark Hardship Relief Provide No Role to the BSA.

The Zoning Resolution includes many provisions in addition to §74-711 which allocate landmark hardship relief powers to the City Planning Commission.[157] The BSA is mentioned in none of these provisions, nor in any other provisions of the Zoning Resolution. The BSA clearly exceeded its powers.

H. Bricking Over of Windows In the Front of the Adjoining Building ZR §72–21(c) and ZR §72–21(e).

Simply, the BSA arbitrarily and capriciously ignored the blocking of the windows of Petitioner Lepow and others in the adjoining 18 West 70th Street

[157] Other provisions of the Zoning Resolution concerning relief from landmark hardships, which assign power and jurisdiction to the City Planning Commission, with no role for the BSA, include:

ZR §42–142; ZR §74–711; ZR §74–712; ZR §74–721; ZR §74–79; ZR §74–791; ZR §74–792; ZR §74–793; ZR §81–254; ZR §81–266; ZR §81–277; ZR §81–63; ZR §81–631; ZR §81–633; ZR §81–634; ZR §81–635; ZR §81–741; and ZR §99–08.

building and tried to obscure this fact in its Decision. Without question, the bricking over of these windows falls within the purview of ZR §72–21(c).

Community Board 7 found with reference to the bricking-over of windows: "it was an abuse of the variance process to permit one landowner to exceed zoning restrictions at the expense of its neighbors." [A-2635].

Clearly, a conforming building would not block these windows, which have views of Central Park. Clearly, the value of the apartments has diminished, while at the same time the condominium variances accrued to the substantial benefit of the Congregation membership. The BSA Decision was silent as to the blocked windows because the BSA had no explanation for its arbitrary and capricious failure to balance the equities as to these windows.

The BSA, having required the Congregation to analyze the financial feasibility of courtyards in the rear of the building, arbitrarily failed to require the Congregation as part of the (e) finding to submit feasibility studies of courtyards or setbacks in the front of the building so that windows would not be bricked over. The BSA also failed to analyze whether setbacks in the front of the building would unreasonably reduce the 10.93% return on investment to the Congregation.

I. By Applying Only the CEQR As To Shadows, the BSA Failed to Make the Findings Required by ZR §72–21(c).

The BSA in its finding as to shadows under ZR §72–21(c), stated:

> WHEREAS, CEQR regulations provide that an adverse shadow impact is considered to occur when the shadow from a proposed project falls upon a publicly accessible

> open space, a historic landscape, or other historic resource…[158]

It is incumbent upon the BSA to respect the purposes of the zoning regulations as discussed above and as well make the findings required by ZR §72–21(c), not just CEQR.[159] The mid-block contextual zoning regulations establish height and setback requirements to allow light and air into the narrow streets. Satisfaction of CEQR and SEQR requirements by themselves does not mean that ZR §72–21(c) has been satisfied or that the purposes of the particular zoning regulation have been respected.

The condominium variances not only increase building height but eliminate upper floor setbacks, together having a dramatic effect on shadows on a narrow street. Because the Synagogue height and setbacks essentially conform to contextual zoning, the adverse impact of the condominium variances is all the more dramatic.

The BSA's excuse that CEQR[160] and SEQR[161] do not require meaningful studies of streetscape shadows is wholly irrelevant to the obligation of the BSA to meet the requirements of the (c) finding and to follow the purposes of the zoning statute. ZR § 72–21 (c) is a statute separate and apart from CEQR, and CEQR is not a limitation on ZR § 72–21 (c). A superficial "study" by the Congregation's

[158] BSA Decision, ¶195. [A-63].
[159] *See* discussion at page 49 above.
[160] City Environmental Quality Review.
[161] New York State Environmental Quality Review Act.

consultant does not discharge the BSA from its obligations. The BSA cannot meet its obligations by simply accepting the "magic words" incorporated in a report from a consultant hired by an applicant for the purpose of uttering those very "magic words."

By confining its findings to the CEQR finding, the BSA failed to make the findings required by ZR § 72–21 (c).

J. The BSA Created for Itself the Power to Consider Landmarking When Granting a Variance.

The BSA is not entitled to engage in self-serving and idiosyncratic interpretations of its own governing statutes. In *GRA,*[162] through the Supreme Court and the Appellate Division, the BSA argued that it had certain powers. Then, when faced with the appeal to the Court of Appeals, the BSA abruptly admitted error.

The BSA should now admit error in this case. The BSA acted highly improperly in using landmarking as a factor when the BSA had no jurisdiction whatsoever.[163] Worse yet is the unbridled discretion the BSA has given itself in handing out variances. The BSA's loose statutory construction is what was firmly rejected by the First Department and the Court of Appeals, thwarting efforts of

[162] *GRA v. LLC*, 12 N.Y.3d 863 (2009) ("On appeal to this Court, however, the BSA concedes that it and the lower courts were in error…").
[163] *In the Matter of 330 West 86th Street* (New York City Board of Standards and Appeals, 290-09-A, July 13, 2010.):.

New York City agencies to skirt real estate laws.[164] These courts rejected the interpretations of statutes by real estate administrative agencies that were unconstitutionally vague and not in accord with the plain words of the applicable statutes.

Without the use of the value of undeveloped space above the landmark-burdened parsonage, there is no evidentiary support for the reasonable return finding for Scheme A and the minimum variance finding for the Proposed Scheme.

CONCLUSION

The Congregation had ample opportunity and resources during the 18-month BSA proceeding to establish a basis for the findings that the conforming as-of-right buildings would be unable to provide a reasonable return. The record is clear that only by using irrational manipulations of the site value and factors not authorized by statute, was the Congregation able to claim an inability to earn a reasonable return on investment. The record is also clear that even the faulty analysis of an all-residential Scheme C yields a return on investment acceptable to the Congregation.

The BSA did exactly what it claimed it would and could not do: provide variances to religious non-profit seeking variances for the purpose of allowing

[164] *Roberts v Tishman Speyer Props., L.P.*, 13 N.Y.3d 270 (2009) (disregarding administrative agency's interpretation of statute which is improper and conflicts with the plain language of the statute).

income production. BSA Decision, ¶¶ 34, 35, and 125 [A-52]. So, as not to create precedent that the BSA would regret, the BSA concealed what it was doing.

The BSA granted variances to the Congregation of the very type it has adamantly refused to provide to Yeshivas in Brooklyn.[165]

Because of the confusing state of the record, the court below may have been unable to unscramble the confusion sown by the Congregation and the BSA. Further, the court below did not apply the substantial evidence requirement of the statute. Yet, the court below did note that the result might be different if that court were empowered to conduct a de novo review.[166]

What is sought here is not a *de novo* review, but an application of the standard of sufficient if not substantial evidence, a review of the legal powers asserted by the BSA in support of its findings, the application of the legal standards as to feasibility studies, and the rejection of irrational findings.

[165] BSA Decisions in *245 Hooper Street,*72–05-BZ, NYC-BSA, May 2, 2006 [A-3065] and *Yeshiva Imrei Chaim Viznitz*, 290–05-BZ, NYC-BSA, January 9, 2007 [A-3069]. The BSA Decision at ¶ 213 and ¶ 214 improperly defers to the Congregation as to the condominium variances.

[166] Lobis decision at page 32 [A-45].

The decision below should be reversed and the BSA instructed to void all the variances, save for the variances for the community house on the first four floors.

Dated: September 7. 2010
New York, New York

Respectfully submitted,

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Order and Judgment Appealed From: Decision, Justice Joan B. Lobis, July 10, 2009, entered July 24, 2009, 2009 NY Slip Op 31548(U) (1 of 38)

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis PART 6

Index Number : 113227/2008
KETTANEH, NIZAM PETER
VS.
BOARD OF STANDARDS AND APPEALS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.
MOTION DATE 3/31/09
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of ~~Motion~~/ Order to Show Cause — Affidavits — Exhibits ...	1-27
Answering Affidavits — Exhibits	28-71; 72
Replying Affidavits	73-103

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/10/09

J.S.C.

FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

Index No. 113227/08

-against-

Decision, Order and Judgment

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

Respondents.

----------X

JOAN B. LOBIS, J.S.C.:

Nizam Peter Kettaneh and Howard Lepow bring this petition, pursuant to Article 78 of the C.P.L.R., seeking to annul and reverse the August 26, 2008 determination of the Board of Standards and Appeals of the City of New York and its chair and vice-chair, Meenakshi Srinivasan and Christopher Collins, respectively (collectively referred to as the "BSA" or the "Board"). The determination is set forth in Resolution 74-07-BZ (the "BSA Resolution"). The BSA Resolution approved the application of respondent Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel (the "Congregation"), a not-for-profit religious institution, for a variance for the property located at 8-10 West 70th Street in Manhattan (the "Property"), which is adjacent to the Congregation's sanctuary, located at 6 West 70th Street. The Congregation seeks to build a structure containing four floors of community space and five floors of luxury condominiums (the "proposed building" or the "Project"). The Board found that the Congregation had satisfied the criteria set forth in New York City Zoning Resolution § 72-21 for a variance. Respondents BSA and the Congregation oppose the petition.

The Property is located within the Upper West Side/Central Park West Historic District and is in a residential zoning district. Petitioner Kettaneh owns and resides in a townhouse located at 15 West 70th Street, which is opposite the Congregation's sanctuary. Petitioner Lepow resides at 6 East 79th Street. Mr. Lepow owns ten (10) cooperative apartments in a building located at 18 West 70th Street (the "West 70th Building"), which is the building adjoining the Property.

The Property is comprised of two tax lots—Block 1122, Lots 36 and 37—with a total lot area of 17,286 square feet. The lots constitute a single zoning lot because the tax lots have been in common ownership since 1984, which is the date of the adoption of the existing zoning district boundaries. The bulk of the site is in the R8B zoning district, known as contextual mid-block zoning, with height and setback limitations. The remainder of the Property is in the R10A zoning district, which has less restrictive zoning requirements. The zoning lot has 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage on Central Park West. Lot 36 consists of the synagogue building, an historic landmark, which was constructed in 1896. Adjacent to the south side of the synagogue, on Central Park West, is a townhouse known as the Parsonage, which was also constructed in 1896. The Parsonage is 75 feet tall and holds 27,760 square feet. Lot 37, which is on West 70th Street, just off Central Park West, is 64 feet by 100 feet. This lot is the combination of three residential house lots, once owned by the Congregation, but sold in 1896 to private owners for the construction of private residences, with the restriction that no structure would exceed the height of the Synagogue building itself. In 1949, two of these lots were conveyed back to the Congregation and in 1954, row houses were constructed on this portion of the Property, creating the Community House. The third lot was conveyed back to the Congregation in 1965. While there were three structures originally, in 1970, the building on the lot acquired in 1965 was

demolished, leaving a vacant lot. Presently, this vacant part of Lot 37 contains a trailer that is used for classrooms. The other part of the lot contains the four-story Community House, which totals 11,079 square feet, and occupies approximately 40% of the tax lot area; the remaining 60% is vacant. The Beit Rabban Day School, a private, nonsectarian Jewish day school that is not affiliated with the Congregation, is the primary user of the Community House, and pays rent to the Congregation.

The Application Process

In order to develop a property that has a non-conforming use or non-complying bulk, the applicant must submit an application to the Department of Buildings ("DOB"). After the DOB issues its denial of the non-conforming or non-complying proposal, the property owner may then apply to the BSA[1] for a variance. The BSA is required to hold hearings and comply with other statutory procedures. Specific findings must be made in the BSA determination to grant or deny a variance. (See below.) Each of the five criteria must be satisfied before a variance may be granted. If the BSA does not grant a variance, the property owner may only develop the property in conformance with the use and bulk regulations for the particular zoning district.

The Zoning Regulations as to the Granting or Denial of a Variance

In determining whether or not to grant a variance, Z.R. § 72-21 requires the BSA to make "each and every one" of five specific findings of fact, as follows: (1) that the subject property

[1] The BSA is empowered to hear, decide and determine whether to grant or deny requests to vary the zoning laws. New York City Charter (the "Charter") §§ 666(5), 668; Z.R. §§ 72-01(b) and 72-20 et seq. The BSA is comprised of five commissioners, who are appointed by the Mayor of the City of New York, each for a term of six years. Pursuant to § 659 of the Charter, at least one member must be a planner with professional qualifications; another member is required to be a licensed professional engineer; and, another member is required to be a registered architect. All three of these professionals must have at least ten years' experience.

has "unique physical conditions" which create "practical difficulties or unnecessary hardship in complying strictly" with the permissible zoning uses and that such practical difficulties are not due to the general conditions of the neighborhood; (2) that the physical conditions of the property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a reasonable return" from the property; (3) that the variance "will not alter the essential character of the neighborhood" or "substantially impair the appropriate use or development of adjacent property" and "will not be detrimental to the public welfare"; (4) that the "practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner"; and, (5) that the variance be "the minimum variance necessary to afford relief." The BSA is further required to set forth in its determination

> 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 of other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board.

The Congregation's Application to the BSA

On or about March 27, 2007, the Manhattan Borough Commissioner of the DOB denied the application, citing eight objections.[2] After the application was revised, the DOB issued a second determination, which eliminated one of the prior objections. The DOB's second determination, issued on or about August 27, 2007, was the basis for the variance application.

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[2] Prior to this application, the Congregation submitted an application to the Landmarks Preservation Commission ("LPC"). As set forth at p. 29, infra, the LPC issued a Certificate of Appropriateness in March 2006.

On April 1, 2007, the Congregation submitted its variance application to the BSA. As a result of its growth in membership from 300 families when the synagogue first opened, to its present membership of 550 families, the Congregation asserted that it needed a new facility to accommodate its religious mission. In addition, the Congregation claimed that it needed to update the 110-year-old building to make it more easily handicapped accessible.

To this end, the plan seeks to demolish the existing Community House occupying tax lot 37, and replace it with a nine-story (including penthouse and cellar) mixed-use community facility/residential building. The use of the Property conforms with the zoning regulations (i.e., as-of-right), so no use waivers were requested; the variance request was with respect to non-complying bulk. The Congregation sought a waiver of certain regulations, since the proposed building does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear setback for the zoning district.[3] The proposed building will have a total floor area of 42,406 square feet, which is comprised of 20,054 square feet of community facility floor area and 22,352 square feet of residential floor area. The base height along West 70th Street is 95 feet, 1 inch, which is just over 35 feet higher than the maximum permitted height of 60 feet; the front setback is 12 feet, which is 3 feet short of the minimum permitted distance of 15 feet; the total height is 105 feet, 10 inches, which is just over 30 feet higher than the maximum permitted height; the rear yard is 20 feet for the second through fourth floors, which is equal to the required minimum; the rear

[3] "Lot coverage" is that portion of a zoning lot which, when viewed from above, is covered by a building."Rear yard" is that portion of the zoning lot which extends across the full width of the rear lot line and is required to be maintained as an open space. "Base height" is the maximum permitted height of the front wall of a building before any required setback. "Building height" is the total height of the building, measured from the curb level or base plane to the roof. A "setback" is the portion of a building that is set back above the base height before the total height of the building is achieved.

setback is 6 feet, 8 inches, which is more than 3 feet short of the minimum required distance of 10 feet; and, the interior lot coverage is 80%, which is 10% greater than the maximum permitted lot coverage of 70%.

In support of the application, the Congregation submitted a zoning analysis, a statement in support, an economic analysis, drawings, and photographs. The Congregation also submitted an Environmental Assessment Statement. An Economic Analysis Report, dated March 28, 2007 (the "March 2007 Report"), was submitted by the Congregation's consultant, Freeman/Frazier & Associates, Inc. ("Freeman/Frazier"). The March 2007 Report analyzed the feasibility of two alternatives for the development of the site— an as-of-right residential/community facility consisting of a six-story building, with condominium units on the fifth and sixth floors, and a proposed residential/community facility. The latter proposal would require a variance from the BSA, since the proposal called for an eight-story plus penthouse mixed-use building, with condominiums on floors five through eight, plus the penthouse.[4]

On or about June 15, 2007, the BSA issued a Notice of Objections to the variance application, to which Freeman/Frazier responded; the BSA issued a second set of objections on October 12, 2007, comprising twenty-two (22) objections, to which Freeman/Frazier also responded. The crux of the response related to the second prong of the required finding of fact, i.e., the

[4] Freeman/Frazier subsequently made revisions to the March 2007 Report, and submitted letters and/or reports dated September 6, 2007; October 24, 2007; December 21, 2007; January 30, 2008; March 11, 2008; April 1, 2008; May 13, 2008; June 17, 2008; and, July 8, 2008.

reasonable return analysis. Freeman/Frazier also provided a revised as-of-right development, since the prior as-of-right proposal actually violated the rear yard limitations and was not as-of-right. The revised proposal also reduced the floor-to-ceiling heights, which resulted in a seven-story building with a total of six residential units. Freeman/Frazier concluded that an as-of-right building would result in an annualized capital loss in the amount of $23,000, while the revised proposed development would yield an annualized return on total investment of 8.16%.

The Community Board 7 Land Use Committee ("CB7") held hearings on October 17 and November 19, 2007. A number of community residents and elected officials spoke in opposition. The Congregation pointed out that the design had changed slightly after the Congregation appeared before the Landmarks Preservation Commission ("LPC"), with respect to the decrease in size of the proposed building and certain elements of the façade.[5] CB7 expressed concern as to whether all of the residential space in the proposed building was really necessary to finance the Project and the Congregation's programmatic needs. The opposition raised this as a concern, and also questioned the Congregation's use of the Parsonage as rental property rather than as space for its programmatic needs; the excessive garbage that would pile up after events; excessive traffic from the school; and, the shadows that will result from the height of the new building. CB7 questioned the need for five condominiums; whether five condominiums was truly the minimum number necessary for a reasonable return; and, why a Congregation with a large number of wealthy members needed this manner of financing for its programmatic needs.

[5] At the time of the presentation to the LPC, the Congregation sought to construct a fourteen-story building.

The Congregation asserted that it was not required to satisfy the finding of a reasonable rate of return, and that it was optional for the BSA to make that finding. The Congregation stated that the Parsonage was not suitable for community facility use, in that there were too many building code violations for multi-purpose use, so that it is only suitable as a residence. CB7 rejected the variances for the condominiums, but approved the smaller, lower floor variances, essentially approving the horizontal variances but not the vertical variances. On December 4, 2007, the entire Community Board rejected all seven of the variances.

After notice by publication and mailing, the BSA held its first hearing on November 27, 2007. Representatives from the Congregation addressed the reasons for the proposed building, which included the need to accommodate the growth in membership and the need to make the building more handicapped accessible. The BSA asked the Congregation to consider only the value of the residential portion of the site in calculating the reasonable return, and eliminate the community facility from the site value.[6] By letter dated December 21, 2007, Freeman/Frazier submitted its revisions. Five development alternatives were set forth: (1) a revised as-of-right community facility/residential development, which is a revision to the proposal submitted in the March 2007 Report; (2) a lesser variance alternative as-of-right community facility/residential development, which is based on the proposal that was submitted in response to the Board's June 15, 2007 Notice of Objections; (3) a claimed as-of-right structure with tower development, which would consist of a tower with floors five through sixteen comprising thirteen residential units, but would have a smaller zoning floor area than the proposed development; (4) the proposed development, which

[6] The term "site value" is used interchangeably with the terms "acquisition cost" and "market value" of the Property.

consists of new construction of an eight-story building, plus penthouse; and, (5) an as-of-right residential development. Also, pursuant to the Board's request, the economic feasibility analysis was performed considering only the value of the residential portion of the site. The first three alternatives all resulted in annualized losses. The fourth proposal of the mixed use building with five condominiums provided an annualized return on total investment in the amount of 12.19%, while the fifth proposal provided an annualized return on total investment in the amount of 3.63%. Freeman/Frazier acknowledged its failure to respond to the opposition's concerns, including not valuing income from the school, Parsonage and basement/banquet space.

The public hearing continued on February 12, April 15, and June 24, 2008. Each date, testimony was presented by opponents to the Project and written submissions were prepared by both the Congregation and the opponents to the Project after each hearing. Freeman/Frazier's March 11, 2008 letter and report responds specifically to concerns raised at the February 12, 2008 hearing, and to the report of Martin Levine, of Metropolitan Valuation Services ("MVS"), the expert for the opposition. The BSA asked Freeman/Frazier to review the estimated property value of the residential development portion of the site, using the as-of-right zoning floor area determined by assuming the building lot to be a single split zoning lot, and to consider the financial feasibility of several new alternatives. Freeman/Frazier re-examined comparable sites for land prices, and examined alternatives such as increasing the courtyard space (which would decrease the sellable area on each floor), and reducing the height of the proposed building by one story. The revised proposals would provide an annualized return on total investment of 8.58% and 1.94%, respectively.

MVS submitted a report in which the principal complaint was with respect to the economic feasibility of the Project. MVS questioned Freeman/Frazier's land value of $750 per square foot of buildable area, claiming that this number was arrived at using "cherry picked" data. Rather, MVS argued that a land value of $500 per buildable square foot was a more probable indicator of the Property's market value. MVS also questioned the construction costs. At the April 15 hearing, the Board focused on the price per foot for development, the comparables that were used, and the programmatic needs of the Congregation. The Chair questioned the credibility of the site value, and questioned whether the current proposal before the Board really was the minimum variance required, which is the fifth required finding. The opposition questioned why the BSA was not scrutinizing the Congregation's financial statements to see what available resources it has, other than potential income from the sale of the condominiums. The BSA concluded the hearing by requesting that the Congregation address the issue of shadows and the implication of a larger building on the surrounding buildings. The BSA also requested clarification to demonstrate that the additional ten-foot encroachment is driven by the Congregation's programmatic needs.

Freeman/Frazier's May 13, 2008 response contained a revised proposal consisting of a building with eight floors and a penthouse, with a complying courtyard in the rear in order to continue providing light and air to three lot line windows in the West 70th Building. The courtyard would start at the sixth floor, which would reduce the size of floors six through eight, and the penthouse. A second revised proposal was the same as above, but eliminated the penthouse. A third alternative eliminated the eighth floor, but retained the penthouse, because the LPC believed the architectural character of the penthouse was an important design feature. The three proposals yielded an annualized return on total investment of 10.66%, 3.82%, and 0.93%, respectively. Although the

BSA specifically requested that the Congregation address the impact of shadows and the programmatic needs of the Congregation, these issues were not addressed.

MVS raised additional objections, to which Freeman/Frazier responded by noting that the same objections were set forth previously. A member of the opposition (petitioners' counsel herein) expressed concern about the practice of measuring return on investment, rather than a return based on equity. Freeman/Frazier responded that it is customary in a condominium development project to use return on investment (see pp. 23-24, infra), and also addressed other concerns raised by opponents to the Project.

At the June 24 hearing, a question arose concerning the failure to account for the terraces in the proposed pricing of the condominiums. The BSA also questioned how the efficiency ratio was calculated, the comparables that were used, and whether the comparables calculated square footage solely based on the interior of an apartment or whether the square footage also included common areas. Freeman/Frazier responded to issues raised at the June 24 hearing, MVS' June 23, 2008 report, and a letter from Mr. Sugarman. Freeman/Frazier's July 8 submission updated the prices for the condominium units, since they now had terraces on the fifth and sixth floors; the proposed apartment prices were still lower than in the March 2007 Report, since there is now less sellable square footage per floor than in the original plan. The additional value as a result of the terrace areas increased the annualized return on investment from 10.66% to 10.93%. The revisions to the as-of-right development resulted in an annualized capital loss of $4,569,000. Freeman/Frazier also responded to the question concerning the efficiency ratio, noting that the variations occurred as the sellable areas change, while the common areas remain the same size. The opponents continued

to question the methodology to determine the acquisition costs, and the decision to utilize a return on investment analysis, rather than a return based on equity. Freeman/Frazier responded by noting that the concerns were repetitive, or rejected the comments outright.

In a decision dated August 26, 2008, the BSA adopted unanimously, by a vote of 5-0, the Resolution granting the variance. The BSA Resolution approved the construction of a new building which will contain both community space and five luxury condominium apartments. The relevant portion of the Resolution provides that the BSA

> permit[s], on a site partially within an R8B district and partially within an R10A district within the Upper West Side/Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to Z.R. §§ 24-11, 77-24, 24-36, 23-66, and 23-633; on condition that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received May 13, 2008" - nineteen (19) sheets and "Received July 8, 2008" - one (1) sheet; and on further condition:
>
> **THAT** the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80. . .

Other conditions include, inter alia, that the Congregation obtain an updated Certificate of Appropriateness from the LPC prior to any building permit being issued by the DOB; that substantial construction be completed in accordance with Z.R. § 72-23; and, that the DOB ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction. The Resolution was filed on August 29, 2008. This Article 78 proceeding was commenced on September 29, 2008.

As approved, the proposed building includes mechanical space and a multi-function room on the sub-cellar level, with 360-person capacity[7] for a banquet hall for various life cycle events; a cellar level with separate dairy and meat kitchens and childcare space. The first floor consists of the synagogue lobby, small synagogue, rabbi's office, and library and archive space; the second floor contains toddler classrooms; the third floor contains Hebrew School classrooms and the Beit Rabban Day School; and, the fourth floor consists of a caretaker's apartment and adult education classrooms. The residential condominiums are on the fifth through eight and ninth (penthouse) floors. Portions of the ground through fourth floor contain elevators for the synagogue.

Petitioners' Allegations

Petitioners raise numerous objections to the BSA's determination. The primary claim is that there was no need for the zoning variance at all. Petitioners assert that the Congregation stated repeatedly during the course of the proceedings before the BSA that the purpose of the variances was to fund the Congregation's programmatic needs, through income from the condominiums. Petitioners argue that the Congregation failed to demonstrate financial need; indeed, petitioners assert that the historic Congregation can raise the necessary funds from its members. They also object to the BSA's failure to inquire of the Congregation as to the rent being paid by the Beit Rabban Day School; the rent being paid by the residential tenant of the six-bedroom luxury Parsonage residence, which is apparently rented to Lorin Maazel, the Musical Director of Lincoln Center, at a monthly rent of $19,000; and, income from the banquet facilities.

[7] During the November 19, 2007 CB7 public meeting, a representative of the Congregation stated that the capacity was 440 persons.

Petitioners further allege that a conforming as-of-right mixed-use building could be built, with two floors of luxury condominiums, with setbacks and height limitations of 75 feet, consistent with the brownstones on the block, or, a conforming all-residential building could be built that would allow for seven floors of condominiums, with two sub-basements. The proposed building will adversely affect the light and air in the courtyard that these apartments face. Two of the apartments owned by Mr. Lepow—apartments 7B and 8B—will be "bricked up" by the proposed building as a result of the variances. In a conforming, as-of-right structure, however, his apartments would not be bricked up. Similarly, the other units face a courtyard; in an as-of-right structure, there would be little, if any, adverse impact.

Petitioners allege that on November 8, 2006, before the application was filed, respondents Srinivasan and Collins held what petitioners describe as an "ex parte" meeting with the Congregation's lawyers and consultants at BSA headquarters without notifying the opponents of the project, and refused to provide information concerning what occurred at the meeting.

Finally, petitioners allege that because the Congregation did not exhaust its administrative remedies provided by §74-711, claiming that the Congregation failed to complete the review process before the LPC. Petitioners contend that the BSA should not have entertained the application, since the Congregation is asserting the same landmark hardships and economic need inherent in a § 74-711 application.

Article 78 Standard of Review

"'It is not the function of judicial review in an article 78 proceeding to weigh the facts and merits *de novo* and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis.'" Clancy-Cullen Storage Co., Inc. v. Board of the Elections in City of New York, 98 A.D.2d 635, 636 (1st Dep't 1983) (emphasis in original), quoting Kayfield Const. v. Morris, 15 A.D.2d 373, 378 (1st Dep't 1962). "[A]n agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable." In re Smith v. Donovan, 61 A.D.3d 505 (1st Dep't 2009), citing Seitttelman v. Sabol, 91 N.Y.2d 618, 625 (1998).

Moreover, there is a special deference given to determinations of zoning boards and other bodies. Khan v. Zoning Bd. of Appeals of Village of Irvington, 87 N.Y.2d 344, 351 (1996); Parsons v. Zoning Bd. Of Appeals, 4 A.D.3d 673, 674 (3d Dep't 2004). "Local zoning boards have broad discretion in considering applications for variances and interpretations of local zoning codes, and the scope of judicial review is limited to whether their action was arbitrary, capricious, illegal, or an abuse of discretion." Matter of Marino v. Town of Smithtown, 61 A.D.3d 761 (2d Dep't 2009), citing Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613 (2004); Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 62-63 (1st Dep't 2000). A determination is considered to be rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." Halperin v. City of New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005), lv. dismissed, 6 N.Y.3d 890, lv. denied, 7 N.Y.3d 708 (2006). Furthermore, "[w]hile religious institutions are not exempt from local zoning laws, 'greater flexibility is required in evaluating an application for a religious use than an

application for another use and every effort to accommodate the religious use must be made.'" Halperin, supra, at 773, citations omitted.[8] In challenging any zoning determination as arbitrary, "the burden of establishing such arbitrariness is imposed upon him who asserts it." Robert E. Kurzius, Inc. v. Incorporated Vil. of Upper Brookville, 51 N.Y.2d 338, 344 (1980), cert. denied, 450 U.S. 1042 (1981), quoting Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121 (1951).

The Five Factors

As set forth at pp. 3-4, supra, pursuant to Z.R. § 72-21, the BSA is required to examine five factors before granting a variance. Each of these findings is addressed below.

The First Finding - Unique Physical Conditions

Under § 72-21(a), there must be a finding that the property at issue has "unique physical conditions" which create practical difficulties or unnecessary hardship in complying strictly with the permissible zoning provisions, and that such practical difficulties are not the result of the general conditions of the neighborhood. The unique physical conditions must be "peculiar to and inherent in the particular zoning lot." The Congregation argued that the site's physical conditions created an unnecessary hardship in developing the site in compliance with the zoning regulations

[8] Of course, where the proposed use is solely or primarily for religious purposes, flexibility and greater deference must be accorded. Here, the variance is sought for a mixed use building. "Affiliation with or supervision by religious organizations does not, *per se*, transform institutions into religious ones. 'It is the proposed use of the land, not the religious nature of the organization, which must control.'" Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710, 711 (2d Dep't 1988), quoting Bright Horizon House v. Zoning Bd. of Appeals of Town of Henrietta, 121 Misc. 2d 703, 709 (Sup. Ct. Monroe Co. 1983). The record reflects that the BSA gave the Congregation deference with respect to the variance request for the community facility, but did not accord the Congregation deference to the extent that it was seeking a variance for the revenue-generating, residential portion of the Project.

with respect to lot coverage and yards. Were the Congregation required to comply with the 30 foot rear yard and lot coverage, it argued, the floor area of the community facility would be reduced by approximately 1,500 square feet, which would severely restrict the Congregation's programmatic needs. The Congregation argued that it needed to expand the lobby ancillary space; expand the toddler program; develop classroom space for the Hebrew school and adult education program; provide a residence for an onsite caretaker; and, provide classrooms for the Beit Rabban Day School.

The BSA separated its analysis of the first finding into two parts: the community facility portion of the Project and the residential portion of the Project. This separation was necessitated by the fact that the Congregation is not accorded the deference as a non-profit for the residential portion of the Project. With respect to the community facility portion of the Project, the BSA rejected the opposition's claim that the Congregation was required to establish a financial need for the project as a whole, since nothing in the zoning law requires a showing of financial need as a prerequisite for the granting of a variance. Rather, all that is required is that the existing zoning regulations impair its ability to meet its programmatic needs The BSA rejected petitioners' contentions that the Congregation should have sought to raise funds from its members instead of seeking the requested variances, stating that the wealth of the property owner is irrelevant to the hardship finding.

The BSA determined that, when considering the physical conditions together with the programmatic needs of the Congregation, denying the variance would constitute an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations." The BSA rejected petitioners' contention that the programmatic needs were too

speculative; that both the Beit Rabban Day School and the toddler program were not reasonably associated with the overall religious purpose of the Congregation; and, that the Congregation's programmatic needs could be satisfied within an as-of-right building. In response to the BSA's request, the Congregation submitted a detailed analysis of the programmatic needs on a space- and time-allocated basis, which demonstrated that daily simultaneous use of the majority of the space required waivers of the zoning regulations with respect to floor area. Because of the areas needed for an elevator and stairs, and the height limit of an as-of-right building due to the width of the Parsonage, an as-of-right building would gain little additional floor area. The BSA Resolution cites Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that it is inappropriate for a zoning board to second guess a non-profit organization with respect to the location in which to place its programs.

Turning to the residential portion of the Project, among the unique physical conditions of the site include the fact that the lot is divided by a zoning district boundary, with 73% of the lot in R10A and 27% of the lot in R8B. The total height limitation for R10A is 185 feet, with a maximum base height of 125 feet, while the R8B portion has a total height limit of 75 feet and a maximum base height of 60 feet. Applying the R8B restrictions, less than two full stories of residential floor area would be permitted above the four-story community use facility.

Petitioners argued that the lot was not unique, solely because of the presence of a zoning district boundary within the lot, pointing out that other properties owned by religious institutions and the Museum of Natural History in the areas bounded by Central Park West and Columbus Avenue, and by 59th Street and 110th Street, had the same zoning district boundaries.

The BSA noted that the presence of other lots with the same zoning district boundaries does not defeat the claim of "uniqueness;" rather, the parcel's conditions must be such that they are not generally applicable to other lots in the vicinity.

An applicant's claim of uniqueness necessarily requires a comparison between similarly situated lots in the neighborhood with those of the applicant's lot. Soho Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441 (2000). "Unique physical conditions" may include the idiosyncratic configuration of the lot (Soho Alliance, supra) or unique characteristics of the building itself. UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248, 249 (1st Dep't 2002). A unique consideration here is that a large portion of the lot is occupied by the landmark Synagogue; the BSA noted that the limitations on development on the Synagogue portion of the lot result in that portion being underdeveloped. Because of the landmark status, the Synagogue is permitted to use only 28,274 square feet for an as-of-right development, although it has approximately 116,752 square feet in developable floor area. The unique physical conditions, the BSA concluded, "when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations," which satisfied the requirement of subdivision (a) of the zoning regulations. This finding is sufficient to support the BSA's determination that the Property is unique.

The Second Finding - Inability to Earn a Reasonable Return

Second, the BSA must find that the physical conditions of the Property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a

reasonable return" from the property.[9] Failure to meet the burden of proof that an as-of-right building in conformity with the zoning requirements will not bring a reasonable return requires denial of the variance. Petitioners assert that the BSA failed to properly analyze the reasonable return of a conforming as-of-right building.

The Congregation argued initially that it did not even need to show a reasonable return, since the Congregation is a not-for-profit corporation. Section 72-21(b) sets forth that "this finding shall not be required for the granting of a variance to a non-profit organization." But, the BSA specifically requested that the Congregation submit reasonable return analysis, concluding that the exemption from this requirement did not apply when a non-profit was seeking variances for a total or partial for-profit building. Alternatively, the Congregation argued that even if the Congregation had to satisfy the requirement of the reasonable return analysis, the Congregation demonstrated that a conforming as-of-right structure would not result in a reasonable rate of return.

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[9] The term "reasonable return" is not defined. In its memorandum of law, the Board suggests that "reasonable return" does not mean "any sort of profit whatsoever," but rather a profit margin "substantial enough to actually spurt development." The rate of return for the proposed development, as approved by the BSA, is 10.93%. In SoHo Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441, a reasonable rate of return was found to be 9.9%. In Mt. Lyell Enterprises, Inc. v. DeRooy, 159 A.D.2d 1015, 1016 (4th Dep't 1990), an 11.76% rate of return after three years was found to be "not unreasonably low." But, in Ryan v. Miller, 164 A.D.2d 968 (4th Dep't 1990), a use variance was denied when a conforming use would still earn 5.7%, even though other conservative investments were earning 10-11% return at that time. The Appellate Division decision in SoHo Alliance flatly rejected any effort to determine that a specific percentage is reasonable as a matter of law: "[w]e are 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." Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 69 (1st Dep't), aff'd, 95 N.Y.2d 437, 441 (2000).

Petitioners assert that although the BSA required the analysis to be performed, the BSA never explicitly addressed how the reasonable return analysis should be conducted, since there is no language in the statute as to how to consider a mixed-use profit and non-profit structure. Freeman/Frazier's March 2007 Report concluded that there is no return on investment provided by the as-of-right development. The first proposed development provided a 6.55% annualized return on total investment. Freeman/Frazier notes that this is at the low end of the range that typical investors would consider for an investment opportunity. The Congregation then submitted a study that analyzed an as-of-right community facility/residential building within an R8B envelope; an as-of-right building with a floor area ratio ("FAR") of 4.0;[10] a proposed building requiring a variance; and, a community facility and residential building that is smaller than the third proposal. In November 2007, the BSA asked the Congregation to revise the evaluation, which it did, by including an as-of-right community facility and residential tower using a modified site value. None of these analyses, other than the original proposed structure, resulted in a reasonable return.

The BSA asked the Congregation to submit additional revisions, after it was determined that the proposed tower on the R10A portion of the lot was contrary to Z.R. § 73-692, the "Sliver Law."[11] At the February 12, 2008 and April 15, 2008 hearings, the BSA questioned the Congregation's basis for the valuation of its development rights, and asked for a recalculation of the value of the site, together with a revised plan with a court to the rear of the building, above the fifth floor. Another revised plan was submitted, which assessed the financial feasibility of: the original proposed building, but with a complying court; an eight-story building with a complying court; and,

[10] The FAR permitted for district R8B is 4.0; the FAR for district R10A is 10.0.

[11] The Sliver Law applies to lots under 45 feet and limits the height of a building on such a lot to a height of 60 feet.

a seven-story building with a penthouse and complying court, using revised site values. Once again, only the original proposed building was shown to be financially feasible. The Board asked for further clarifications; in a July 8, 2008 response, Freeman/Frazier recalculated the value of the apartments with the addition of rear outdoor terraces, and revised the sale prices of two units. Again, the revised analysis that was submitted failed to demonstrate a reasonable return.

Petitioners assert that the BSA failed to adhere to its own guidelines because it did not require the Congregation to provide the original acquisition price of the Property. But, the BSA points out that this is not required, since it is contained in the general guidelines. In any event, the Congregation did submit the acquisition costs, which were provided in the deeds to the Property. Petitioners also assert that the Congregation never complied with the request to provide an analysis of an all-residential building, and instead, provided an analysis for a partially residential building, without including basement and sub-basement space. The methodology utilized by the Congregation's expert, petitioners contend, inflated the largest single cost component—the site value—in concluding that the Congregation could not obtain a reasonable return. Petitioners questioned the use of comparable sales prices based on property values from the period of mid-2006 to 2007, rather than more current sales prices, and questioned the methodology of calculating the financial return based on profits, rather than by calculating the projected return on equity. They also questioned the omission of income from the Beit Rabban Day School from the feasibility study. Finally, petitioners' biggest complaint was that the Congregation's expert did not utilize the return on equity analysis in determining the Project's rate of return.

Freeman/Frazier responded that it was more appropriate to use a return on profit model, which evaluated profit or loss on an unleveraged basis, to evaluate the feasability of the Project, rather than to evaluate the Project's return on equity on a leveraged basis. Freeman/Frazier argued that the methodology it used is typically used for condominium or home sale analyses, and is more appropriate for this Project, while the methodology petitioners wanted to use is typically used for income producing residential or commercial rental projects. Petitioners assert, in contrast, that not only do the BSA guidelines ask for an analysis on a leveraged basis, but that many reported decisions show that return on equity is the factor commonly used. Petitioners point out that Freeman/Frazier used the return on equity analysis in the project that was the subject of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 2006 WL 1547635, 1 (Sup. Ct. Kings Co. 2006), rev'd, 49 A.D.3d 749 (2d Dep't 2008). Petitioners contend that both the BSA and Freeman/Frazier were unable and unwilling to explain why a leveraged return on equity analysis was appropriate in the Red Hook project, but not for the Congregation's Project. What neither side points out is that the Red Hook project consisted of both condominiums and retail space; according to one decision, four of the six floors were condominiums, while the other two floors were retail space.[12] See, Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 11 Misc. 3d 1081(A), 2006 WL 1023901, 1 (Sup. Ct. Kings Co. 2006). This mixed-use of commercial rental and residential areas explains why Freeman/Frazier employed the return on equity analysis in the Red Hook case, while here, it used a return on profit model. It cannot be found to be arbitrary and capricious to use a return on profit model for that portion of the Project that consists solely of residential condominiums.

[12] The Board incorrectly refers to the Red Hook project as a conversion from a warehouse to luxury rental apartments. Petitioners simply refer to the Red Hook project as a residential building.

The other cases cited by petitioners that employed a return on equity analysis were requests for variances for conversions for commercial use. Kingsley v. Bennett, 185 A.D.2d 814 (2d Dep't 1992) (real estate office in a one- and two-family residential zoning district); Morrone v. Bennett, 164 A.D.2d 887 (2d Dep't 1990) (restaurant/bar with cabaret sought to expand its facility in a commercial district mapped within a residential district); Lo Guidice v. Wallace, 118 A.D.2d 913, 915 (3d Dep't 1986) (request to open an Italian restaurant in an area zoned as two-family residential). In contrast, a return on profit analysis was utilized in Cook v. Haynes, 63 A.D.2d 817 (4th Dep't 1978), which concerned a request by a landowner for a variance to build a residence on a lot that was zoned for both residential and agricultural purposes.

Here, the BSA agreed that the return on profit model, which evaluates profit or loss on an unleveraged basis, is the customary model for evaluating market-rate residential condominium development. Using the return on profit model, Freeman/Frazier concluded that the Congregation could not obtain a reasonable return from a conforming, as-of-right structure. Petitioners contend that Freeman/Frazier's reports used inconsistent terms, provided incomplete and unsigned reports by the estimator of construction costs, and used different values for the total square footage. In the petition, petitioners accuse Freeman/Frazier of "transparently manipulating the numbers," by decreasing the number of square feet in each report as the value per square foot increases, thereby allowing the Project to show a loss. The expert retained by the opposition, Martin Levine, of MVS, pointed out the Congregation's faulty approach, which the Congregation never corrected, based on its contention that the BSA did not ask for any additional information concerning the reasonable return for an all-residential building and the Congregation's failure to include the sub-sub-basement. Mr. Levine questioned Freeman/Frazier's non-compliance with BSA guidelines; construction cost

estimate fallacies; incomplete documents; and, exaggerated soft costs. Petitioners contend that the BSA ignored every issue raised by Mr. Levine, except his criticism of the return on equity, which the BSA considered but rejected.

These are but some of the challenges petitioners raise in their attempt to challenge the subdivision (b) finding. This court has considered all of their objections and finds them to be unavailing. The record reflects that the BSA responded to the concerns raised by petitioners during the underlying proceedings, particularly in that the BSA required numerous revisions to the Freeman/Frazier submissions. Contrary to petitioners' contentions, the BSA Resolution does more than merely "indicate" that there would be no reasonable return; the BSA makes the requisite finding. Based on the foregoing, and the deference that must be accorded the BSA's determination that the proposed building is necessary to enable the Congregation to realize a reasonable return from the Property, this court determines that the finding is not arbitrary and capricious.[13]

The Third Finding — Not Altering the Essential Character of the Neighborhood and Not Impairing the Use of Adjacent Property

Petitioners challenge the BSA finding that the granting of a variance will not alter the essential character of the neighborhood; will not "substantially impair the appropriate use or development of adjacent property;" and, "will not be detrimental to the public welfare." Rather, they argue that (1) the variance results in the bricking up of windows in the West 70th Building and (2) the shadows cast on other buildings on the block will have a negative effect on the public welfare and the environment.

[13] Given the current economic climate, it is uncertain whether the reasonable return as calculated by Freeman/Frazier remains a viable figure.

The initial proposal would have resulted in the closure of seven windows in six cooperative apartment units in the West 70th Building. The BSA required the Congregation to reduce the size of the condominiums in the rear of the building and create a courtyard to prevent the rear windows in the West 70th Building from being bricked up. But, petitioners assert that the BSA and the Congregation "collaborated" to create a record that would obscure the facts as to the number of windows that would be bricked up. Petitioners argue that it was arbitrary and capricious and an abuse of discretion for the BSA to require courtyards in the rear of the building but not to require a courtyard for the identically situated apartments in the front part of the eastern face of the building. As approved, the proposed building results in windows on the eastern face of the West 70th Building losing light and air, together with views of Central Park, while a conforming, as-of-right building would not block any windows in the West 70th Building.

The BSA points out that a property owner has no protected right to a view, and that lot line windows cannot be used to satisfy light and air requirements. Nevertheless, the BSA required the Congregation to provide a fully compliant outer courtyard to the sixth through eighth floors of the Project, which would retain three more lot line windows than had been proposed originally, notwithstanding the fact that there was no requirement to do so. The fact that four lot line windows in the front of the West 70th Building adjacent to the Project will be blocked is not grounds to reject the Project.

As part of the variance application, an environmental review was conducted in accordance with the State Environmental Quality Review Act, Article 8 of the State Environmental Conservation Law ("SEQRA") and the City Environmental Quality Review, Title 62, Chapter 5 of

the Rules of the City of New York ("CEQR"), which found that the Project would not have a significant adverse impact on the environment. Once the BSA made this finding, there was no need for the BSA to prepare an Environmental Impact Statement, pursuant to 43 RCNY § 6-07(b). Petitioners criticize the BSA's reliance on CEQR regulations, which provide that shadows on streets and sidewalks or on other buildings generally are not considered significant.[14] Petitioners contend that there is a conflict between CEQR, and the mid-block zoning resolution and subdivision (c). Petitioners further assert that there was no proper analysis of the street shadows and no comparison of the difference in shadows between an as-of-right building and the Project.

The BSA notes that while petitioners argued that the proposed height of the Project was incompatible with the neighborhood character, the West 70th Building has approximately the same base height as the proposed Project and no setback. The West 70th Building also has a FAR of 7.23, while the Project has a FAR of 4.36. Other buildings directly to the north and south on Central Park West have a greater height than the proposed building. Finally, since no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street, any incremental shadows would not constitute a significant impact on the surrounding community.

The Fourth Finding — Practical Difficulties or Unnecessary Hardship Have Not Been Created by the Owner

Subdivision (d) requires that the evidence support a finding that the claimed hardship was not created by the owner of the premises or a predecessor in title. The BSA found that the

[14] An adverse shadow impact occurs when the shadow from a proposed project falls upon a publicly accessible open space, an historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation.

hardship was not self-created, but originated from the fact that the Synagogue building is landmarked. The hardship is a further result of the 1984 rezoning of the site, the site's unique physical conditions, and the site's location on a zoning lot that is divided by a district boundary. This finding has ample support in the record, and is not specifically challenged by petitioners.

The Fifth Finding — Variance is the Minimum Variance Necessary to Afford Relief

Petitioners argued that the minimum variance necessary would actually be no variance at all, claiming that the Congregation could have built an as-of-right structure to meet its programmatic needs. After changes were made to the Project's design, the BSA determined that the Congregation had "fully established its programmatic needs for the proposed building and the nexus of the proposed uses within its religious mission." As to the community use portion of the Project, the BSA again cited to the line of cases, including Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, supra, 38 N.Y.2d 283; Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968); and, Jewish Recons. Synagogue of North Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that a zoning board must accommodate a proposal by religious and educational institutions for projects in furtherance of their mission, unless the proposed project is shown to have "significant and measurable detrimental impacts on surrounding residents." The BSA found that no such showing had been made.

As to the condominium portion of the Project, the BSA found that the modifications to the proposal, which included adding an outer court and reducing the floor plates of the upper floors, thereby reducing the variance for the rear yard setback, when considered in conjunction with the reasonable return analysis, led to the determination that the variance is the minimum required to afford relief. This finding is supported in the record and is not arbitrary and capricious.

Other Arguments Raised By Petitioners

In addition to their contentions that the Congregation's proposed building did not satisfy the need for a variance, and that the Board's findings under §72-21 were arbitrary and capricious, petitioners raise other challenges to the Board's determination, and contend that the process was flawed. All of these allegations are addressed below.

First, petitioners contend that prior to seeking a variance from the BSA, the Congregation was required to submit an application to the LPC for a special permit under Zoning Resolution § 74-711, and that its failure to do so precludes its application to the BSA for a variance. In 2001, the Congregation applied to the LPC for a special permit under Zoning Resolution § 74-711. A hearing was held on November 26, 2002. The Congregation subsequently withdrew the application and requested a Certificate of Appropriateness, which was considered at a public hearing on February 11, 2003. Following comments at that hearing, the proposal was revised, and a hearing was held on July 1, 2003; additional changes were made, and two additional hearings were held on January 17 and March 14, 2006. At the conclusion of the March 14 hearing, the LPC indicated that it was approving the proposed building, and issued a Certificate of Appropriateness, dated March 21, 2006, solely as to whether the structure would be appropriate for a landmark district. As the BSA points out in its papers, there is no legal requirement that a party seek a special permit from the LPC. A party may elect to seek either a special permit or a variance. The only requirement that the Congregation had to fulfill was to apply for a Certificate of Appropriateness, which the Congregation did. Therefore, the Congregation fulfilled the prerequisite before applying to the BSA for a variance.

Another argument raised by petitioners is that it was improper for the BSA to meet with representatives of the Congregation on November 8, 2006, months before the application was even brought before the BSA. Petitioners assert that the Board had already determined to grant the variances before the hearings had even begun. In response to this claim, the BSA asserts that pre-application meetings are a routine part of practice before the Board. Indeed, annexed as Exhibit E to the Board's answer is a document entitled "Procedure for Pre-Application Meetings and Draft Applications." The document sets forth that "[t]he BSA historically has offered some form of pre-application meeting process to potential applicants." Pre-application meetings are strongly encouraged, so that the application process proceeds more smoothly. After petitioners' counsel complained about the pre-application meeting, the BSA offered counsel the opportunity for his own pre-application meeting, but counsel refused.

At the start of the public hearing in this matter, the Chair of the BSA addressed the concerns of the community that an "ex parte" meeting had been held some months before, and the opposition's request that the BSA members who met with representatives from the Congregation should recuse themselves. The Chair of the BSA explained that pre-application meetings are routine, and that the meeting is not barred under section 1046 of the Charter, Administrative Procedure Act ("APA"), since APA does not apply to proceedings before the BSA.[15] See, Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25

[15] Section 1046 pertains to rules for adjudication when an agency is authorized to conduct an adjudication. The term "adjudication" is defined in § 1041 as "a proceeding in which the legal rights, duties or privileges of named parties are required to be determined by an agency on a record and after an opportunity for a hearing." This section applies to hearings before an administrative law judge or hearing officer, not an agency such as the LPC or BSA. Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25 A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y. 3d 710 (2006).

A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y.3d 710 (2006); but see, Carroll v. Srinivasan, Index No. 110199/07 (Sup. Ct. N.Y. Co. Jan. 30, 2008) (holding that BSA hearings are subject to § 1046 of the City Charter). Since nothing in the law prohibits the BSA from holding pre-application meetings, petitioners' claim that the meeting was improper is without merit.

Finally, petitioners challenge the manner in which the hearing was conducted and the entire proceeding as arbitrary and capricious. Petitioners challenge the time limits on their presentations at the hearing; the BSA's failure to question some of the opposition's expert witnesses; the refusal to allow the opposition architect to inspect the premises; and, the BSA's refusal to subpoena witnesses. In response to these allegations, the BSA notes that since the applicant has the burden to support its case for each of the five required findings under Z.R. § 72-21, applicants must be given the opportunity to do so. But, the BSA maintains that the opponents were in no way strictly limited to a three minute time limit during the four hearings dates.

First, nothing requires sworn testimony, cross-examination of witnesses, or the subpoenaing of witnesses at a BSA hearing. Under section 663 of the Charter, it is wholly discretionary for the chair or vice-chair to administer oaths or compel the attendance of witnesses. Similarly, § 1-01.1(j) and (k) of the Rules of the City of New York provides that the Chair controls the admission of evidence and order of the speakers, and allows the Chair to limit testimony.

The administrative record that was submitted in this case belies petitioners' contention that they did not have an adequate opportunity to be heard. The transcripts of the BSA hearings reflect that at every hearing date, community members who opposed the project—including

petitioners, petitioners' counsel, elected officials and other members of the community—were permitted to speak.[16] In addition, opponents to the Project, including petitioners' counsel, submitted numerous letters, documents and reports to the BSA in opposition to the Project.

Petitioners' contentions as to the conduct of the hearing are wholly devoid of merit. The public hearing is not a judicial or quasi-judicial proceeding. Opponents to an application have no due process right to cross-examine applicants for a variance. See note 15, supra. For all of these reasons, petitioners' claim that the procedures employed by the BSA were improper is rejected.

Conclusion

If this court were empowered to conduct a *de novo* review of the BSA's determination, and were not limited to the Article 78 standard of review of a reasonable basis for the determination, the result here might well be different. The facts are undisputed that the Congregation receives substantial rental income from the Beit Rabban Day School and the rental of the Parsonage; the Congregation may have additional earnings from renting the banquet space. There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage. It is also undisputed that the windows of some apartments in the building adjacent to the Project will now be blocked, whereas the windows would not be blocked by an as-of-right structure, which could have been built with two floors of condominiums.

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[16]For example, at the November 27, 2007 hearing, representatives from the offices of State Senator Tom Duane and Assembly Member Richard N. Gottfried spoke in opposition to the Project, as did Mark Lebow, Esq. an attorney for another group of opponents to the application; Norman Marcus, a retired attorney who previously served as general counsel to the Planning Commission; Alan Sugarman, Esq., counsel for petitioners herein; and, many other community residents. Indeed, of the 88-page transcript for that day's hearing, 43 pages contain opposition testimony.

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. But, "in reviewing administrative determinations, a court may not overturn an agency's decision merely because it would have reached a contrary conclusion." Matter of Sullivan County Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 278 (1972). This court cannot substitute its judgment for that of the BSA. 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. Matter of Sullivan County Harness Racing Ass'n, supra, at 277-78 (1972) ("if the acts of the administrative agency find support in the record, its determination is conclusive."). The record reflects that the BSA "balanced and weighed the statutory facts, and its findings were based on objective facts appearing in the record." Halperin, supra, 24 A.D.3d 773. Accordingly, the decision must be confirmed. Id.

Based on the foregoing, the [illegible] is denied, and the petition is dismissed. The decision of the BSA is confirmed in all respects. This constitutes the decision, order and judgment of the court.

Dated: July 10, 2009

JOAN B. LOBIS, J.S.C.

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Norman Cousins
Clerk

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

74-07-BZ
CEQR #07-BSA-071M

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

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

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

COMMUNITY BOARD #7M

APPEARANCES –
For Applicant: Lori Cuisinier.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

THE RESOLUTION:

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

1. "Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to Section 24-11/77-24. Proposed interior portion lot coverage is 0.80;
2. Proposed rear yard in R8B does not comply. 20'.00 provided instead of 30.00' contrary to Section 24-36;
3. Proposed rear yard in R10A interior portion does not comply. 20.—' provided instead of 30.00' contrary to Section 24-36;
4. Proposed initial setback in R8B does not comply. 12.00' provided instead of 15.00' contrary to Section 24-36;
5. Proposed base height in R8B does not comply. . . contrary to Section 23-633;
6. Proposed maximum building height in R8B does not comply. . . contrary to 23-66;
7. Proposed rear setback in an R8B does not comply. 6.67' provided instead of 10.00' contrary to Section 23-633;"[2] and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶22 WHEREAS, the applicant states that as 73 percent of the site is within an R10A zoning district, which permits an FAR of 10.0, and 27 percent of the site is within an R8B zoning district, which permits an FAR of 4.0, the averaging methodology allows for an overall site FAR of 8.36 and a maximum permitted zoning floor area of 144,511 sq. ft.; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Community Facility Use

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¶62 WHEREAS, the Board notes that where a

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

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

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

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

¶66 WHEREAS, however, it is well-established under New York law that religious use is not limited to houses of worship, but is defined as conduct with a 'religious purpose;' the operation of an educational facility on the property of a religious institution is construed to be a religious activity and a valid extension of the religious institution for zoning purposes, even if the school is operated by a separate corporate entity (see Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971); and

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

¶68 WHEREAS, the Board notes that the applicant has provided supportive evidence showing that, even without the Beit Rabban school, the floor area as well as the waivers to lot coverage and rear yard would be necessary to accommodate the Synagogue's programmatic needs; and

¶69 WHEREAS, the applicant represents that the variance request is necessitated not only by its programmatic needs, but also by physical conditions on the subject site – namely – the need to retain and preserve the existing landmarked Synagogue and by the obsolescence of the existing Community House; and

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

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

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

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

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

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

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

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

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

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York State law, nor ZR § 72-21, require a showing of financial need as a precondition to the granting of a variance to such an organization; and

¶79 WHEREAS, the applicant proposed the need to generate revenue for its mission as a programmatic need, New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization, notwithstanding an intent to use the revenue to support a school or worship space; and

¶80 WHEREAS, further, in previous decisions, the Board has rejected the notion that revenue generation could satisfy the (a) finding for a variance application by a not-for-profit organization (see BSA Cal. No. 72-05-BZ, denial of use variance permitting operation by a religious institution of a catering facility in a residential district) and, therefore, requested that the applicant forgo such a justification in its submissions; and

¶81 WHEREAS, however, in numerous prior instances the Board has found that unique physical conditions, when considered in the aggregate and in conjunction with the programmatic needs of a not-for-profit organization, can create practical difficulties and unnecessary hardship in developing a site in strict conformity with the current zoning (see, e.g., BSA Cal. No, 145-07-BZ, approving variance of lot coverage requirements to permit development of a medical facility; BSA Cal. No. 209-07-BZ, approving bulk variance to permit enlargement of a school for disabled children; and 215-07-BZ, approving bulk variance to permit enlargement of a YMCA); and

Residential Use

¶82 WHEREAS, the building is proposed for a portion of the Zoning Lot comprised of Lot 37, with a lot area of approximately 6,400 sq. ft. (the "development site"); and

¶83 WHEREAS, proposed residential portion of the building is configured as follows: (1) mechanical space and accessory storage on the cellar level; (2) elevators and a small lobby on the first floor; (2) core building space on the second, third and fourth floors; and (3) a condominium unit on each of the fifth through eighth, and ninth (penthouse) floors, for a total of five units; and

¶84 WHEREAS, the first floor is proposed to have approximately 1,018 sq. ft. of residential floor area, the second through fourth floors will each have 325 sq. ft. of residential floor area, the fifth floor will have 4,512 sq. ft. of residential floor area, the sixth through eighth floors will each have approximately 4,347 sq. ft. of residential floor area and the ninth (penthouse) floor will have approximately 2,756 sq. ft., for a total residential floor area of approximately 22,352 sq. ft.; and

¶85 WHEREAS, the applicant represents that compliance with the zoning requirements for base height, building height, and front and rear setback would allow a residential floor area of approximately 9,638 sq. ft.; and

¶86 WHEREAS, the applicant states that the following unique physical conditions create practical difficulties and unnecessary hardship in developing the subject site in compliance with underlying district regulations: (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; and

¶87 WHEREAS, as to the development site's location on a zoning lot that is divided by a zoning district boundary, the applicant states that the development site is split between an eastern portion, comprising approximately 73 percent of the Zoning Lot, which is located within an R10A zoning district, and a western portion, comprising approximately 27 percent of the Zoning Lot, which is located in an R8B zoning district; and

¶88 WHEREAS, applicant represents that the division of the development site by a zoning district boundary constrains an as-of-right development by imposing different height limitations on the two respective portions of the lot; and

¶89 WHEREAS, in the R10A portion of the Zoning Lot, a total height of 185'-0" and maximum base height of 125'-0" are permitted; and

¶90 WHEREAS, in the R8B portion of the development site, a building is limited to a total height of 75'-0" and a maximum base height of 60'-0" with a setback of 15'-0"; and

¶91 WHEREAS, the applicant further represents that the requirements of the R8B district also limit the size of floor plates of a residential development; and

¶92 WHEREAS, in the R8B portion of the development site, a setback of 15'-0" is required at the 60 ft. maximum base height, and a 10'-0" rear setback is required; the applicant represents that a complying development would therefore be forced to set back from the street line at the mid-point between the fifth and sixth floors; and

¶93 WHEREAS, in the R10A portion of the development site, a 15'-0" setback is not required below the maximum base height of 125'-0", and a total height of 185'-0" is permitted, which would otherwise permit construction of a 16-story residential tower on the development site; and

¶94 WHEREAS, the applicant is constrained from building to the height that would otherwise be permitted as-of-right on the development site by the "sliver law" provisions of ZR § 23-692, which operate to limit the maximum base height of the building to 60'-0" because

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the frontage of the site within the R10A zoning district is less than 45 feet; and

¶95 WHEREAS, a diagram provided by the applicant indicates 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; and

¶96 WHEREAS, the Board notes that several Zoning Resolution provisions recognize the constraints created by zoning district boundaries where different regulations apply to portions of the same zoning lot; and

¶97 WHEREAS, specifically, the Board notes that the provisions of ZR § 77-00, permitting 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, recognize that there is a hardship to a property owner whose property becomes burdened by a district boundary which imposes differing requirements to portions of the same zoning lot; and

¶98 WHEREAS, the Board further notes that that the special permit provisions of ZR § 73-52 allow the extension of a district boundary line after a finding by the Board that relief is required from hardship created by the location of the district boundary line; and

¶99 WHEREAS, the applicant represents, however, that because of the constraints imposed by the contextual zoning requirements and the sliver law, the Synagogue can transfer only a small share of its zoning lot area across the R8B district boundary; and

¶100 WHEREAS, the applicant further represents that the site is unique in being the only underdeveloped site overlapping the R10A/R8B district boundary line within a 20-block area to the north and south of the subject site; and

¶101 WHEREAS, the applicant further represents that 17 other residential zoning lots overlap the R10A/ R8B district boundary line between West 65th Street and West 86th Street, but that none were characterized by a similar amount of surplus development rights; and

¶102 WHEREAS, the applicant states that all the properties within the 22-block study area bisected by the district boundary line are developed to an FAR exceeding 10.0, while the subject Zoning Lot is developed to an FAR of 2.25; and

¶103 WHEREAS, the Opposition argues that the presence of a zoning district boundary within a lot is not a "unique physical condition" under the language of ZR § 72-21 and represents that four other properties are characterized by the same R10A/ R8B zoning district boundary division within the area bounded by Central Park West and Columbus Avenue and 59th Street and 110th Street owned by religious or nonprofit institutions, identified as: (i) First Church of Christ Scientist, located at Central Park West at West 68th Street; (ii) Universalist Church of New York, located at Central Park West at West 76th Street; (iii) New-York Historical Society, located at Central Park West at West 77th Street; and (iv) American Museum of Natural History, located at Central Park West at West 77th Street to West 81st Street; and

¶104 WHEREAS, the Board notes 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 (see BSA Cal. No. 358-05-BZ, applicant WR Group 434 Port Richmond Avenue, LLC; BSA Cal. No. 388-04-BZ, applicant DRD Development, Inc.; BSA Cal. No. 291-03-BZ, applicant 6202 & 6217 Realty Company; and 208-03-BZ, applicant Shell Road, LLC); and

¶105 WHEREAS, the Board further notes that the incidence of four sites within a 51-block area sharing the same "unique conditions" as the subject site would not, in and of itself, be sufficient to defeat a finding of uniqueness; and

¶106 WHEREAS, under New York law, a finding of uniqueness 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 (see Douglaston Civ. Assn. v. Klein, 51 N.Y.2d 963, 965 (1980)); and

¶107 WHEREAS, as to the impact of the landmarked Congregation Shearith Israel synagogue building on the ability to develop an as-of-right development on the same zoning lot, the applicant states that the landmarked synagogue occupies nearly 63 percent of the Zoning Lot footprint; and

¶108 WHEREAS, the applicant further states that because so much of the Zoning Lot is occupied by a building that cannot be disturbed, only a relatively small portion of the site is available for development; and

¶109 WHEREAS, the applicant represents that only the area occupied by the parsonage house, located directly to the south of the Synagogue on Tax Lot 36, and the development site are available for development; and

¶110 WHEREAS, the applicant represents that the narrow width of the parsonage house makes its development infeasible; and

¶111 WHEREAS, the applicant states that the area of development site, at approximately 6,400 sq. ft., constitutes only 37 percent of Zoning Lot area of the site; and

¶112 WHEREAS, the Board notes that the site is significantly underdeveloped and that the location of

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

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

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

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

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

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

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

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

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

¶121 WHEREAS, the Board further notes that while a nonprofit organization is entitled to no special deference for a development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to develop its property than would be imposed on a private owner; and

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

ZR § 72-21 (b) – Financial Return Finding

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

Community Facility Use

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

Residential Development

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

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

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

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residential building with 4.0 FAR; (3) the original proposed building; and (4) a lesser variance community facility/residential building; and

¶128 WHEREAS, at hearing, the Board questioned why the analysis included the community facility floor area and asked the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of-right development; and

¶129 WHEREAS, in response, the applicant revised the financial analysis to analyze: (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 the site value; and

¶130 WHEREAS, the feasibility study indicated that the as-of-right scenarios and lesser variance community facility/residential building, would not result in a reasonable financial return and that, of the five scenarios only the original proposed building would result in a reasonable return; and

¶131 WHEREAS, it was subsequently determined that a tower configuration in the R10A portion of the Zoning Lot was contrary to ZR § 73-692 (the "sliver law") and therefore that the as-of-right community facility/residential tower building could not represent an as-of-right development; the Board then questioned the basis for the previous valuation of the development rights and requested that the applicant recalculate the site value using only R8 and R8B sales; and

¶132 WHEREAS, the Board also requested the applicant to evaluate the feasibility of providing a complying court to the rear above the fifth floor of the original proposed building; and

¶133 WHEREAS, applicant subsequently analyzed the financial feasibility of: (i) the proposed building (the original proposed building with a complying court); (ii) an eight-story building with a complying court (the "eight-story building"); and (iii) a seven-story building with penthouse and complying court (the "seven-story building"), using the revised site value; the modified analysis concluded that of the three scenarios, only the proposed building was feasible; and

¶134 WHEREAS, at hearing, the Board raised questions as to the how the space attributable to the building's rear terraces had been treated in the financial feasibility analysis; and

¶135 WHEREAS, in a written response, the applicant stated that the rear terraces on the fifth and sixth floors had not originally been considered as accessible open spaces and were therefore not included in the sales price as sellable terrace areas of the appertaining units; the applicant provided an alternative analysis considering the rear terraces as sellable outdoor terrace area and revised the sales prices of the two units accordingly; and

¶136 WHEREAS, at hearing, the Board also asked the applicant to explain the calculation of the ratio of sellable floor area gross square footage (the "efficiency ratio") for each of the following scenarios: the proposed building, the eight-story building, the seven-story building, and the as-of-right building; and

¶137 WHEREAS, in a subsequent submission, the applicant provided 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; and

¶138 WHEREAS, the applicant also submitted a revised analysis of the as-of-right building using the revised estimated value of the property; this analysis showed that the revised as-of-right alternative would result in substantial loss; and

¶139 WHEREAS, in a submission, the Opposition questioned the use of comparable sales prices based on property values established for the period of mid-2006 to mid-2007, rather than using more recent comparable sales prices, and questioned the adjustments made by the applicant to those sales prices; and

¶140 WHEREAS, in a written response, the applicant pointed out that, to allow for comparison of earlier to later analyses, it is BSA practice to establish sales comparables from the initial feasibility analysis to serve as the baseline, and then to adjust those sales prices in subsequent revisions to reflect intervening changes in the market; the applicant also stated that sales prices indicated for units on higher floors reflected the premium price units generated by such units compared to the average sales price for comparable units on lower floors; and

¶141 WHEREAS, the Opposition also questioned the choice of methodology used by the applicant, which calculated the financial return based on profits, contending that it should have been based instead on the projected return on equity, and further contended that the applicant's treatment of the property acquisition costs distorted the analysis; and

¶142 WHEREAS, in response to the questions raised by the Opposition concerning the methodology used to calculate the rate of return, the applicant states that it used a return on profit model which considered the profit or loss from net sales proceeds less the total project development cost on an unleveraged basis, rather than evaluating the project's return on equity on a leveraged basis; and

¶143 WHEREAS, the applicant further stated that a return on equity methodology is characteristically used for income producing residential or commercial rental projects, whereas the calculation of a rate of return based

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

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

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

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

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

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

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

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

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

Community Facility Use

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

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

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

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

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

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

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

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

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

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

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

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

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

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affect the City's ability to provide trash collection services; and

¶164 WHEREAS, the Synagogue states that trash from multi-purpose room events will be stored within a refrigerated area within the proposed building and, if necessary, will be removed by a private carter on the morning following each event; and

¶165 WHEREAS, at the Board's direction, the applicant submitted revised plans showing the cellar location of the refrigerated trash storage area; and

¶166 WHEREAS, with respect to noise, as the multi-purpose room is proposed for the sub-cellar of the proposed building, even at maximum capacity it is not expected to cause significant noise impacts; and

¶167 WHEREAS, as held in Westchester Reform Temple v. Brown (22 N.Y.2d 488 (1968)), a religious institution's application is entitled to deference unless significant adverse effects upon the health, safety, or welfare of the community are documented (see also Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

¶168 WHEREAS, the Opposition has raised general concerns about disruption to the character of the surrounding neighborhood, but has presented no evidence to the Board supporting the alleged traffic, solid waste and noise impacts of the proposed community facility; and

¶169 WHEREAS, the detrimental effects alleged by the Opposition largely concern the purported impact of events held in the multi-purpose room which, as noted above, is permitted as-of-right; and

Residential Use

¶170 WHEREAS, the applicant represents that the proposed variances to height and setback permitting the residential use will not negatively affect the character of the neighborhood, nor affect adjacent uses; and

¶171 WHEREAS, the applicant states that the proposed base height waiver and front setback waivers of the R8B zoning requirements allow the building to rise to a height of approximately 94'-10" along the West 70th Street street-line, before setting back by 12'-0"; and

¶172 WHEREAS, the applicant further states that the R8B zoning regulations limit the base height to 60 feet, at which point the building must set back by a minimum of 15'-0"; and

¶173 WHEREAS, the applicant states that the proposed waiver of maximum building height will allow a total height of approximately 105'-10", instead of the maximum building height of 75'-0" permitted in an R8B district; and

¶174 WHEREAS, the applicant also seeks a rear setback of 6'-8", instead of the 10'-0" rear setback required in an R8B district; and

¶175 WHEREAS, the applicant represents that the front and rear setbacks are required because the enlargement would rise upward and extend from the existing front and rear walls; and

¶176 WHEREAS, the applicant represents that the proposed base height, wall height and front and rear setbacks are compatible with neighborhood character; and

¶177 WHEREAS, the applicant states that a Certificate of Appropriateness approving the design for the proposed building was issued by the Landmarks Preservation Commission on March 14, 2006; and

¶178 WHEREAS, the Opposition raised issues at hearing concerning the scale of the proposed building and its compatibility to the neighborhood context; and

¶179 WHEREAS, the applicant represents that the proposed bulk and height of the building is consistent with the height and bulk of neighboring buildings, and that the subject site is flanked by a nine-story building at 18 West 70th Street which has a base height of approximately 95 ft. with no setback, and an FAR of 7.23; and

¶180 WHEREAS, the applicant further represents that the building located at 101 Central Park West, directly to its north, has a height of 15 stories and an FAR of 13.92; and that the building located directly to its south, at 91 Central Park West, has a height of 13 stories and an FAR of 13.03; and

¶181 WHEREAS, the Board notes that, at nine stories in height, the building would be comparable in size to the adjacent nine-story building located at 18 West 70th Street, while remaining shorter than the 15-story and 13-story buildings located within 60 feet of the site; and

¶182 WHEREAS, the Opposition also contends that the proposed nine-story building disrupts the mid-block character of West 70th Street and thereby diminishes the visual distinction between the low-rise mid-block area and the higher scale along Central Park West; and

¶183 WHEREAS, the applicant submitted a streetscape of West 70th Street indicating that the street wall of the subject building matches that of the adjacent building at 18 West 70th Street and that no disruption to the midblock character is created by the proposed building; and

¶184 WHEREAS, the Opposition also contends that approval of the proposed height waiver will create a precedent for the construction of more mid-block high-rise buildings; and

¶185 WHEREAS, as discussed above, the Opposition has identified four sites within a 51-block area bounded by Central Park West and Columbus Avenue, and 59th Street and 110th Street that purportedly could seek variances permitting midblock buildings which do not comply with the requirements of the R8B zoning district; and

¶186 WHEREAS, an analysis submitted by the applicant in response found that none of the four sites identified by the Opposition shared the same potential for mid-block development as the subject site; and

¶187 WHEREAS, the Opposition argues that the

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proposed building will significantly diminish the accessibility to light and air of its adjacent buildings; and

¶188 WHEREAS, the Opposition contended specifically 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; and

¶189 WHEREAS, the Opposition further argues that the proposed building will cut off natural lighting to apartments in the building located at 91 Central Park West and diminish light to apartments in the rear of the building located at 9 West 69th Street, and that the consequentially diminished light and views will reduce the market values of the affected apartments; and

¶190 WHEREAS, in response the applicant noted 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 lack a legally protected right to their maintenance; and

¶191 WHEREAS, the applicant further notes that an owner of real property also has no protected right in a view; and

¶192 WHEREAS, nonetheless, the Board directed the applicant to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows than originally proposed; and

¶193 WHEREAS, the applicant submitted revised plans in response showing a compliant outer court; and

¶194 WHEREAS, the Opposition asserts that the proposed building would cast shadows on the midblock of West 70th Street; and

¶195 WHEREAS, CEQR regulations provide that an adverse shadow impact is considered to occur when the shadow from a proposed project falls upon a publicly accessible open space, a historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation, and that shadows on streets and sidewalks or on other buildings are not considered significant under CEQR; and

¶196 WHEREAS, a submission by the applicant states that that no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street; thus any incremental shadows in this area would not constitute a significant impact on the surrounding community; and

¶197 WHEREAS, a shadow study submitted by the applicant compared the shadows cast by the existing building to those cast by the proposed new building to identify incremental shadows that would be cast by the new building that are not cast presently; and

¶198 WHEREAS, the EAS analyzed the potential shadow impacts on publicly accessible open space and historic resources and found that no significant impacts would occur; and

¶199 WHEREAS, the applicant evaluated shadows cast over the course of a full year, with particular attention to December 21, when shadows are longest, March 21 and September 21 (vernal and autumnal equinoxes) and June 21, when shadows are shortest, disregarding the shadows cast by existing buildings, and found that the proposed building casts few incremental shadows, and those that are cast are insignificant in size; and

¶200 WHEREAS, specifically, the shadow study of the EAS found that the building would cast a small incremental shadow on Central Park in the late afternoon in the spring and summer that would fall onto a grassy area and path where no benches or other recreational equipment are present; and

¶201 WHEREAS, based upon the above, the Board finds that neither the proposed community facility use, nor the proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare; and

ZR § 72-21 (d) - Self Created Hardship Finding

¶202 WHEREAS, as pertains to the (d) finding under ZR § 72-21, the Board is required to find that the practical difficulties or unnecessary hardship burdening the site have not been created by the owner or by a predecessor in title; and

¶203 WHEREAS, the applicant states that the unnecessary hardship encountered by compliance with the zoning regulations is inherent 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; and

¶204 WHEREAS, the applicant further states that these conditions originate with the landmarking of its Synagogue building and with the 1984 rezoning of the site; and

¶205 WHEREAS, based on the above, the Board therefore finds that the hardship herein was not created by the owner or by a predecessor in title; and

ZR § 72-21 (e) – Minimum Variance Finding

¶206 WHEREAS, as pertains to the (e) finding under ZR § 72-21, the Board is required to find that the variance sought is the minimum necessary to afford relief; and

¶207 WHEREAS, the original proposed building of the Synagogue had no rear court above the fifth floor, and

¶208 WHEREAS, in response to concerns raised by the residents of the adjacent building, the Board directed the applicant to provide a fully compliant outer court to the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A true copy of resolution adopted by the Board of Standards and Appeals, August 26, 2008.
Printed in Bulletin No. 35, Vol. 93.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

CERTIFIED RESOLUTION

Chair/Commissioner of the Board

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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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January 13, 2011

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MUNICIPAL RESPONDENTS' BRIEF

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.

Dated: New York, New York
January 13, 2011

Respectfully submitted,

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_____
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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.

BRIEF FOR RESPONDENT-RESPONDENT CONGREGATION SHEARITH ISRAEL

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PRELIMINARY STATEMENT

Respondent Congregation Shearith Israel (the "Congregation") respectfully submits this brief in opposition to the appeal of petitioners Landmark West! Inc., 91 Central Park West Corp., and Thomas Hansen (the "Petitioners"). In a verified, second amended petition filed under Article 78 of the CPLR (the "Petition"), Petitioners sought to block the Congregation's plan to preserve itself by constructing a new community house, topped by a few residential floors, at 8 West 70th Street in Manhattan, next to the Congregation's historic Spanish and Portuguese Synagogue. As found by Supreme Court, New York County (Lobis, J.), below, the unanimous decision of respondent Board of Standards and Appeals of the City of New York (the "BSA") is neither arbitrary nor capricious. This Court should affirm the lower court's decision denying the petition.

This Court has ordered this appeal heard with the appeal in *Kettaneh v. Bd. of Standards and Appeals of the City of New York* (N.Y. Co. Clerk's Index No. 113227/08) ("*Kettaneh*"), another Article 78 challenge to the same BSA resolution. To minimize repetition, this brief contains cross-references to the Congregation's brief in *Kettaneh*. Accordingly, it will facilitate the Court's understanding if our brief in *Kettaneh* is reviewed by the Court before it reviews this brief.

Under Section 72-21 of the Zoning Resolution, respondent Board of Standards and Appeals of the City of New York (the "BSA") can grant a property

owner a variance from zoning restrictions by making five findings of fact (one of which is inapplicable to not-for-profit organizations, such as the Congregation). As is documented in the voluminous administrative record, the BSA held four hearings (on November 27, 2007, February 12, 2008, April 15, 2008, and June 24, 2008; *see* R 1726-1813, 3654-3758, 4462-4515, 4937-4974)[1], studied the issue for fifteen months, credited the testimony of the Congregation's Rabbi (R. 1736-39), education director (R 1739-42), architects (R 1733-36), financial experts (R 3669-79, 4463-83) and counsel, and then explicitly made the factual findings referenced in the statute in its unanimous resolution, dated August 26, 2008, granting the Congregation the zoning variance (the "Resolution").

Petitioners are (i) challenging the BSA's assertion of jurisdiction over the Congregation's application for a zoning variance, and (ii) disputing three of the BSA's five statutory factual findings. Petitioners lack standing to mount these challenges. (*See* Point I.) Moreover, even if they had standing, it would be appropriate to affirm the lower court's decision given that the BSA had a rational basis to (i) assert jurisdiction to issue the variance (*see* Point II(B)(1)), and (ii) make the statutory findings (*see* Point II(B)(2)). The lower court's decision denying the Petition should be affirmed.

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[1] References to "R __" are to the administrative record filed by the BSA below. References to "A__" are to Petitioners' appendix. "BSA Res ¶ __" refers to a copy of the BSA Resolution that Petitioners below annotated with paragraph numbering. The copy of the resolution provided by Petitioners in their appendix contains no such numbering. (*See* A275.)

The bulk of Petitioners' brief is devoted to their meritless challenge to the BSA's broad jurisdiction. Petitioners do not (and cannot) deny that the BSA is authorized to issue variances under Section 668 of the New York City Charter regardless of whether there are technical defects in the property owner's application to the Department of Buildings ("DOB") or in the DOB's objections to that application. While Petitioners contend that the only provision that vests the BSA with jurisdiction is Section 666(6) of the New York City Charter, Section 666(5) of the Charter, another jurisdictional provision, explicitly authorizes the BSA to "vary the application of the zoning resolution as may be provided in such resolution and ***pursuant to section six hundred sixty-eight.***" N.Y.C. Charter § 666(5) (emphasis added). In any event, even if Petitioners were correct in asserting that the only provision vesting the BSA with jurisdiction were Section 666(5), their jurisdictional challenge would fail, since the BSA had a rational basis for finding that section's requirements satisfied here.

The remainder of Petitioners' brief consists of equally meritless attacks on three of the BSA's factual findings. A BSA finding, however, must "'be sustained if it has a rational basis and is supported by substantial evidence.'" *See Matter of SoHo Alliance v. N.Y. City Bd. of Standards & Appeals*, 95 N.Y.2d 437, 440, 718 N.Y.S.2d 261, 262, 741 N.E.2d 106, 108 (2000). Here, the findings in the BSA's Resolution are supported by an extensive administrative record – almost 6,000

pages in eleven volumes.

The BSA's determination is neither arbitrary nor capricious. The lower court's decision should be affirmed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Do Petitioners have standing to challenge the BSA's zoning variance where the Petition is devoid of any substantive allegation that the variance will affect them in any way?

2. Did the lower court properly find that the BSA's assumption of jurisdiction over the Congregation's application for a variance pursuant to Section 666 of the New York City Charter was rational?

3. Did the lower court properly find that the BSA's grant of a variance was neither arbitrary nor capricious where, in its Resolution, the BSA made each of the five factual findings referenced in Section 72-21 of the New York City Zoning Resolution and each was supported by an extensive administrative record?

COUNTER-STATEMENT OF THE FACTS

Much of the factual and procedural history necessary to understand the BSA's Resolution is set forth in the Congregation's *Kettaneh* brief. We focus here on the lower court's disposition of Petitioners' particular challenges.

As the lower court explained, Petitioners raised two challenges to the BSA's jurisdiction. Petitioners first claimed that the plans that the Congregation

submitted to the BSA were not "'passed on' by the DOB in the [manner] required by [§ 666(6)(a) of] the City Charter" because they were purportedly signed by the wrong civil servant. (A10-11.) Petitioners further claimed that because "the plan submitted to the BSA was not identical to the first plan submitted to the BSA," the BSA lacked jurisdiction to grant the variance. (A12-13.) The lower court rejected these challenges and dismissed the Petition. (A12, A13.)

As a threshold matter, the lower court rejected the Congregation's challenge to Petitioners' standing. It stated that, since "Thomas Hansen, the individual property owner, and 91 [Central Park West] are in close proximity to the Property, they have standing. Accordingly, [P]etitioners collectively have standing. This court need not reach the issue of whether Landmark West!, as an organization, has standing." (A10.)

The lower court then turned to Petitioners' first attack on the BSA's jurisdiction, and upheld the BSA's assertion of jurisdiction as rational. The lower court explained that City Charter § 666 grants the BSA jurisdiction in several ways. Although, as Petitioners asserted, Section 666(6)(a) gives the BSA jurisdiction to decide appeals from the DOB, the lower court agreed with the BSA that Section 666(5)[2] also grants the BSA jurisdiction "[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and

[2] When it quoted § 666(5), the lower court inadvertently stated that it was quoting § 665.

pursuant to section six hundred sixty-eight." (A11.) The court upheld as rational the BSA's holding that "a review under § 668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner." (A11-12.)

The lower court next rejected Petitioners' assertion that, because the plan submitted to the BSA was slightly different from to the first plan submitted to the DOB, the BSA lacked jurisdiction. (A12-13.) The lower court explained that the Congregation had actually submitted successive applications to the DOB. (A12.) The first was denied, with the DOB citing eight objections. (A12.) After the application was revised, the DOB issued a second denial, which eliminated one of the eight objections. (A12.) It was the second denial, the lower court found, that formed the basis for the variance application. (A12.) Having set forth this procedural history, the lower court had little trouble rejecting Petitioners' claim:

> Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB . . . , the BSA Resolution reflects that the revised plan was reviewed by the DOB. . . . There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the *Kettaneh* decisions, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the *Kettaneh* decision notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur overtime through the BSA's review process in an effort to insure that an applicant is

> meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required showing under [Zoning Resolution] § 72-21.

(A13.)

The lower court also rejected Petitioners' challenges to (i) the BSA's purported consideration of the "landmark status" of the historic Synagogue, (ii) the BSA's finding that the Congregation would be unable to earn a reasonable return from an as-of-right development, and (iii) the BSA's finding that the variances granted were the minimum necessary. (A259, A261-265, A268; *Landmark* Memorandum of Decision on Motion to Reargue at 1-2.) The Congregation's brief in the *Kettaneh* appeal addresses the lower court's conclusions that the BSA's factual findings were rational.

After filing an appeal with this Court, Petitioners also filed a motion to reargue with the lower court. (*Landmark* Memorandum of Decision on Motion to Reargue at 1.) The lower court denied that motion, along with a motion by the *Kettaneh* petitioners to intervene in this case. (*Id.*)

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE BSA RESOLUTION

In an effort to establish standing, the Petition included a few conclusory remarks about the three Petitioners. The Petition alleged that Petitioner Landmark West! Inc. is a not-for-profit organization that protects the "historic architecture

and development patterns of the Upper West Side." (A128 ¶ 8.) It alleged that the two remaining Petitioners are owners of a building (91 Central Park West, on the corner of West 69th Street), around the corner from the West 70th property at issue (but fairly distant from the corner of the property being developed). (A128-29 ¶¶ 11, 12.) The Petition asserted, with no further elaboration, that Petitioners are "within a zone immediately and directly impacted by the New Building" (A131 ¶ 24.) and that they "will experience a reduction of the light, air and convenience of access" as a result of the issuance of the variance (A131 ¶ 25.) Nowhere else in the Petition was there any allegation about "light, air [or] access" or any other information about how Petitioners are in the purportedly impacted "zone." The Petition's "vague, conclusory and unsubstantiated allegations" are insufficient to establish standing. *See All Way East Fourth St. Block Ass'n v. Ryan-NENA Community Health*, 30 A.D.3d 182, 182, 817 N.Y.S.2d 14, 14 (1st Dep't 2006) .

To establish standing, a petitioner must show that the petitioner will suffer injuries of the type that the statute (here, the Zoning Resolution) is designed to protect and that those alleged injuries are "specific to petitioner" and not "general concerns shared by all the residents of the area." *Buerger v. Town of Grafton*, 235 A.D.2d 984-85, 652 N.Y.S.2d 880, 881-82 (3d Dep't 1997). Thus, in *Buerger*, the Court denied standing to a neighbor "within 600 feet" of an affected site who was a member of a property association that owned 400 acres of land contiguous to the

development property since the flood damage, forest habitat degradation, and lake despoliation complained of, while "serious concerns," were "shared by all residents of the area," and thus insufficient to support standing. *Id.*; *see also Soc'y of the Plastics Indus. Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774, 570 N.Y.S.2d 778, 785, 573 N.E.2d 1034, 1041 (1991) ("In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large."); *Matter of City of Plattsburgh v. Mannix*, 77 A.D.2d 114, 116, 432 N.Y.S.2d 910, 912 (3d Dep't 1980) (holding that petitioner lacked the necessary standing to challenge the issuance of a variance because it failed to demonstrate how its personal or property rights would be directly and specifically affected apart from any damage suffered by the public at large).

The standing test for an organization is even higher. *See Soc'y of the Plastics Indus.*, 77 N.Y.2d at 775, 570 N.Y.S.2d at 787, 573 N.E.2d at 1043. As set forth in *Soc'y of the Plastics*, an organization has standing only if three requirements are satisfied. First, as a petitioner, Landmark West! must demonstrate that "one or more of its members [has] standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent." *Id.* Second, Landmark West! "must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate

representative of those interests." *Id.* Lastly, "it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members." *Id.*; *see also Soc'y of the Plastics Indus.*, 77 N.Y. at 775, 570 N.Y.S.2d at 786, 573 N.E.2d at 1042 (no standing found); *see also N.Y. City Coalition for the Preservation of Gardens v. Giuliani*, 666 N.Y.S.2d 918, 246 A.D.2d 399 (1st Dep't 1998) (holding that an organization was without standing to bring action to enjoin construction).

The Petitioners here cannot meet those tests. The Petition is devoid of any substantive allegation that the variance will block Petitioners' windows, affect their views, affect their light, or limit their ability to enter their buildings. Petitioners can make no such claims and, instead, focus on picayune issues about whether the right official signed the DOB objection sheet and whether there are irrelevant distinctions between the plans before the DOB and BSA. Indeed, as-of-right developments would have greater impacts on the supposed "neighbors," Petitioners 91 Central Park West Corporation and Thomas Hansen, than the variance at issue. (*See, e.g.,* R. 4664; A278.)

Furthermore, Landmark West! makes no assertions regarding the impact of the variance on its members. Instead, the Article 78 Petition merely asserted that Landmark West! works with "individuals and grassroots community organizations to protect the historic architecture and development patters of the Upper West Side

and to improve and maintain the community for all of its members." (A128 ¶8.) Indeed, the only allegations that even remotely relate to Landmark West's organizational standing were contained in an affidavit from Kate Wood, Landmark West's executive director. Specifically, Wood claimed that several of Landmark West's "contributing supporters" "reside and own property (or shares in a cooperative apartment corporation which owns property) in buildings immediately adjacent to the development site." (A237-238 ¶2.) Wood further claimed that a sizable number of "contributing supporters" live on the same block as the development site. (A238 ¶3.) Conspicuously absent from this affidavit was any statement regarding Landmark West's legal members, as opposed to "contributors" and "supporters." Indeed, if Landmark West! had any members that purportedly were affected by this variance, it stands to reason that Wood would have referred to them instead of "contributing supporters." Accordingly, these allegations are wholly insufficient to establish Landmark West's standing.

Furthermore, Petitioners' claims, which focus on purported defects in the BSA's jurisdiction, the BSA's purportedly excessive concern for landmarks and the BSA's analysis of finances, are not germane to the organizational purposes of Landmark West! While Landmark West! purportedly has an interest in all Upper West Side landmarks, it can claim no unique interest in this variance, as it will

protect, not undermine, a significant, landmarked Synagogue. Petitioners clearly lack standing to challenge the BSA Resolution.

II. PETITIONERS' CHALLENGES ARE MERITLESS IN ANY EVENT

A. This Court's Standard of Review is Exceedingly Deferential

The New York Court of Appeals has explained that, in general, under the New York City Zoning Resolution, the BSA may grant a variance if it makes five factual findings: "(a) because of 'unique physical conditions' of the property, conforming uses would impose 'practical difficulties or unnecessary hardship;' (b) also due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property; (c) the proposed variances would 'not alter the essential character of the neighborhood or district;' (d) the owner did not create the practical difficulties or unnecessary hardship; and (e) only the 'minimum variance necessary to afford relief' is sought." *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (quoting N.Y. City Zoning Resolution § 72-21).

Once the BSA makes these five findings, the judiciary's role is extraordinarily limited. The New York Court of Appeals has held that a 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." *SoHo Alliance*, 95 N.Y.2d at 440, 718

N.Y.S.2d at 262, 741 N.E.2d at 108.

Petitioners contend that the lower court should not have deferred to the BSA's conclusions as to whether it had jurisdiction over the Congregation's request for a variance. Yet, there is no "jurisdiction" exception to the administrative law principle that agencies are entitled to deference. *See Matter of Korn v. Batista*, 131 Misc. 2d 196, 199, 499 N.Y.S.2d 325, 327 (Sup. Ct. N.Y. Co.) (deferring to agency conclusion that particular types of applications fall within its jurisdiction), *aff'd*, 123 A.D.2d 526, 506 N.Y.S.2d 656 (1st Dep't 1986); *Park Towers South Co. v. A-Lalan Imports, Inc.*, 103 Misc. 2d 565, 566, 430 N.Y.S.2d 188, 189 (App. Term 1st Dep't 1980) (deferring to agency interpretation of extent of its jurisdiction) (*per curiam*); *see also NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830, n.7, 104 S. Ct. 1505, 1510, n.7, 79 L. Ed. 2d 839, 848, n.7 (1984) ("Respondent argues that because 'the scope of the "concerted activities" clause in Section 7 is essentially a jurisdictional or legal question concerning the coverage of the Act,' we need not defer to the expertise of the Board. . . . We have never, however, held that such an exception [for issues of statutory jurisdiction] exists to the normal standard of review of Board interpretations of the Act; indeed, we have not hesitated to defer."). Petitioners cite cases holding that deference – as to jurisdictional or non-jurisdictional issues – is not appropriate where the statute in question is not a complex scheme with which the agency has developed great

expertise. (Petitioners' Br. at 17-18). Those cases focus on the clarity of the statute, *Teachers Ins. and Annuity Ass'n of America v. City of New York*, 82 N.Y.2d 35, 41-42, 603 N.Y.S.2d 399, 401-02, 623 N.E.2d 526, 528-29, or the absence of technical language or practices unique to the agency involved, *Matter of Raganella v. N.Y. City Civ. Serv. Comm'n,* 66 A.D.3d 441, 445-46, 886 N.Y.S.2d 681, 684-85 (1st Dep't 2009), not on jurisdiction. Moreover, the Court of Appeals has held that "the BSA's interpretation of the statute's terms must be 'given great weight and judicial deference' because the BSA is "'comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution,'" an obviously complex, if not Byzantine, statutory scheme. *Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418, 654 N.Y.S.2d 100, 104, 676 N.E.2d 862, 866 (1996); *Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599, 394 N.Y.S.2d 579, 584, 363 N.E.2d 305, 310 (1977) ("[R]esponsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. . . . It matters not whether, in close cases, a court would have, or should have, decided the matter differently."). Such deference is particularly important in this case since the BSA is familiar with what is "common practice"

and what is seen "all the time." (A632-33.)

B. The BSA's Decision Was Not Arbitrary or Capricious

1. The BSA's Assertion of Jurisdiction Was Rational

Petitioners claim that some sort of technical defect in the DOB's signing of its objections to the Congregation's application for a building permit and an irrelevant change in the Congregation's building plans divested the BSA of jurisdiction to issue a variance to the Congregation. (*See* Petitioners' Br. at 13.) This is nonsense. The BSA considered this issue and concluded that its broad jurisdiction over zoning matters was unfettered by the purported defects. This Court should defer to the BSA's construction of the Zoning Resolution in this regard. The BSA's finding that it had jurisdiction is plainly rational.

The BSA explicitly addressed the jurisdiction issue in footnote two of its Resolution, which states in full:

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

(A275 n.2; *see also* A275-277 (discussing plans).)

Even if Petitioners are correct that no deference should be accorded to the BSA's interpretation of Section 666 of the New York City Charter , their argument that Section 668 of the Charter (cited by the BSA in the paragraph quoted above) has no bearing on the BSA's jurisdiction misses the BSA's point. (Petitioners' Br. at 18-21.) The BSA did not assert jurisdiction solely pursuant to Section 668 – instead, the BSA had jurisdiction pursuant to Sections 666(5) *and* 668. That section provides, in pertinent part: "*Jurisdiction.* The Board shall have power . . . . 5. To determine and vary the application of the zoning resolution as may be provided in such resolution and *pursuant to section six hundred sixty-eight.*" N.Y.C. Charter § 666(5) (emphasis added). It plainly is apparent that that Section 666(5) provides a grant of jurisdiction to the BSA to vary the application of the zoning resolution independent of Section 666(6).[3] Accordingly, the BSA's conclusions that (1) Section 668 (through Section 666) empowers the BSA to grant variances and (2) Section 668 "does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner,"[4] are rational constructions of the Zoning Resolution. Indeed,

[3] Section 666(6) gives the BSA jurisdiction to hear and decide appeals from, *inter alia*, any decision of the commissioner of buildings or any bureau superintendent of buildings acting under a written delegation of power from the commissioner of buildings.

[4] Petitioners do not challenge this conclusion.

several courts have reached the same conclusion. *See, e.g., Highpoint Enters., Inc. v. Bd. of Estimate*, 67 A.D.2d 914, 916 (2d Dept. 1979) (noting that Section 666 (6)[5] gives BSA jurisdiction to "vary the application of the zoning resolution"); *Matter of William Israel's Farm Cooperative v. Board of Standards and Appeals*, 22 Misc. 3d 1105(A), *1 (Sup. Ct. N.Y. County Nov. 15, 2004) (unpublished opinion) (although the respondent apparently filed an application for a variance with the BSA without any review by either of the City officials listed in Section 666(6), the court stated: "The BSA has jurisdiction over applications for variances to the zoning resolution."); *Caprice Homes, Ltd., v. Bennett*, 148 Misc. 2d 503, 505-06 (Sup. Ct. N.Y. County 1989) (distinguishing between claims brought pursuant to Section 666(6) and claims pursuant to Section 666(7)[6]).

Petitioners, however, place great weight on Section 81-a(4) of Article 5-A of the General City Law, which provides:

> Hearing appeals. *Unless otherwise provided by local law or ordinance*, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination, made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the city.

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[5] At the time the *Highpoint Enterprises* decision was rendered, present day § 666(5) was codified at § 666(6).

[6] At the time the *Caprice Homes* decision was rendered, present day § 666(5) was codified at § 666(6) and present day § 666(6) was codified at § 666(7).

General City Law, Art. 5-A, § 81-a(4) (emphasis added). Yet, the New York City Charter *is* a "local law or ordinance" that "otherwise provide[s]." *See id.* Indeed, City Charter § 666(5) clearly vests the BSA with original jurisdiction to handle applications for variances.[7]

Petitioners also argue that, according to the BSA website, the BSA will not grant a variance to a property owner "who has not first sought a proper permit or approval from an enforcement agency." (Petitioners' Br. at 27.) Yet, even if an agency's website could constrict an agency's statutory jurisdiction (which it cannot), Petitioners jurisdictional attack would fail. Petitioners are not alleging that the Congregation failed to seek a permit from the Department of Buildings; they are claiming that the Congregation failed to submit the final plans and that DOB failed to select the correct signatory for its objections. (Petitioners' Br. at 13, 21.) Even assuming, *arguendo*, that the BSA website summary is binding, nothing

[7] By contrast, the cases cited on page 28 of the Petitioners' brief are inapposite the local zoning statutes in those cases, unlike New York City's Charter, expressly limited the jurisdiction of the agencies in question to appeals only. *See, e.g., Gaylord Disposal Service, Inc. v. Zoning Bd. of Appeals of Town of Kinderhook*, 175 A.D.2d 543, 544, 572 N.Y.S.2d 803, 804 (3d Dept. 1991) (jurisdiction of zoning board of appeals is "limited to the appellate jurisdiction specifically given to it by Town Law § 267 (2)."); *Barron v. Getnick*, 107 A.D.2d 1017, 1018, 486 N.Y.S.2d 528, 529 (4th Dep't 1985) (Town of Kirkland "statute clearly gives the Board of Appeals only appellate jurisdiction"); *Kaufman v. City of Glen Cove*, 180 Misc. 349, 356, 45 N.Y.S.2d 53, 58 (Sup. Ct. Nassau Co. 1943) (Glen Cove "Board of Appeals has been vested only with the appellate power of review"); *cf. Klingaman v. Miller*, 168 A.D.2d 856, 857, 564 N.Y.S.2d 526, 528 (3d Dep't 1990) (City of Troy Board of Appeals does not have solely appellate jurisdiction and "is expressly authorized to hear and decide requests for interpretations of the zoning ordinance").

in that website summary bars the BSA from issuing a variance in the alleged circumstances.

a. Petitioners' Complaint Regarding The Signatory To The DOB Objections Is Meritless

In any event, even if the BSA's jurisdiction is limited to claims brought pursuant to Section 666(6)(a) (which it is not), Petitioners' claim that the Notice of Objections was signed by the wrong official still fails. (Petitioners' Br. at14-15) Indeed, there are several independent flaws in Petitioners' logic.

First, the assertions contained in Petitioners' own brief are sufficient to vest the BSA with jurisdiction. Petitioners themselves assert that the DOB Notice of Objections was issued by "Kenneth Fladen, a 'provisional Administrative *Borough Superintendent.*'" (Petitioners Br. at pp. 14-15) (emphasis added) Because (1) Fladen was a Borough Superintendent and (2) Section 666(6)(a) permits the review of any decision or determination "of *any borough superintendent* of buildings acting under a written delegation of power from the commissioner of buildings," the BSA clearly had the authority to "hear and decide appeals" from his determination. (Emphasis added.) Indeed, the BSA's resolution itself states: "the decision of the Manhattan Borough Commissioner, dated August 28, 2007, acting on Department of Buildings Application No. 104250481, reads, in pertinent part . . . ." (A275) Thus, if, as Petitioners assert, Fladen signed the notices of objections, and if, as Petitioners assert, Fladen was a "borough superintendent," the

BSA clearly had the authority to "hear and decide appeals" from his determination. In light of this language, it was not unreasonable for the BSA to conclude that Fladen was acting under written authority from the Commissioner. Petitioners have pointed to no evidence to the contrary.

Second, Petitioners' factual assertions about the process before the DOB are not supported by the record. For example, the March 27, 2007 and August 28, 2007 DOB permit denials are both stamped "Boro Commissioner . . . denied." (A292, A507.) The BSA reasonably could have inferred that these permit denials were either signed by the Borough Commissioner or another authorized employee.

Third, at most, Petitioners' complaints about the DOB process bear on the DOB's decision to *deny* the Congregation a building permit. Petitioners did not file an Article 78 challenge to overturn the DOB denial nor did they name the DOB in this suit. Petitioners cannot challenge the DOB permit denials in this action.

Lastly, Petitioners do not claim that the DOB permit denials were erroneous. Indeed, Petitioners' position is that the DOB – regardless of the official or architectural plans involved – *correctly* concluded that the Congregation's plan would require a variance. It would make absolutely no sense to deprive the BSA of jurisdiction to grant a variance in such circumstances.

b. Petitioners' Complaint Regarding the Trivial Change in the Congregation's Plans is Meritless

Petitioners' contention that the BSA reviewed the wrong plans is equally meritless. (Petitioners' Br. at 26) Relying on their contention that the BSA only has appellate jurisdiction, Petitioners maintain that the BSA improperly reviewed plans that differed (in an irrelevant respect) from those submitted to the DOB. (Petitioners' Br. at 26) Even assuming that, the BSA's jurisdiction is purely appellate (and, as explained *supra*, it is not), the fact that the Congregation's plans naturally evolved over time does not divest the BSA of jurisdiction.

The BSA rationally concluded that the trivial change in plans did not divest it of jurisdiction. The record reflects that while the DOB's initial building permit denial included an eighth objection (based on the inclusion of space between buildings), the Congregation mooted the objection by removing the space from the design. Accordingly, the Borough Commissioner dropped the eighth objection and issued a new building permit denial (with seven objections). (R 348.) The record also reflects that the Congregation provided the BSA with "evidence that the DOB issued their current objections based on the current proposal before the BSA" (R. 308, 310) by submitting, among other things, (i) the revised plans (*i.e.*, without the space between the buildings), dated August 28, 2007, that the Congregation had submitted to the DOB (R. 402-19), and (ii) the Borough Commissioner's revised building-permit denial (with just seven objections), dated that same day (R. 348).

Petitioners filed an untimely administrative appeal of the Borough Commissioner's August 28, 2007 decision (R. 2511-12) but never followed-up with an Article 78 proceeding. The BSA, reasonably, accepted the Congregation's documentation and proceeded to consider the merits of the Congregation's application for a variance.[8] (*See* R. 512).

Even if the plans differed slightly, Petitioners have cited to no authority supporting its assertion that the BSA's jurisdiction was destroyed because the plans it considered slightly differed from those considered by the DOB. Indeed, none of the cases Petitioners cite on page 28 of their brief involved an applicant that submitted plans to a zoning board that differed from those submitted to a building-permit authority, let alone that involved plans that were revised to moot the objections of the permitting authority.[9] Nothing in Charter Section 666(6)(a) divests the BSA of jurisdiction where architectural plans submitted to the DOB are

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[8] Furthermore, contrary to Petitioners assertions on page 26 of their brief, it is clear that Community Board 7 did, in fact, review this application. BSA Res. ¶6.

[9] *See, e.g., McDonald's Corp. v. Kern*, 260 A.D.2d 578, 578, 688 N.Y.S.2d 613, 614 (2d Dep't 1999) (Board of Zoning Appeals improperly raised issue of zoning district boundary lines *sua sponte* and "upon its own inquiry" determined that issue de novo); *Gaylord Disposal Serv., Inc. v. Zoning Bd. of Appeals*, 175 A.D.2d 543, 545, 572 N.Y.S.2d 803, 804-05 (3d Dep't 1991) (Building Inspector sought advisory opinion from Zoning Board of Appeals); *Barron v. Getnick*, 107 A.D.2d 1017, 1017-1018, 486 N.Y.S.2d 528, 529 (4th Dep't 1985) (Zoning Board of Appeals, which only had jurisdiction to hear appeals from determination of Building Inspector, improperly considered application where petitioner filed no application with Building Inspector); *Kaufman v. Glen Cove*, 180 Misc. 349, 357-58, 45 N.Y.S.2d 53, 59-60 (Sup. Ct. Nassau County 1943) (Board of Appeals, which had appellate jurisdiction only, lacked jurisdiction where no application was filed with Building Inspector).

amended upon appeal to the BSA. Indeed, to the extent that the plans differed, they were modified to address one of the DOB's objections – a practice which, as the BSA explained, is common. (*See* A632-33 (Vice-Chair explaining that "that objection is not before us anymore because revised plans were filed and a new objection sheet was filed. It's a common practice. We see it all the time. I think you're seeing demons where none exist."). As the BSA Chair explained, the Congregation was only "requesting a waiver" with respect to the seven objections, and could ultimately be barred from building if the withdrawal of the eighth objection was erroneous: "If there's another objection that they did not identify for the Board, there's no waiver to that." (A631.) It is thus apparent that, as the BSA Vice Chair explained, this claim is "bogus" and lacking "any legal basis." (A632.) Because, as the BSA explained, such modifications are a common part of its unique practice, this Court should not second guess the BSA's conclusion that such modifications are not only permissible, but also preferable. *See Toys "R" Us*, 89 N.Y.2d at 418-19, 654 N.Y.S.2d at 104, 676 N.E.2d at 866 ("The BSA, comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution . . . . Consequently, *in questions relating to its expertise*, the BSA's interpretation of the statute's terms must be 'given great weight and judicial deference, so long as the interpretation is neither

irrational, unreasonable nor inconsistent with the governing statute.'") (emphasis added).

In sum, as the lower court explained, the BSA's conclusion was rational:

> Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB, the footnote in the BSA Resolution reflects that the revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight objections. There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the *Kettaneh* decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the *Kettaneh* decision notes that the BSA often has pre-application meetings with applications for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required finding under Z.R. § 72-21.

(A13.) Petitioners have failed to demonstrate any flaws with this analysis.

2. The BSA's "Five Findings" Were Rational

The BSA made each of the factual findings referenced in Section 72-21 of the New York City Zoning Resolution, referenced in *SoHo Alliance* (*See* BSA Res. ¶¶ 37-215). Each of the five findings is supported by evidence in the record:

- ***"Unique Physical Conditions," ZR § 72-21(a).*** Eighty-five paragraphs of the BSA's Resolution were devoted to the BSA's conclusion that "the unique physical conditions" of the site "create practical difficulties and unnecessary hardship in developing the site in strict compliance with the

applicable zoning regulations" the "required finding under ZR § 72-21(a)." (BSA Res. ¶ 122; *see id.* ¶¶ 37-122.) This finding is supported in the record. (*See, e.g.*, R. 39-43; 139; 319-320; 337-342; 1733-1735; 1739-1740; 1744-1745; 1751; 4565-4576; 4859-4861; 5147-5157; 5763.)

- ***No "Reasonable Return," ZR § 72-21(b).*** Twenty-five paragraphs of the BSA's Resolution addressed the BSA's finding 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." (BSA Res. ¶ 148; *see id.* ¶¶ 123-48.) The BSA's reasonable return finding is supported by the record. (*See, e.g.*, R. 133-161; 342-343; 567-568; 4576-4577; 5157-5159.) (As explained below, this finding, which should be viewed as an alternate ground for affirmance, was unnecessary because the Congregation is a not-for-profit organization. *See* Point II(B)(2)(b), below. The record supports the undisputed fact that the Congregation is a not-for-profit corporation. (*See, e.g.*, R. 43-44; 342; 567; 1729-1733; 4576; 4861-4862; 5763-5764.).)
- ***Neighborhood Character, ZR § 72-21(c).*** The BSA devoted fifty paragraphs of its Resolution to explaining its conclusion that "neither the proposed community facility use, nor the proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare." (BSA Res. ¶ 201; *see id.* ¶¶ 149-201.) This finding is fully supported by the record. (*See, e.g.*, R. 44-45; 121-130; 343-344; 3845-3846; 4577-4582; 4597-4635; 4917-4920; 5159-5164; 5764; 5767-5771.)
- ***No "Self-Created Hardship," ZR § 72-21(d).*** The BSA also explicitly found, in a four-paragraph discussion, that "the hardship herein was not created by the owner or by a predecessor in title." (BSA Res. ¶ 205; *see id.*

¶¶ 202-05.) This finding is supported by the record. (*See, e.g.*, R. 45-46; 344-345; 4582; 5764.)

- ***"Minimum Variance," ZR § 72-21(e).*** Finally, the BSA, in a ten-paragraph review of alternate scenarios – including modifications to the Congregation's proposal that the Congregation had already adopted at the BSA's request – concluded that "none" of the additional "lesser variance scenarios" would be appropriate, such that the variance granted was the "minimum" necessary. (BSA Res. ¶¶ 210-211; *see id.* ¶¶ 206-215.) This finding is supported by the record. (*See, e.g.*, R. 4582-4586; 5164-5167; 5765-5766; 5785.)

Petitioners challenge three of these five findings. Their challenges, which are addressed below, are meritless.

a. <u>The BSA's Finding of "Unique Physical Conditions" Was Rational</u>

Petitioners contend that the BSA based its finding, that the Congregation's property is burdened by unique physical conditions, on only two conditions (the obsolescence of existing structures and the landmarked status of the Synagogue), and that these conditions are not "physical conditions" within the meaning of the Zoning Resolution. (Petitioners' Br. at 29-30 & n.6.) In fact, the BSA based its finding on several conditions ignored by Petitioners, each of which independently warrants affirmance, In any event, the BSA rationally concluded that the presence of obsolescent structures and a historically and culturally important Synagogue are "physical conditions" that can be considered in granting a variance.

First, as a threshold matter, the BSA's "physical conditions" finding does not depend on the existence of obsolescent structures or on the landmarked status of the Synagogue. While Petitioners assert that the fact that the development site is located on a zoning lot that is divided by a zoning district boundary and is further constrained by the "sliver" law "were not the basis of the Resolution" (Petitioners' Br. at 30 n.6), the BSA, in fact, devoted more than 20 paragraphs of its Resolution to those conditions. (*See, e.g.*, BSA Res. ¶¶ 86-106, 122). Since Petitioners have not raised any challenges to the BSA's finding that these conditions were "unique physical conditions" justifying the variance, the lower court's decision may be affirmed on that basis alone. *Matter of Boland v. Town of Northampton*, 25 A.D.3d 848, 850, 807 N.Y.S.2d 205, 207 (3d Dep't 2006) ("As petitioner does not pursue his substantive challenges to the special use permit on appeal, these arguments are deemed abandoned.").

Second, the lack of merit in Petitioners' unsupported one-liner that the obsolescence of the physical structures on the Congregation's property cannot be "physical conditions" within the meaning of the Zoning Resolution (Petitioners' Br. at 30 n.6) offers a second, independent basis for affirming the lower court. The BSA, employing its expertise in applying New York City's complex Zoning Resolution and citing four court decisions, concluded that unique physical conditions "can refer to buildings" and that the "obsolescence of a building is well

established as a basis for a finding of uniqueness." (BSA Res. ¶ 76). Petitioners point to nothing irrational regarding this conclusion. Indeed, it is established that "unique physical conditions" refers to both land and buildings. *See UOB Realty (USA) Ltd. v. Chin*, 291 A.D.2d 248, 249, 736 N.Y.S.2d 874, 875 (1st Dep't 2002).

Third, contrary to Petitioners assertions, the Congregation did not assert, nor did the BSA find, that the landmarked *status* of the Synagogue constituted a "unique physical condition." It is the historical and cultural significance of the Synagogue, not the mere fact that the LPC has designated it as a landmark, that renders the dominating presence of the Synagogue on the property a "unique physical condition." Because the Congregation demonstrated that the vital importance of the Synagogue to the Congregation's mission renders it impossible to modify, the Congregation clearly satisfied the "unique physical conditions" finding. (*See, e.g.,* BSA Res. ¶108 ("because so much of the Zoning lot is occupied by a building that cannot be disturbed, only a relatively small portion of the site is available for development"); R. 4566 ("unique physical conditions" include "the presence of a unique, noncomplying, specialized building of significant cultural and religious importance occupying two-thirds of the Zoning Lot").)

Indeed, in light of the fact that the Congregation did not seek to alter the Synagogue, Petitioners' claim that the BSA's recognition of the Synagogue's

cultural and religious significance "usurped" the jurisdiction of the City Planning Commission ("CPC") and the LPC is meritless. The record belies that claim because it is undisputed that the Congregation never sought a variance to change the landmarked Synagogue and the BSA never authorized the Congregation to alter the landmark. Tellingly, Petitioners do not contend that the BSA lacks authority to grant a variance for a property *containing* a landmarked structure. Yet, that is all that occurred here: the BSA granted a variance for the part of the lot *not containing the Synagogue* because, *inter alia*, the remainder of the lot contains a Synagogue that may not be altered without impairing the Congregation's mission.

Lastly, Petitioners' arguments regarding Section 74-711 of the Zoning Resolution are meritless in any event. That section merely provides: "In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by the Landmarks Preservation Commission, the City Planning Commission may permit modification of the use and bulk regulations." Interpreting this section, both the BSA and the lower court found that an entity, whose property contains a landmarked building, may seek either a special permit from the LPC pursuant to Section 74-711 or a variance from the BSA pursuant to Section 72-21 of the Zoning Resolution. (A42.) This finding is consistent with the

BSA's other administrative decisions.[10] *See, e.g., Matter of 330 W. 86th St.* (BSA No. 280-09-A, July 13, 2010) (available at http://archive.citylaw.org/bsa/2010/07.13.10/280-09-A.doc) (noting that "a form of concurrent jurisdiction is evident" with "landmarks" and DOB); *see also Matter of 67 Vestry Tenants Ass'n v. Raab*, 172 Misc. 2d 214, 223-224, 658 N.Y.S. 2d 804, 811 (Sup. Ct. N.Y. Co. 1997) , ("LPC is not authorized to regulate matters ordinarily considered in the zoning process such as 'the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses'"). Because, as the lower court found, the BSA's construction of the Zoning Resolution was rational, it must be accorded substantial deference. *Toys "R" Us*, 89 N.Y.2d at 418-19, 654 N.Y.S.2d at 104, 676 N.E.2d at 866.

Even if no deference were warranted, no reading of Section 74-711 can support Petitioners' contention that the section vests the LPC or the CPC with

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[10] *Matter of 745 Fox St.* (BSA Res. No. 19-06-BZ May 2, 2006) (noting "existence of . . . historic structure on the site hinders as of right development . . . because of its landmark status") (available at http://archive.citylaw.org/bsa/2006/May%202,%202006/19-06-BZ.doc); *Matter of 135-35 Northern Blvd.* (BSA Res. No. 156-03-BZ Dec. 13, 2005) (considering costs "as a result of the need to protect the interior landmark") (available at http://archive.citylaw.org/bsa/2005/December%2023,%202005/156-03-BZ.doc); *Matter of 543/45 W. 110th St.* (BSA Res. No. 307-03-BZ July 13, 2004) ("lot's close proximity to a landmarked subway station" not common condition in area) (available at http://archive.citylaw.org/bsa/2004/July%2013,%202004/307-03-BZ.doc); *Matter of 400 Lennox Ave.* (BSA Res. No. 73-03-BZ Jan. 13, 2004) (finding site's "proximity to a designated landmark" a "unique physical condition") (available at http://archive.citylaw.org/bsa/2004/January%2013,%202004/73-03-BZ.doc); *Matter of 245 E. 17th St.* (BSA Res. No. 84-02-BZ June 11, 2002) (LPC's requirements "create[] a practical difficulty and unnecessary hardship for the Congregation" in meeting programmatic needs) (available at http://archive.citylaw.org/bsa/2002/84-02-BZ.doc).

exclusive jurisdiction to consider the impact of a landmarking designation on a property owner. At the very least, nothing in that section purports to divest the BSA of its authority under Section 72-21 of the Zoning Resolution to designate aspects of zoning lots as "unique physical conditions" under the Zoning Resolution. Nowhere does that statute suggest that once the LPC designates a structure as a landmark the BSA is divested of authority to grant a variance application that considers the presence and impact of that structure. *See e.g. E. 91st St. Neighbors to Pres. Landmarks, Inc. v. N.Y. City Bd. of Standards and Appeals*, 294 A.D.2d 126 (1st Dep't 2002) (upholding amendment of variance BSA granted for construction on lots containing landmarked buildings); Brief for Petitioner at 3, *E. 91st St. Neighbors to Pres. Landmarks, Inc. v. N.Y. City Bd. of Standards and Appeals*, 294 A.D.2d 126 (1st Dep't 2002) (No. 984), 2001 WL 36097225 (challenging amendment to variance BSA granted for construction on lots containing landmarked buildings); *Matter of 745 Fox St.* (BSA Res. No. 19-06-BZ May 2, 2006) (noting "existence of . . . historic structure on the site hinders as of right development . . . because of its landmark status") (available at http://archive.citylaw.org/bsa/2006/May%202,%202006/19-06-BZ.doc). Indeed, the contrary is the case: If the BSA considered a variance application for a lot containing a landmarked building and blinded itself to that building's presence,

then the BSA clearly would have abused its discretion. The BSA's decision was plainly rational.[11]

b. The BSA's Finding of "No Reasonable Return" Was Rational

Petitioners' challenge to the BSA's "no reasonable return" finding (BSA Res. ¶ 148) is also meritless. Petitioners contend that, in conducting its financial analysis, the BSA disregarded its own precedent by not forcing the Congregation to demonstrate a reasonable return with regard to the community facility. (Petitioners' Br. at 33-36.) Petitioners further claim that non-profit entities are not allowed to earn a reasonable return and thus must, instead, show a nexus between any variance application and its programmatic needs (even though the statute requires nothing of the kind). (*See* Petitioners' Br. at 37-38.) These challenges are

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[11] Petitioners argue that "a court should not find that the Legislature intended two separate agencies to exercise concurrent jurisdiction unless no other reading of the statute is possible." (Petitioners' Br. at 31, *citing Ardizzone v. Elliott*, 75 N.Y.2d 150, 157, 551 N.Y.S.2d 457, 461, 550 N.E.2d 906, 910 (1989)). This is inapposite. First, the BSA did not claim it had "concurrent jurisdiction" of the sort referenced in *Ardizzone*. The BSA did not claim it could issue a Section 74-711 "special permit"; at most, it suggested that it could account for the impact of the landmarked structure on the property. Moreover, Section 74-711 merely provides that the CPC "may permit modification of the use and bulk regulations" affecting landmarked buildings. If its drafters had wished to oust the BSA of its variance power where a Section 74-711 permit may be granted, it could have done so explicitly. *See N.Y. Pub. Interest Research Grp. Straphangers Campaign v. Reuter*, 293 A.D.2d 160, 164-165, 739 N.Y.S.2d 127, 130 (N.Y. App. Div. 1st Dep't 2002) (court must give effect to statute as written) . The BSA rationally concluded that its authority to address areas beyond the landmarked structure is not diminished by the LPC's designation of a landmark. *See Matter of 330 West 86th Street* (BSA No. 280-09-A, July 13, 2010) ("WHEREAS, the Board notes that *concurrent authority* may manifest as multiple agencies, whose approval is required for a single application, review different elements of the same application; this includes instances when, in the process of reviewing plans, DOB may be alerted to another agency's jurisdiction, as it is with *landmarks*, wetland, and flood hazard regulations *and thus a form of concurrent jurisdiction is evident*.") (emphasis added) (available at http://archive.citylaw.org/bsa/2010/ 07.13.10/280-09-A.doc).

nonsense and do not undermine the rationality of the BSA's finding.

As a threshold matter, as explained in Part II(B)(1) of the Congregation's *Kettaneh* brief, the Zoning Resolution explicitly exempts not-for-profit organizations, such as the Congregation, from the "no reasonable return" showing that would otherwise be needed to secure a variance. The lower court's dismissal of the Petition can be affirmed on this basis without considering Petitioners' contentions regarding the BSA's "no reasonable return" finding. In any event, as shown below, Petitioners' assertions are meritless.

Petitioners claim that the BSA's analysis in this case "created a new test for determining mixed purpose variance applications" and, thereby, departed from its prior decision in *Matter of Yeshiva Imrei Chaim Viznitz* (BSA Res. No. 290-05-BZ Jan. 9, 2007) (available at http://archive.citylaw.org/bsa/2007/January%209,%202007/290-05-BZ.doc). (*See* Petitioners' Br. at 33-36.) The BSA faithfully applied its precedent.

Petitioners' misreading of *Yeshiva Imrei* turns on a fundamental misapprehension of Sections 72-21(a) and (b) of the Zoning Resolution. Section 72-21(a) of the Zoning Resolution requires proof that "that 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 Resolution." A non-profit entity is not required to satisfy this requirement if it can demonstrate that accommodation of its programmatic needs requires the variance. (A277-79.) In turn, Section 72-21(b) requires proof that "that because of such physical conditions there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of this Resolution will bring a reasonable return" and states that "this finding shall not be required for the granting of a variance to a non-profit organization."

In *Yeshiva Imrei*, the applicant sought a variance to allow it to create a catering establishment. While the applicant was unable to satisfy the "unique physical conditions" prong, it claimed that it did not need to do so because the catering business was needed to fund its programmatic needs. The BSA disagreed, reasoning that raising funds is not "the type of programmatic need that can be properly considered sufficient justification for the requested use variance." *Yeshiva Imrei* merely concerns the "programmatic need" alternative under Section 72-21(a). The decision has nothing to do with the "no reasonable return" prong of Section 72-21(b). Indeed, *Yeshiva Imrei* stated that not-for-profit entities may proceed as for-profit applicants if they are unable to demonstrate a programmatic need.

Petitioners' second challenge to the BSA's "no reasonable return" finding is also meritless. Petitioners' claim that "[t]he proper inquiry for a not-for-profit

applicant is whether 'unique physical conditions' create a hardship impairing its ability to meet its programmatic needs," and therefore, a non-profit applicant may not seek a variance if it is not related to its programmatic needs. (Petitioners' Br. at 38.) This claim, however, turns Sections 72-21(a) and (b) of the Zoning Resolution on their head. Petitioners essentially reason that because a non-profit entity (1) is *not required* to satisfy the "unique physical conditions" prong of the analysis if it can demonstrate programmatic needs and (2) is *not required* to satisfy the "reasonable return" finding, then the BSA abuses its discretion if it grants a variance to a non-profit entity that, nevertheless, satisfies both subsections. Of course, such a claim is belied by the plain language of the Zoning Resolution and the BSA's prior precedent – nothing in the resolution precludes a not-for-profit entity from satisfying the higher test imposed on for-profit applicants.[12]

c. The BSA's "Minimum Variance" Finding Was Rational

Petitioners' challenge to the BSA's "minimum variance" finding, based on their assertion that the residential floors of the Congregation's planned development are "not necessary" for the Congregation's programmatic needs

[12] Petitioners cases (Petitioners' Br. at 38) are distinguishable because neither involved applications for variances by not-for-profit entities. *See Concerned Residents of New Lebanon v. Zoning Board of Appeals of Town of New Lebanon*, 222 A.D.2d 773, 774, 634 N.Y.S.2d 825, 826 (3d Dep't 1995) (challenging variance application granted to "Lebanon Valley Auto Racing, Inc."); *Citizens for Ghent, Inc. v. Zoning Board of Appeals of Town of Ghent*, 175 A.D.2d 528, 528, 572 N.Y.S.2d 957, 958 (3d Dep't 1991) (challenging variance granted to company that "sells and installs truck-mounted cranes and related equipment").

(Petitioners' Br. at 39-40), is baseless. The BSA found that the few residential floors proposed by the Congregation were necessary, in that without them the Congregation would not be able to meet "its programmatic need" and fulfill "its religious mission." (BSA Res. ¶ 213.) This finding is well supported in the record. (*See, e.g.*, R. 4223-30, 5157-59.)

The BSA listed, in detail, efforts that it undertook to ensure that the "variance sought" was the "minimum necessary to afford relief" under Section 72-21(e) of the Zoning Resolution. (A287 ("Whereas, the Board finds that the requested lot coverage and rear yard waivers are the minimum necessary to allow the applicant to fulfill its programmatic needs and that the front setback, rear setback, base height and building height waivers are the minimum necessary to allow it to achieve a reasonable financial return[.]").) The BSA required the Congregation to scale back its proposal (*see* BSA Res. ¶¶ 207-209) and also considered numerous alternatives to the Congregation's proposal to determine whether an alternative approach would accommodate its needs (*see id.* ¶¶ 210-211). The record is replete with analyses of alternatives, including as-of-right approaches. (*See, e.g.*, *id.* ¶¶ 128, 129, 132, 133, 147, 211). The BSA found, based on the evidence in the record, that the Congregation had "fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission." (*Id.* ¶ 213.)

Based on this record, the BSA rationally determined that the Congregation's final proposal would involve the minimum variance. (*Id.* ¶ 212-15). This Court should not upset the BSA's "minimum variance" finding.

CONCLUSION

For the foregoing reasons, the order of the lower court dismissing the Petition should be affirmed.

Dated: January 14, 2011
New York, New York

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SS:
COUNTY OF NEW YORK)

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Daniel Vinci being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 14th day of January 2011 deponent served 2 copies of the within

BRIEF FOR RESPONDENT-RESPONDENT CONGREGATION SHEARITH ISRAEL

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January 14, 2011

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Qualified in Kings County
Commission Expires November 15, 2012

/s/ Daniel Vinci

Case Name: Landmark West! v. City of NY

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.

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

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LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,	:	
Petitioners-Appellants,	:	Sup. Ct. N.Y. County Index No. 650354/08
- 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,	:	
HON. ANDREW CUOMO, as Attorney General of the State of New York,	:	
Respondent.	:	

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

Petitioners-Appellants Landmark West!, Inc. ("Landmark West!"), 91 Central Park West Corporation and Thomas Hansen (collectively, "Appellants") submit this brief in 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") seeking to vacate and declare null and void an August 29, 2008 resolution (the "Resolution") of Respondent-Respondent City of New York Board of Standards and Appeals ("BSA"), the government body of the City of New York (the "City")[2] charged under the General City Law, the New York City Charter (the "Charter") and the New York City Zoning Resolution (the "Zoning Resolution") with the authority to entertain and decide zoning variance applications.

The Resolution [A275 - 288] granted the application (the "Application") of Respondent-Respondent Congregation Shearith Israel ("CSI") for seven variances from height, bulk, setback and other regulations adopted by the City in the Zoning Resolution to protect the neighborhood and its residents.

---

[1] Unless otherwise stated, bracket references are to the pages of the Petitioners' Appendix filed on this appeal and all emphasis herein is added.

[2] Respondents BSA and New York City Planning Commission ("CPC" and, with BSA, the "City Respondents") jointly appeared; Respondent Congregation Shearith Israel separately appeared; and Hon. Andrew Cuomo, as Attorney General of the State of New York, did not appear.

Each variance had been rejected by the local Community Board [A248].

Four of the seven variances were required solely to "monetize" air rights [A300] and " accommodate a market rate residential development" – five floors of luxury condominiums (the "Luxury Condominium Development") to be constructed by CSI through and on top of an addition (the "Synagogue Annex") to its landmarked synagogue (the "Synagogue") [A276].

As will be demonstrated:

> Material violations of the General City Law, the Charter, the Zoning Resolution and BSA's own rules and precedent render the Resolution invalid as a matter of law;
>
> BSA lacked jurisdiction over the Application; and
>
> BSA illegally usurped the jurisdiction of the Landmarks Preservation Commission ("LPC") and CPC by effectively granting relief which only those agencies are empowered to grant.

The Resolution was improper; the Judgment confirming it was erroneous; and the matter should be remanded for appropriate relief.

QUESTIONS PRESENTED

Question 1: Did the Supreme Court improperly defer to BSA's determination that it had jurisdiction to consider CSI's Application?

Answer: The statutes controlling BSA's jurisdiction are clear and unequivocal; BSA's legally unsupported "interpretation" should have been rejected.

Question 2: Is BSA's zoning variance jurisdiction limited to appeals from statutorily specified officials of the New York City Department of Buildings ("DOB")?

Answer: CSI's Application to BSA was (1) not an appeal from a denial by a DOB official designated in the Charter; and (2) not based on plans reviewed by DOB. For each reason, BSA lacked jurisdiction.

Question 3: Where the Legislature statutorily authorized two City agencies – CPC and LPC – to provide relief from the burdens imposed by the New York City Landmarks Preservation Law (the "Landmarks Law"), may another agency, not so designated by the Legislature, assume such authority?

Answer: Notwithstanding that the Legislature provided express remedies to CPC and LPC, obviously intending for such remedies to preempt other remedies and to "occupy the field", BSA, in effect, enacted, and then applied, new remedies.

Question 4: Did BSA err in failing to adhere to its own precedents?

Answer: By failing to adhere to its own precedents in deciding similar applications, BSA's actions were arbitrary and capricious as a matter of law.

STATEMENT OF FACTS

Appellants

Appellant Landmark West! is an award winning non-profit community organization which, since 1985, has worked to protect the historic architecture, special character, and development pattern of the Upper West Side and to improve and maintain the community [A128].

The other two Appellants are a corporation which owns a cooperative apartment building and an individual apartment owner, both neighboring property owners directly detrimentally affected by the Resolution [A128, 129].

The Property

CSI owns: an individually landmarked Synagogue at Central Park West and West 70th Street; a parsonage building (the "Parsonage") immediately

to the south; and a four-story school building (the "Community House") and vacant parcel identified as 6-10 West 70th Street, to the west [A276].

All of CSI's property (the "Property") lies within the Upper West Side/Central Park West Historic District, designated by LPC in 1990 [A242].

The Purpose of Zoning Regulations

The fundamental purpose of zoning regulations in New York is to provide "adequate light, air [and] convenience of access" for the City's residents. General City Law § 20.

CSI's Proposed New Building

The BSA Resolution at issue granted CSI seven zoning variances so that it could construct a nine-story building (the "New Building") with the four floor Synagogue Annex and five floor Luxury Condominium Development, containing apartments (the "Luxury Condominiums") which are to be sold to wealthy individuals and not used for CSI's religious, educational or cultural purposes (its "Programmatic Needs") [A276].

CSI's Application did not seek permission for a minor violation of the zoning restrictions, such as permitting a homeowner to construct a garage two feet closer to the boundary line with his neighbor.

CSI's Application sought permission for five material violations of the zoning restrictions:

1. To violate §§ 24-11 and 77-24 by increasing lot coverage from the permitted 70% to 80%, an increase of 10%;

2. To violate § 24-36 by reducing the rear yard depth from the required 30 feet to 20 feet, an additional 33% incursion into the rear yard requirements for light and air to the surrounding buildings;

3. To violate § 24-36 by reducing the required set back from the street from 15 feet to 12 feet, an additional 20% incursion onto the street;

4. To violate §§ 23-66 and 23-633, by increasing the height from the limit of 75 feet to 105 feet, 10 inches, a more than 33% increase over that permitted; and

5. To violate § 23-633, by reducing the rear yard set back from 10 feet to 6.67 feet, an additional 33% incursion into the required rear yard light and air space.

The variances were not necessary to address CSI's Programmatic Needs, all of which could be accommodated in a building which complied with the zoning restrictions. Rather, the variances were sought to generate a cash windfall through the sale of the Luxury Condominiums or, as stated by CSI's attorney, to "monetize" the variances from the Zoning Resolution requirements [A300, 311]. (As stated in the Resolution: "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 . . . ") [A276].

By BSA's own calculations, were the Luxury Condominiums not to be constructed, there would be 2,000 square feet of space available for CSI's Synagogue Annex on the first through fourth floors of the New Building since there would be no need for a separate lobby and additional elevators, stairs and a mechanical room to serve the Luxury Condominiums [A280].

The New Building's overall height will be four stories taller and its base height more than three stories taller than that permitted under the Zoning Resolution, completely blocking several apartment windows and impacting dozens of windows in neighboring buildings [A245, 266].

The Resolution also granted CSI other unwarranted benefits, including the right to violate bulk, setback and other legislatively adopted requirements [A287].

Appellants' Supreme Court Proceeding

If allowed to stand, the Resolution would result in irreversible damage to the character and quality of life of the surrounding area and would improperly lower the bar for zoning variances and permit developers to circumvent the laws and regulations protecting designated landmarked structures and historic areas throughout New York City.

Appellants brought the proceeding to enforce the letter and intent of the governing laws, including the General City Law, the Charter and the New York City Administrative Code. Although originally brought as an action for declaratory and injunctive relief [A15 - 48], the action was converted to a CPLR Article 78 proceeding pursuant to an April 17, 2009 decision and order of the Supreme Court (the "First Decision") [A120 - 125].

Appellants' Petition [A126 - 153] challenged the Resolution on the grounds, among others, that:

BSA lacked jurisdiction due to material deficiencies in the Application process;

BSA illegally usurped the exclusive jurisdiction of LPC and CPC by granting variances based on landmarking restrictions, rather than physical conditions; and

BSA applied the wrong legal standard -- one which BSA, itself, previously rejected -- to find that CSI's proposed plans satisfied the requirements for a variance under the Zoning Resolution.

CSI and the City Respondents served answers and memoranda of law in opposition, to which Petitioners responded [A233 - 236].

The Judgment Dismissing The Petition

The Judgment accepted BSA's claims regarding jurisdiction, denied Appellants' request to annul the Resolution and dismissed their Petition, finding that Appellants had failed to demonstrate that BSA acted illegally in considering and granting CSI's Application and ignored the plain meaning of the governing statutes [A13].

The court concluded that other arguments in Appellants' Petition were encompassed and decided in a related proceeding challenging the same BSA Resolution entitled Kettaneh *v.* Board of Standards and Appeals of the City of New York, *et al*, which the court previously had dismissed (the "Kettaneh Judgment"), based upon its recollection (as recited in the Judgment), that [A9]:

> At the . . . oral argument [on the initial motions to dismiss in this proceeding, at which time there also was a preliminary hearing in the Kettaneh proceeding], the court questioned counsel for [Appellants] as to the differences between the instant proceeding and the Kettaneh proceeding. [Appellants'] counsel articulated two specific claims . . . that were not raised by petitioners in Kettaneh.

Contrary to the court's recollection, Appellants' counsel stated that he was not fully aware of the extent of the issues raised in Kettaneh [A81 - 82], not having been served with the Kettaneh papers [A82].

Ignoring other claims raised by Appellants, not decided in Kettaneh [A13], the court addressed solely the jurisdictional claims raised in Appellants' Petition [A8 - 13].

The *Kettaneh* Proceeding

The Kettaneh Judgment addressed whether a reasonable basis existed for BSA's factual findings, concluding [A272 - 273]:

> If this court were empowered to conduct a *de novo* review of the BSA's determination, and were not limited to the Article 78 standard of review of a reasonable basis for the determination, the result here might well be different. The facts are undisputed that the Congregation receives substantial rental income from the Beit Rabban Day School and the rental of the Parsonage; the Congregation may have additional earnings from renting the banquet space. There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage. It is also undisputed that the windows of some apartments in the building adjacent to the Project will now be blocked, whereas the windows would not be blocked by an as-of-right structure, which could have been built with two floors of condominiums.
>
> 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. But. . . [t]his court cannot substitute its judgment for that of the BSA.

That Kettaneh determination is irrelevant since Appellants did not challenge the reasonableness of the Resolution, but whether BSA had any authority to issue it.[3]

[3] An appeal from the Kettaneh Judgment is scheduled to be heard for the February Term of this Court.

ARGUMENT

Point I

The Court Improperly Accorded Deference To BSA's Interpretation As To Its Jurisdiction To Entertain CSI's Application

A. BSA Lacked Jurisdiction Because CSI's Variance Application Was Not An Appeal From A Determination Of Either Of Two Designated City Officials

(i) CSI's Position

Both before BSA and the Supreme Court Appellants argued that BSA lacked jurisdiction to entertain CSI's Application because it was not based upon an appeal from a determination of either of the two City officials specified in Charter § 666 which states:

> The board [BSA] shall have power:
>
> * * *
>
> 6. To hear and decide appeals from and review,
>
> (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five. . . .

Thus, for BSA to entertain jurisdiction, CSI's Application had to be an appeal from a determination of the Commissioner of Buildings or Manhattan Borough Superintendent acting under written delegation of power from the Commissioner.

(ii) The Facts Supporting Appellants' Position

CSI's Application sought review of an October 28, 2005 Notice of Objections issued by DOB (the "First DOB Notice of Objections") [A292], which rejected CSI's plans for the New Building.[4] Almost two years later – while the Application was pending before BSA – DOB issued an August 24, 2007 Notice of Objections (the "Second DOB Notice of Objections") [A507], which BSA, over the objections of Appellants and others, substituted for the First DOB Notice of Objections.

Neither DOB Notice of Objections was issued by the Commissioner of Buildings or the Manhattan Borough Commissioner acting under written delegation, but by Kenneth Fladen, a "provisional Administrative Borough

[4] The First DOB Notice of Objections was dated and issued on October 28, 2005 [A292]; it was presented to DOB for a final denial to permit the Application to BSA on March 27, 2007 [*id.*].

Superintendent" [A132]. Mr. Fladen also signed on the line for "Examiner's Signature" [id.], eliminating the two step review normally required.[5]

(iii) BSA's Determination

In footnote 2 to its Resolution, BSA concluded [A275]:

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

(iv) The Supreme Court's Determination

In the Judgment, the Supreme Court disposed of Appellant's argument by merely adopting BSA's conclusion [A10 - 12]:

> **Claim that the BSA Lacked Jurisdiction**
>
> Turning to the merits of the petition, petitioners assert that the BSA lacked jurisdiction to entertain [CSI's Application] because the plans were not approved properly, in that the plans were not "passed on" by the DOB in the matter required by the City

[5] At the time both DOB Notices of Objections were issued, Patricia J. Lancaster was the Commissioner of Buildings and Christopher Santulli was the Manhattan Borough Commissioner [A132].

Charter. To invoke the BSA's jurisdiction, petitioners assert, the application must be an appeal from a determination of the DOB Commissioner or Manhattan Borough Superintendent. Petitioners cite to § 666(6)(a) of the City Charter, which, they assert, sets forth the jurisdiction of the BSA. Section 666(6)(a) provides that the BSA has the power:

> [t]o hear and decide appeals from and review, (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five, or a not-for-profit corporation acting on behalf of the department of buildings pursuant to seciton 27-228.6 of the code, ...

But, as the BSA itself pointed out in a footnote to the BSA Resolution, the BSA has jurisdiction pursuant to § 668 of the Charter. The footnote sets forth: . . . [the Judgment quotes Footnote 2 set forth above].

Section 668 sets forth the procedure for variances and special permits. This section is referenced to § 665 of the Charter, which provides that the BSA has the power "[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to section six hundred sixty-eight."

An agency's construction of a statute or regulation it administers, "if not unreasonable or irrational, is entitled to deference." Matter of Salvati v. Eimicke, 72 N.Y. 784, 791 (1988), rearg. denied, 73 N.Y.2d 995 (1989). The BSA's interpretation that it has jurisdiction under § 668 is rational and will not be disturbed. Given the interplay in the Charter between the different ways for the BSA to acquire jurisdiction over a matter, it is appropriate to defer to the agency's interpretation. "[W]here the statutory language suffers form some 'fundamental ambiguity' . . . or "the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices' . . . , courts routinely defer to the agency's construction of a statute it administers." New York City Council v. City of New York, 4 A.D.3d 85, 97 (1st Dep't 204) (internal citations omitted). The

> BSA's interpretation that a review under § 668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner is entitled to deference and will not be disturbed.

(v) The Supreme Court Improperly Gave Deference To BSA's Determination Of Its Jurisdiction

The Supreme Court cited cases which provide for judicial deference to interpretations of an agency as to its own regulations.

Appellants have no quarrel with the cited cases; they simply are irrelevant to an agency's interpretation of the statutes defining its jurisdiction. Rather, as held by the Court of Appeals in Teachers Ins. & Annuity Ass'n *v.* City of New York, 82 N.Y.2d 35, 41 (1993):

> Where interpretation of statutory terms is involved, two standards of review are applicable. An agency charged with implementing [a law] is presumed to have developed an expertise that requires us to accept its interpretation of that law if not unreasonable. . . . Such deference . . . however, is not required where the question is one of pure legal interpretation. [A statute establishing a] jurisdictional predicate [is] a matter of pure legal interpretation as to which no deference is required.

See also, generally, Levy *v.* Board of Standards and Appeals of the City of New York, 267 N.Y. 347 (1935).

Recently, this Court applied similar reasoning in concluding that a determination of the New York City Civil Service Commission as to whether it had jurisdiction under the Charter was not entitled to deference:

> Critical to the disposition of this appeal is whether CSC's determination dismissing petitioner's appeal for want of jurisdiction is entitled to deference.
>
> * * *
>
> Here, no deference should be accorded CSC's determination. The language used in City Charter § 813(d), above quoted, is plain and involves no special or technical words. Similarly, City Charter § 814(a)(6) employs common words of clear import in vesting DCAS with the power "to revoke or rescind any certification … by reason of the disqualification of the applicant … under the provisions of the civil service law." Here too, interpretation does not depend in the slightest on the knowledge and understanding of the practices unique to CSC or that body's evaluation of factual data (*see* Roberts v Tishman Speyer Props., L.P., 62 AD3d 71, 874 N.Y.S.2d 97 [2009]). Rather, interpretation of these City Charter provisions requires "statutory reading and analysis, dependent only on accurate apprehension of legislative intent …" (*Gruber*, 89 NY2d at 231-32). Therefore, "[we] need not accord any deference to the agency's determination, and [we are] free to ascertain the proper interpretation from the statutory language and legislative intent" (*id.*).

Matter of Raganella *v.* New York City Civ. Serv. Commn., 66 A.D.3d 441, 444 - 446 (1st Dep't 2009).

(vi) The Charter Must Be Interpreted As Written

Charter § 665 merely provides generally for the board "[t]o determine and vary the application of a zoning resolution as may be provided in such resolution and pursuant to section [668]".

Charter § 668, by its plain terms, then sets forth the procedure to be followed by community boards, borough boards and BSA after an application properly is before BSA; it does not, either expressly or by implication, set forth the jurisdictional predicate for BSA review. Rather, it states:

§ 668 Variances and Special Permits

> Community boards and borough boards shall review applications to vary the zoning resolution and applications for special permits within the jurisdiction of the board of standards and appeals under the zoning resolution pursuant to the following procedure . . . .

Section 666(6)(a) of the Charter, in contrast, expressly and specifically sets forth the requirements for BSA's jurisdiction to hear and decide appeals from DOB determinations.

As held by the Court of Appeals in Kurcsics *v.* Merchants Mutual Insurance Company, 49 N.Y.2d 451, 459 (1980):

> Where . . . the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.

Accord, Bikman *v.* New York City Loft Board, 14 N.Y.3d 377 (2010); KSLM-Columbus Apartments, Inc. *v.* New York State Division of Housing and Community Renewal, 5 N.Y.3d 303, 312 (2005); Raritan Development Corp. *v.* Silva, 91 N.Y.2d 98, 102 (1997) (rejecting BSA's interpretation of Zoning Resolution); Rivercross Tenants' Corp. *v.* New York State Division of Housing and Community Renewal, 70A.D.3d 577 (1st Dep't 2010).

BSA's claim that Charter 668 conferred jurisdiction is contrary to the clear wording of the statutory provisions and without precedent.

Most importantly, BSA's authority is derived from and limited by Article 5-A of the General City Law, which states, in § 81-a(4):

> Hearing appeals. Unless other provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination, made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board of bureau of the city.

Charter § 666(a) clearly was adopted in furtherance of this authority and its express restrictions. Nothing in the other provisions cited by BSA or the Supreme Court evidences a contrary intent.

B. BSA Lacked Jurisdiction Because The Plans Which Were The Basis Of The Application Were Not Reviewed By DOB Or The Subject Of The DOB Objections

(i) The Facts Relevant To This Issue

As noted, CSI's Application attached, and sought review of, the First DOB Notice of Objections [A292], which listed eight items, the last of which was:

> PROPOSED SEPARATION BETWEEN BUILDINGS IN R10A DOES NOT COMPLY. 0.00' PROVIDED INSTEAD OF 40.00' CONTRARY TO SECTION 24-67 AND 23-711.

In response to the Application, BSA issued a June 15, 2007 notice [A460 - 466], which required CSI to address 48 BSA objections, including three addressed to objection No. 8 to the First DOB Notice of Objections, two of which were:

> 21. [P]lease clarify that the DOB objection for ZR § 23-711 is due to the lack of distance between the residential portion of the new building and the existing community facility building to remain.

25. It appears that the "as-of-right" scenario would still require a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings) given that it contains residential use (see Objection # 21). Please clarify.

CSI's September 10, 2007 response [A468] did not address these BSA objections, but stated:

N/A: DOB Objection #8 omitted by DOB upon reconsideration (See, DOB Objection Sheet and Proposed Plans, dated August 28, respectively).

CSI claimed that it had applied to DOB for reconsideration of the First DOB Notice of Objections and had submitted "Proposed Plans, dated August 28, 2007" and, thereafter, DOB issued the Second DOB Notice of Objections, which omitted Objection No. 8.

No evidence was presented that the "Proposed Plans" were revised to comply with the noted provisions of the Zoning Resolution. CSI did not produce to BSA or to Appellants its alleged reconsideration application or the documents submitted therewith, nor are they on file at DOB [A135].

When Appellant raised this issue at the February 12, 2008 BSA public hearing [A632 - 633], the following colloquy took place:

[APPELLANTS' ATTORNEY]: There's been no explanation required 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.

VICE-CHAIR COLLINS: I don't understand the relevance of that.

The Buildings Department has given an objection sheet. They told us where these filed plans don't meet the zoning. That's what we're here to rule on.

[APPELLANTS' ATTORNEY]: They're not filed plans.

VICE-CHAIR COLLINS: Now, do you think that there should be further objections based on the plans that you have access to?

[APPELLANTS' ATTORNEY]: As far -- this Board should ask for the answers to its 8th objection that it raised.

VICE-CHAIR COLLINS: But that objection is not before us anymore because revised plans were filed and a new objection sheet was filed. It's a common practice. We see it all the time. I think you're seeing demons where none exist.

[APPELLANTS' ATTORNEY]: No, we haven't been told what the difference is between the revised plans and the original plans, if there is any.

VICE-CHAIR COLLINS: All of our files are completely open. You can make an appointment to come and see them. It's my understanding that they've been made available to you from the beginning. I think it is a bogus issue you're raising.

I don't think there's any legal basis for it.

[APPELLANTS' ATTORNEY]: Well, with all due respect, what is the difference between the original plans and the revised plans?

CHAIR SRINIVASAN: It doesn't matter. We have a set of objections which is what we're reviewing.

CSI's attorney later admitted that the plans which CSI submitted to BSA were not the plans presented to or reviewed by DOB [A635 - 636]:

> [CSI ATTORNEY]: With regard to the issues raised by counsel to the building regarding the objection sheet, I'm prepared to give you an explanation, if you wish now, of what that situation is all about. It's really up to the Board.
>
> CHAIR SRINIVASAN: Why don't you just tell us what the situation is.
>
> [CSI ATTORNEY]: Fine. I would be happy to do so.
>
> CHAIR SRINIVASAN: It seems like you can put it to rest after that.
>
> [CSI ATTORNEY]: The original objection sheet that was obtained at the request of the counsel at the Landmarks Commission when this matter was before the Landmarks Commission, which is kind of unusual, because you're in gross schematics at that stage. You haven't really submitted anything to the Buildings Department but the Landmarks Commission wants to know what the Building Department feels are the zoning waivers requested. We submitted that.
>
> Originally, the building, the tower had a slot between the residential building and the synagogue. There was a physical space there that several of the Landmark's Commissioners wanted us to explore. They thought some separation between the two were important.
>
> That gave rise to an objection regarding the separation of buildings.
>
> Now, that zoning -- that envelope did not emerge from Landmarks, although, by that time, nobody was thinking about the objection sheet that had been asked about in 2003.
>
> So, when we got to the Building's Department and it was submitted for zoning review, we recognized that the zoning objection sheet was in error because the building no longer contained the separation issue between the buildings because the

two buildings were -- now the new and the old were now joined. That was amended.

In other words, until that hearing, CSI had represented that the plans which:

CSI filed to commence its Application; and

CSI represented under penalty of perjury to be the plans which resulted in the First DOB Objections from which BSA's jurisdiction was sought

were not the plans filed at DOB or the ones resulting in the First DOB Notice of but Objections, but were merely "gross schematics" of a different structure prepared five years earlier, in 2003.

(ii) The Supreme Court's Determination

The Judgment ignored these significant omissions and deferred to BSA, noting that "[t]he fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction" [A13]. Once again, the Judgment cited no authority for this incredibly broad conclusion.

(iii) The Supreme Court's Failure To Apply Controlling Law

Since CSI's Application to BSA was premised upon New Building plans which were not reviewed by DOB and not rejected by DOB, they could not serve as a basis for BSA jurisdiction pursuant to Charter § 666.

Nor were the plans which were the basis for CSI's Application to BSA reviewed by the Community Board and other required officials as required by Charter § 668.

BSA's own rules require that the plans which are the basis for such a variance application first must be sent to:

(a) The affected Community Board(s) (or Borough Board);

(b) The affected City Council member;

(c) The affected Borough President;

(d) The administrative official from whose order or determination the appeal is being made; and

(e) The City Planning Commission.

2 RCNY § 1-06.

BSA's Rules further require that it provide 60 days for the Community Board to review the application. *Id.*

The Supreme Court erred in ignoring that BSA's jurisdiction with respect to applications for variances is not original jurisdiction, but solely appellate jurisdiction.

As stated on BSA's website, in describing its authority:

> The Board is empowered by the City Charter to interpret the meaning or applicability of the Zoning Resolution, Building and Fire Codes, Multiple Dwelling Law, and Labor Law. This power includes the ability to vary in certain instances the provisions of these regulations.
>
> The majority of the Board's activity involves reviewing and deciding applications for variances and special permits, as empowered by the Zoning Resolution, and applications for appeals from property owners who proposals have been denied by the City's Departments of Building, Fire or Business Services. The Board also reviews and decides applications from the Departments of Buildings and Fire to modify or revoke certificates of occupancy.
>
> The Board can only act upon specific applications brought by landowners or interested parties who have received prior determinations from one of the enforcement agencies noted above. The Board cannot offer opinions or interpretations generally and it cannot grant a variance or a special permit to any property owner who has not first sought a proper permit or approval from an enforcement agency. . . .

BSA is, as described in its enabling statute, General City Law Article 5-A, a "zoning board of appeals".

As noted previously, General City Law § 81-A limits BSA jurisdiction, unless otherwise provided by a specific law, to appeals:

> Hearing appeals. Unless other provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination, made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board of bureau of the city.

Consistent with this, Charter § 668 limits BSA's jurisdiction to appeals.

Thus, since BSA lacks original jurisdiction, and possesses only appellate jurisdiction to issue variances, it may only act upon the same application previously presented to and denied by DOB. *See, e.g.*, McDonald's Corp. *v.* Kern, 260 A.D.2d 576 (2d Dep't 1999); Gaylord Disposal Source, Inc. *v.* Zoning Board of Appeals, 175 A.D.2d 543, 544 (3d Dep't 1991), *lv. to app. den.*, 78 N.Y.2d 863 (1991); Barron *v.* Getnick, 107 A.D.2d 1017 (4th Dep't 1985), Kaufman *v.* City of Glen Cove, 180 Misc. 349 (1943), *aff'd*, 266 A.D. 870 (2d Dep't 1943); 1962 N.Y. Op. Att'y Gen. 120 (April 23, 1962).

Point II

By Granting Multiple Variances Based Upon The Landmarked Structure On One Of CSI's Parcels, BSA Illegally Usurped The Authority Of The Landmarks Preservation Commission And The City Planning Commission

Zoning Resolution, Section 72-21, requires that a variance applicant satisfy five mandatory findings, the first of which, commonly called the "[a] Finding" requires proof:

> [T]hat there are unique physical conditions, including irregularity, narrowness or shallowness as to size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular zoning lot.

CSI did not, and could not, satisfy this requirement. Instead, CSI argued that the landmark status of its Synagogue adjacent to the proposed New Building constituted a "unique physical condition" which limited its as-of-right development; CSI offered no statutory or decisional support for this claim.

BSA's Resolution accepted CSI's argument [A281 - 282]:

> WHEREAS, as to the impact of the landmarked Congregation Shearith Israel synagogue building on the ability to develop an as-of-right development on the same zoning lot, the applicant states that the landmarked synagogue occupies nearly 63 percent of the Zoning Lot footprint; and
>
> * * *

> WHEREAS, the Board notes that the . . . location of the landmark synagogue limits the developable portion of the site to the development site; and
>
> * * *
>
> WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of development rights from a landmark building within the lot on which it is located or to an adjacent lot; and
>
> * * *
>
> WHEREAS, the Board agrees that the unique physical conditions cited above . . . create . . . unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a). . . . [6]

A. BSA Illegally Usurped The Jurisdiction of CPC

The Zoning Resolution provision permitting the "utilization or transfer" of development rights from a landmark building is § 74-711.

Section 74 is entitled "Powers of the City Planning Commission" and § 74-711 states:

> In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by

[6] BSA also cited "obsolescence of the existing community house building" as a unique physical condition which allegedly satisfied this requirement. Clearly, that is not a physical condition inherent in the Zoning Lot. Although Respondents claimed that additional considerations also factored into this finding, such as division of boundary line and the "sliver law", they were not the basis of the Resolution.

> the Landmarks Preservation Commission, the City Planning Commission may permit modification of the use and bulk regulations.

By its express terms, Zoning Resolution § 74-711 authorizes CPC, not BSA, to modify use and bulk regulations due to the presence of a landmark structure.

CSI initially advised LPC that it would seek relief under Zoning Resolution § 74-711 [A269]. CSI then elected not to do so [*id*.].

Having elected not to seek such relief where statutorily available, CSI could not claim before BSA that it was prejudiced by the landmarked status of the Synagogue.

In reaching its determination to grant extraordinary relief to CSI based upon the presence of the landmarked Synagogue, BSA expressly relied upon the Zoning Resolution rights granted solely to CPC.

No authority justifies this. To the contrary, one agency is prohibited from exercising the jurisdiction and authority of another without an express legislative grant. *See*, Ardizzone *v*. Elliott, 75 N.Y.2d 150, 157 (1989) ("a court should not find that the Legislature intended two separate agencies to exercise concurrent jurisdiction unless no other reading of the statute is possible").

As discussed in the Kettaneh Judgment, those petitioners asserted a different claim [A254, 269]:

> [P]etitioners [in Kettaneh] allege that because [CSI] did not exhaust its administrative remedies provided by 74-711, claiming that [CSI] failed to complete the review process before the LPC, Petitioners contend that the BSA should not have entertained the application, since [CSI] is asserting the same landmark hardships and economic need inherent in a 74-11 application.
>
> * * *
>
> [P]etitioners [in Kettaneh] contend that prior to seeking a variance from the BSA, [CSI] was required to submit an application to the LPC for a special permit under Zoning Resolution 74-711, and that its failure to do so precludes is application to the BSA for a variance.

Contrary to the Supreme Court's apparent misapprehension, Appellants additionally argued BSA lacked any right to consider the landmarked status of the Synagogue structure, not because it failed to exhaust its remedies before CPC, but because the Legislature granted the right to award Zoning Resolution § 74-711 relief solely to CPC, not BSA. *See, e.g.*, Windsor Plaza Co. *v.* Deutsch, 110 A.D.2d 531 (1st Dep't), *aff'd*, 66 N.Y.2d 874 (1985).

B. BSA Illegally Usurped The Jurisdiction of LPC

As Appellants also argued, relief arising from landmarking is available under the Landmarks Law, itself, which specifically provides remedies when a landmarked structure creates hardships for a property owner. Charter,

Ch. 74, § 3021; Penn Central Transportation Co. *v.* New York City, 438 U.S. 104 (1978).

Neither the Judgment nor the Kettaneh Judgment addressed this.

No law, rule or regulation permits BSA to grant a variance due to landmark status of a property.

Since the Resolution was expressly premised on the location of the landmarked CSI Synagogue, it lacked legal basis and should have been annulled. *See generally*, Foy *v.* Schechter, 1 N.Y.2d 604, 612 (1956).

Point III

BSA Applied Unprecedented Standards In Granting CSI's Application

A. BSA Improperly Relied Upon CSI's Claimed Programmatic Needs In Granting Variances To Be Used Solely For Income Generation

As previously explained, the great bulk of the variances sought and obtained by CSI were to permit it to construct the Luxury Condominium Development and to sell the apartments to wealthy individuals.

CSI argued that it needed to undertake this project solely to produce income to fund the construction of the New Building and its other activities [A280, 295, 300].

BSA's Resolution conceded that this was not a legitimate basis for a variance [A280]:

> New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization [even where there is] an intent to use the revenue to support a school or worship space.

BSA then created a new test for determining mixed purpose variance applications by considering the Luxury Condominium Development separately from the Synagogue Annex portion of the New Building to satisfy the requirements for a variance [A277] ("[T]he Board subjected this application to the standard of review required under ZR § 72-21 for the discrete community facility and residential uses, respectively. . . notwithstanding [the residential development's sponsorship by a not-for-profit religious institution]").

BSA, itself, previously rejected such a formula in connection with another not-for-profit religious institution. In Yeshiva Imrei Chaim Viznitz, Calendar No. 290-05-BZ, a Jewish religious school sought a variance to operate a catering establishment to serve its religious community and to generate income

to support its school and synagogue. As noted by BSA, in rejecting the application [p. 5]:

> [W]ere [BSA] to adopt Applicant's position and accept income generation as a legitimate programmatic need sufficient to sustain a variance, then any religious institution could ask the Board for a commercial use variance in order to fund its schools, worship spaces, or other legitimate accessory uses. . . .

See also, BSA decision in 739 East New York Avenue, Brooklyn, BSA Calendar No. 194-03-BZ [p. 2], discussed in 290-05-BZ.

BSA's conclusion in Yeshiva Imrei Chaim Viznitz applies equally here. Since BSA did not establish any basis for departing from its own prior determinations, the trial court should have found the Resolution invalid as a matter of law. *See, e.g.*, Cornell University *v.* Bagnardi, 68 N.Y.2d 583 (1986) (zoning board determination was improper where board applied wrong legal standard or criteria to determination).

B. BSA Was Not Permitted To Ignore Its Own Precedent

In permitting CSI to violate multiple zoning restrictions and construct the five floor Luxury Condominium Development on top of, and through, the Synagogue Annex, BSA's Resolution violated BSA's own precedents, described above.

As held by the Court of Appeals in Knight *v.* Amelkin, 68 N.Y.2d 975, 977 (1986):

> We have recently held that "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious" *(Matter of Field Delivery Serv. [Roberts]*, 66 N.Y.2d 516, 517). Inasmuch as a zoning board of appeals performs a quasi-judicial function when considering applications for variances and special exceptions (see, *Matter of Cowan v Kern*, 41 NY2d 591, 598-599, *rearg denied* 42 NY2d 910; *Holy Spirit Assn. v Rosenfeld*, 91 AD2d 190, *lv denied* 63 NY2d 603), and completely lacks legislative power" (2 Anderson, New York Zoning Law and Practice § 23,59, at 251; 6 Rohan, Zoning and Land Use Controls § 43.01 [2] [b], at 43-8 – 43-9), a zoning board of appeals must comply with the rule of the *Field* case.

See also, Lyublinskiy *v.* Srinivasan, 65 A.D.2d 1237 (2d Dep't 2009); Menachem Realty, Inc. *v.* Srinivasan, 60 A.D.2d 854 (2d Dep't 2009).

The Supreme Court's Kettaneh Judgment discussed the five part test under Zoning Resolution § 72-21 [A256 - 268], but did not offer any justification for BSA's substituted standard, merely reciting that [A257]:

> The BSA separated its analysis of the first finding into two parts: the community facility portion of the Project and the residential portion of the Project. This separation was necessitated by the fact that the Congregation is not accorded the deference as a non-profit for the residential portion of the Project.

Neither the Kettaneh Judgment nor the Judgment here provide any legal authority for this new non-statutory standard.

C. BSA Erred As A Matter of Law In Applying The Wrong Legal Standard In Finding An Inability To Realize A Reasonable Return

As acknowledged by BSA in its Resolution, a not-for-profit institution is not required to establish an inability to achieve reasonable financial return to obtain a variance [A282]:

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

Conversely, the inability to realize reasonable return does not warrant the issuance of a variance for a not-for-profit institution. *See, e.g.,* Pine Knolls Alliance Church *v.* Zoning Board of Appeals, 5 N.Y.3d 407, 804 N.Y.S.2d 708 (2005) (examining programmatic needs of church in determining special permit request to expand for these purposes); Society for Ethical Culture in the City of New York *v.* Spatt, 51 N.Y.2d 449 (1980) (noting, in the landmark regulation context, that "because charitable organizations are not created for financial return in the same sense as private businesses, for them the standard is [whether they are able to carry] out [their] charitable purpose").

In separately analyzing the revenue generating potential of the Luxury Condominium Development, but not doing so with respect to the

Synagogue Annex, BSA created separate tests for the same building. The proper inquiry for a not-for-profit applicant is whether "unique physical conditions" create a hardship impairing its ability to meet its programmatic needs, not whether it can make a profit on a speculative real estate venture unrelated to those programmatic needs. *See*, Pine Knolls, *supra* (examining programmatic, and not economic, needs of religious institution in determining special permit request for expansion for non-profit purposes); Foster *v.* Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981) (applying reasonable return test to variance request for property owned by school, but leased to commercial entity).

By limiting the inquiry to whether a portion of an as-of-right development would have been capable of yielding a reasonable return, BSA skewed the calculation creating a new test standard not permitted by the Zoning Resolution. *See*, Citizens for Ghent, Inc. *v.* Zoning Board of Appeals of Town of Ghent, 175 A.D.2d 528 (3rd Dep't 1991) (since appraisal report provided dollars and cents evaluation of only a portion of property, there was no proof that the entire property could not allow a reasonable return); Concerned Residents of New Lebanon *v.* Zoning Board of Appeals of Town of New Lebanon, 222 A.D.2d 773 (3rd Dep't 1995) (rate of return analysis limited to leasehold portion of property of owner was deficient).

D. BSA's Flawed Conclusion That Seven Major Variances Were The Minimum Necessary

Zoning Resolution § 72-21(e) (one of the five requirements for a variance) directs that any variance granted be "the minimum necessary to afford relief."

CSI claimed, and BSA accepted, that the seven variances granted to allow CSI to construct the five floor Luxury Condominium Development on top of the four floor Synagogue Annex was the minimum necessary to alleviate hardship to CSI.

Consistent with its conclusion that the Luxury Condominium Development was not required to meet CSI's programmatic needs, BSA should have rejected it. By BSA's own calculations, this would add over 2,000 square feet of space within the Synagogue Annex otherwise required solely for the Luxury Condominium Development (approx 1,018 square feet of first floor lobby and elevator space, approximately 325 square feet of elevator, stair and core building space on each of the second, third and fourth floors, and an undefined amount of cellar level mechanical space and accessory storage space [A280]).

The Luxury Condominium Development was not necessary for CSI to meet its programmatic needs. Had it been eliminated, the New Building would have been materially smaller.

It does not take an expert zoning legal analysis to understand this. Even a child would comprehend that the Luxury Condominium Development was not essential to satisfy CSI's programmatic needs. Thus, the variances granted to construct it were not the minimum necessary.

As explained by the Court of Appeals:

> Absent a uniform and rigorous standard, it is apparent that even a well-intentioned zoning board by piecemeal exemption which ultimately changes the character of the neighborhood * * * may create far greater hardships than that which a variance may alleviate. Unjustified variances likewise may destroy or diminish the value of nearby property and adversely affect those who obtained residences in reliance upon the design of the zoning ordinance.

Village Board of the Village of Fayetteville *v*. Jarrold, 53 N.Y.2d 254, 260, 440 N.Y.2d 908, 911 (1981).

While the Supreme Court acknowledged the lack fo support for this and other bases of the Resolution, it apparently felt compelled to defer to BSA's judgment.

As demonstrated, the Supreme Court's deference was neither justified nor legally required.

CONCLUSION

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

Dated: New York, New York
November 5, 2010

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Printing Specifications Statement

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 7,994 words counted by the word-processing program.

Dated: New York, New York
November 5, 2010

David Rosenberg

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION AND THOMAS HANSEN,	**INDEX NO. 650354/08**
Petitioners,	
-against-	**PRE-ARGUMENT STATEMENT**
CITY OF NEW YORK BOARDS OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,	
Respondents.	

Petitioners by their attorneys Marcus Rosenberg & Diamond LLP, as their Pre-Argument Statement, state as follows:

1. The title of this action is as set forth in the caption above.

2. The full name of the original parties is set forth above.

3. Counsel for appellants is:

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4. Counsel for respondents are:

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5. This appeal is taken from a decision, order and judgment of the Honorable Joan B. Lobis dated August 4, 2009, and entered October 6, 2009 in the office of the Clerk of the Court, Supreme Court of the State of New York, County of New York.

6. The underlying action seeks to annul and vacate the New York Boards of Standards and Appeals' determination and for other relief.

7. Appellant seeks reversal because, inter alia, the Court erred in dismissing the petition, and failing to annul and vacate BSA's determination granted to the Congregation Shearith Israel.

8. The only related action pending is Nizam Peter Kettaneh and Howard Lepow 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, which was also before the Honorable Joan B. Lobis, which resulted in a decision, order and judgment, dated July 10, 2009. Petitioners in that case have served a notice of appeal to the Court.

Dated: New York, New York
October 20, 2009

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

To be argued by
RONALD E. STERNBERG

NEW YORK SUPREME COURT
APPELLATE DIVISION : FIRST DEPARTMENT

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

Petitioners-Appellants,

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

-against-

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION,

Respondents-Respondents,

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

Respondent,

and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Respondent-Respondent.

MUNICIPAL RESPONDENTS' BRIEF

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January 13, 2011

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NEW YORK SUPREME COURT
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LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

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-against-

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Respondents-Respondents,

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

Respondent,

and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,

Respondent-Respondent.

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MUNICIPAL RESPONDENTS' BRIEF

PRELIMINARY STATEMENT

In this article 78 proceeding to annul a variance granted by respondent Board of Standards and Appeals ("BSA" or "the Board") to respondent owner, Congregation Shearith Israel ("Congregation"), petitioners appeal from an order and judgment

(one paper) of the Supreme Court, New York County (Lobis, J.), entered October 6, 2009, that confirmed the BSA's determination "in all respects," denied the application, and dismissed the petition (A7-A13).[1] Municipal respondents contend that the Court below correctly determined that "[p]etitioners have failed to demonstrate that the BSA acted illegally and without legal authority in considering the Congregation's application" (A13). For the reasons stated herein and in the municipal respondents' brief filed in the companion appeal,[2] the order and judgment (one paper) appealed from should be affirmed.

QUESTION PRESENTED

Whether the Court below correctly determined that the BSA had jurisdiction to consider the Congregation's application and did not otherwise proceed illegally.

STATEMENT OF FACTS

In order to avoid unnecessary repetition, the Court is respectfully referred to the Statement of Facts in the brief filed by this office on behalf of municipal respondents-respondents on the companion appeal.

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

[2] *Kettaneh v. Board of Standards and Appeals of the City of New York,* index no. 113227/08.

ARGUMENT

THE COURT BELOW CORRECTLY DETERMINED THAT PURSUANT TO NEW YORK CITY CHARTER, SECTION 666(5), THE BSA HAD JURISDICTION TO CONSIDER THE CONGREGATION'S VARIANCE APPLICATION.

Petitioners argue that the "BSA lacked jurisdiction to entertain [the Congregation's] Application because it was not based upon an appeal from a determination of either of the City officials specified in [New York City] Charter § 666" (Pets' Br., at 13). Petitioners' contention reflects an imperfect understanding of the BSA's jurisdiction as provided in section 666 of the Charter, and as explained by the BSA in its resolution herein (A275n.2).

As section 666 explicitly provides, the BSA has both appellate and original jurisdiction. Thus, the BSA has the power, *inter alia*, "[t]o hear and decide appeals from and review ... any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings." Charter § 666(6)(a); *see, e.g., Matter of New York Botanical Garden v. Board of Standards and Appeals of the City of New York,* 91 NY2d 413 (1998)(opponent of a building permit issued by the Department of Buildings ["DOB"] appealed to the BSA).

It 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. However, as such jurisdiction was neither invoked nor exercised in the instant case, such issue need not be determined, and municipal respondents express no opinion in that regard.

Petitioners' contention that the BSA "lacks original jurisdiction" (Pets' Br., at 28) is directly contradicted by section 666(5) of the Charter, that explicitly provides that the BSA "shall have the power ... [t]o determine and vary the application of the zoning resolution." Thus, as occurred herein, a party that is denied a building permit on the ground that the application does not conform to the Zoning Resolution may seek a variance of the Resolution from the BSA, invoking the Board's original jurisdiction under section 666(5).[3]

While, by its terms, the Charter provides that an appeal to the BSA shall be from a determination of the Commissioner or an authorized borough superintendent (§

[3] The distinction is clear. A party that believes that the DOB erred, and that it is entitled to a building permit, may appeal the DOB's determination to the BSA. Or, as was the case in *Botanical Garden,* a party that objects to the granting of the permit may appeal to the BSA. On the other hand, a party that recognizes that a permit was correctly denied may seek to vary the Zoning Resolution by invoking the BSA's original jurisdiction to do just that.

666[6][a]), there is no such stipulation in subsection 5, that states only that the BSA is empowered to "vary the application of the zoning resolution." It follows that the BSA herein reasonably interpreted the Charter as providing that a variance application "does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner" (A275n.2).

This conclusion is not altered by the BSA's internal policy that it "'cannot grant a variance ... to any property owner who has not first sought a proper permit or approval from an enforcement agency'" (Pets' Br., at 27). Administrative convenience suggests the appropriateness of not considering a variance unless it is apparent why the variance is necessary. In the instant case, such was clear - DOB issued explicit objections to the Congregation's application. The BSA thus had a basis upon which to act. The fact that the objections may not have been signed as may be required in a different situation is, as the BSA rationally concluded, irrelevant.

The Court below also correctly rejected petitioners' argument that the BSA's jurisdiction was "defeat[ed]" because "the plans that were presented to and rejected by the DOB were not the same as the plans that were presented to the BSA" [A12]. The Court below noted that while the plans submitted to the BSA were not identical to the first plans submitted to the DOB, the

"BSA Resolution reflects that the [Congregation's] revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight [of the DOB's original] objections" (A13; see, A275n.1). "There is no indication in the record," the Court below appropriately concluded, "that the Congregation, bypassed the DOB in any way" (A13).

Finally, as summarized by the Court below, plan changes are a recognized part of the variance process (*id.*):

> "Moreover, as set forth more fully in the *Kettaneh* decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the *Kettaneh* decision notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria [*sic*] that the variance is the minimum necessary, which is the fifth required finding under ZR § 72-21."

As noted by the Court below, petitioners' counsel agreed that "'the rest of the issues are probably encompassed in [*Kettaneh's]* petition'" (A9). Municipal respondents otherwise rely upon, and respectfully refer this Court to, their brief filed on the companion *Kettaneh* appeal.

CONCLUSION

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

Dated: New York, New York
January 13, 2011

Respectfully submitted,

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_____
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To Be Argued By:
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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.

BRIEF FOR RESPONDENT-RESPONDENT CONGREGATION SHEARITH ISRAEL

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PRELIMINARY STATEMENT

Respondent Congregation Shearith Israel (the "Congregation") respectfully submits this brief in opposition to the appeal of petitioners Landmark West! Inc., 91 Central Park West Corp., and Thomas Hansen (the "Petitioners"). In a verified, second amended petition filed under Article 78 of the CPLR (the "Petition"), Petitioners sought to block the Congregation's plan to preserve itself by constructing a new community house, topped by a few residential floors, at 8 West 70th Street in Manhattan, next to the Congregation's historic Spanish and Portuguese Synagogue. As found by Supreme Court, New York County (Lobis, J.), below, the unanimous decision of respondent Board of Standards and Appeals of the City of New York (the "BSA") is neither arbitrary nor capricious. This Court should affirm the lower court's decision denying the petition.

This Court has ordered this appeal heard with the appeal in *Kettaneh v. Bd. of Standards and Appeals of the City of New York* (N.Y. Co. Clerk's Index No. 113227/08) ("*Kettaneh*"), another Article 78 challenge to the same BSA resolution. To minimize repetition, this brief contains cross-references to the Congregation's brief in *Kettaneh*. Accordingly, it will facilitate the Court's understanding if our brief in *Kettaneh* is reviewed by the Court before it reviews this brief.

Under Section 72-21 of the Zoning Resolution, respondent Board of Standards and Appeals of the City of New York (the "BSA") can grant a property

owner a variance from zoning restrictions by making five findings of fact (one of which is inapplicable to not-for-profit organizations, such as the Congregation). As is documented in the voluminous administrative record, the BSA held four hearings (on November 27, 2007, February 12, 2008, April 15, 2008, and June 24, 2008; *see* R 1726-1813, 3654-3758, 4462-4515, 4937-4974)[1], studied the issue for fifteen months, credited the testimony of the Congregation's Rabbi (R. 1736-39), education director (R 1739-42), architects (R 1733-36), financial experts (R 3669-79, 4463-83) and counsel, and then explicitly made the factual findings referenced in the statute in its unanimous resolution, dated August 26, 2008, granting the Congregation the zoning variance (the "Resolution").

Petitioners are (i) challenging the BSA's assertion of jurisdiction over the Congregation's application for a zoning variance, and (ii) disputing three of the BSA's five statutory factual findings. Petitioners lack standing to mount these challenges. (*See* Point I.) Moreover, even if they had standing, it would be appropriate to affirm the lower court's decision given that the BSA had a rational basis to (i) assert jurisdiction to issue the variance (*see* Point II(B)(1)), and (ii) make the statutory findings (*see* Point II(B)(2)). The lower court's decision denying the Petition should be affirmed.

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[1] References to "R __" are to the administrative record filed by the BSA below. References to "A__" are to Petitioners' appendix. "BSA Res ¶ __" refers to a copy of the BSA Resolution that Petitioners below annotated with paragraph numbering. The copy of the resolution provided by Petitioners in their appendix contains no such numbering. (*See* A275.)

The bulk of Petitioners' brief is devoted to their meritless challenge to the BSA's broad jurisdiction. Petitioners do not (and cannot) deny that the BSA is authorized to issue variances under Section 668 of the New York City Charter regardless of whether there are technical defects in the property owner's application to the Department of Buildings ("DOB") or in the DOB's objections to that application. While Petitioners contend that the only provision that vests the BSA with jurisdiction is Section 666(6) of the New York City Charter, Section 666(5) of the Charter, another jurisdictional provision, explicitly authorizes the BSA to "vary the application of the zoning resolution as may be provided in such resolution and ***pursuant to section six hundred sixty-eight***." N.Y.C. Charter § 666(5) (emphasis added). In any event, even if Petitioners were correct in asserting that the only provision vesting the BSA with jurisdiction were Section 666(5), their jurisdictional challenge would fail, since the BSA had a rational basis for finding that section's requirements satisfied here.

The remainder of Petitioners' brief consists of equally meritless attacks on three of the BSA's factual findings. A BSA finding, however, must "'be sustained if it has a rational basis and is supported by substantial evidence.'" *See Matter of SoHo Alliance v. N.Y. City Bd. of Standards & Appeals*, 95 N.Y.2d 437, 440, 718 N.Y.S.2d 261, 262, 741 N.E.2d 106, 108 (2000). Here, the findings in the BSA's Resolution are supported by an extensive administrative record – almost 6,000

pages in eleven volumes.

The BSA's determination is neither arbitrary nor capricious. The lower court's decision should be affirmed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Do Petitioners have standing to challenge the BSA's zoning variance where the Petition is devoid of any substantive allegation that the variance will affect them in any way?

2. Did the lower court properly find that the BSA's assumption of jurisdiction over the Congregation's application for a variance pursuant to Section 666 of the New York City Charter was rational?

3. Did the lower court properly find that the BSA's grant of a variance was neither arbitrary nor capricious where, in its Resolution, the BSA made each of the five factual findings referenced in Section 72-21 of the New York City Zoning Resolution and each was supported by an extensive administrative record?

COUNTER-STATEMENT OF THE FACTS

Much of the factual and procedural history necessary to understand the BSA's Resolution is set forth in the Congregation's *Kettaneh* brief. We focus here on the lower court's disposition of Petitioners' particular challenges.

As the lower court explained, Petitioners raised two challenges to the BSA's jurisdiction. Petitioners first claimed that the plans that the Congregation

submitted to the BSA were not "'passed on' by the DOB in the [manner] required by [§ 666(6)(a) of] the City Charter" because they were purportedly signed by the wrong civil servant. (A10-11.) Petitioners further claimed that because "the plan submitted to the BSA was not identical to the first plan submitted to the BSA," the BSA lacked jurisdiction to grant the variance. (A12-13.) The lower court rejected these challenges and dismissed the Petition. (A12, A13.)

As a threshold matter, the lower court rejected the Congregation's challenge to Petitioners' standing. It stated that, since "Thomas Hansen, the individual property owner, and 91 [Central Park West] are in close proximity to the Property, they have standing. Accordingly, [P]etitioners collectively have standing. This court need not reach the issue of whether Landmark West!, as an organization, has standing." (A10.)

The lower court then turned to Petitioners' first attack on the BSA's jurisdiction, and upheld the BSA's assertion of jurisdiction as rational. The lower court explained that City Charter § 666 grants the BSA jurisdiction in several ways. Although, as Petitioners asserted, Section 666(6)(a) gives the BSA jurisdiction to decide appeals from the DOB, the lower court agreed with the BSA that Section 666(5)[2] also grants the BSA jurisdiction "[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and

[2] When it quoted § 666(5), the lower court inadvertently stated that it was quoting § 665.

pursuant to section six hundred sixty-eight." (A11.) The court upheld as rational the BSA's holding that "a review under § 668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner." (A11-12.)

The lower court next rejected Petitioners' assertion that, because the plan submitted to the BSA was slightly different from to the first plan submitted to the DOB, the BSA lacked jurisdiction. (A12-13.) The lower court explained that the Congregation had actually submitted successive applications to the DOB. (A12.) The first was denied, with the DOB citing eight objections. (A12.) After the application was revised, the DOB issued a second denial, which eliminated one of the eight objections. (A12.) It was the second denial, the lower court found, that formed the basis for the variance application. (A12.) Having set forth this procedural history, the lower court had little trouble rejecting Petitioners' claim:

> Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB . . . , the BSA Resolution reflects that the revised plan was reviewed by the DOB. . . . There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the *Kettaneh* decisions, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the *Kettaneh* decision notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur overtime through the BSA's review process in an effort to insure that an applicant is

> meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required showing under [Zoning Resolution] § 72-21.

(A13.)

The lower court also rejected Petitioners' challenges to (i) the BSA's purported consideration of the "landmark status" of the historic Synagogue, (ii) the BSA's finding that the Congregation would be unable to earn a reasonable return from an as-of-right development, and (iii) the BSA's finding that the variances granted were the minimum necessary. (A259, A261-265, A268; *Landmark* Memorandum of Decision on Motion to Reargue at 1-2.) The Congregation's brief in the *Kettaneh* appeal addresses the lower court's conclusions that the BSA's factual findings were rational.

After filing an appeal with this Court, Petitioners also filed a motion to reargue with the lower court. (*Landmark* Memorandum of Decision on Motion to Reargue at 1.) The lower court denied that motion, along with a motion by the *Kettaneh* petitioners to intervene in this case. (*Id.*)

ARGUMENT

I. PETITIONERS LACK STANDING TO CHALLENGE THE BSA RESOLUTION

In an effort to establish standing, the Petition included a few conclusory remarks about the three Petitioners. The Petition alleged that Petitioner Landmark West! Inc. is a not-for-profit organization that protects the "historic architecture

and development patterns of the Upper West Side." (A128 ¶ 8.) It alleged that the two remaining Petitioners are owners of a building (91 Central Park West, on the corner of West 69th Street), around the corner from the West 70th property at issue (but fairly distant from the corner of the property being developed). (A128-29 ¶¶ 11, 12.) The Petition asserted, with no further elaboration, that Petitioners are "within a zone immediately and directly impacted by the New Building" (A131 ¶ 24.) and that they "will experience a reduction of the light, air and convenience of access" as a result of the issuance of the variance (A131 ¶ 25.) Nowhere else in the Petition was there any allegation about "light, air [or] access" or any other information about how Petitioners are in the purportedly impacted "zone." The Petition's "vague, conclusory and unsubstantiated allegations" are insufficient to establish standing. *See All Way East Fourth St. Block Ass'n v. Ryan-NENA Community Health*, 30 A.D.3d 182, 182, 817 N.Y.S.2d 14, 14 (1st Dep't 2006) .

To establish standing, a petitioner must show that the petitioner will suffer injuries of the type that the statute (here, the Zoning Resolution) is designed to protect and that those alleged injuries are "specific to petitioner" and not "general concerns shared by all the residents of the area." *Buerger v. Town of Grafton*, 235 A.D.2d 984-85, 652 N.Y.S.2d 880, 881-82 (3d Dep't 1997). Thus, in *Buerger*, the Court denied standing to a neighbor "within 600 feet" of an affected site who was a member of a property association that owned 400 acres of land contiguous to the

development property since the flood damage, forest habitat degradation, and lake despoliation complained of, while "serious concerns," were "shared by all residents of the area," and thus insufficient to support standing. *Id.*; *see also Soc'y of the Plastics Indus. Inc. v. County of Suffolk*, 77 N.Y.2d 761, 774, 570 N.Y.S.2d 778, 785, 573 N.E.2d 1034, 1041 (1991) ("In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large."); *Matter of City of Plattsburgh v. Mannix*, 77 A.D.2d 114, 116, 432 N.Y.S.2d 910, 912 (3d Dep't 1980) (holding that petitioner lacked the necessary standing to challenge the issuance of a variance because it failed to demonstrate how its personal or property rights would be directly and specifically affected apart from any damage suffered by the public at large).

The standing test for an organization is even higher. *See Soc'y of the Plastics Indus.*, 77 N.Y.2d at 775, 570 N.Y.S.2d at 787, 573 N.E.2d at 1043. As set forth in *Soc'y of the Plastics*, an organization has standing only if three requirements are satisfied. First, as a petitioner, Landmark West! must demonstrate that "one or more of its members [has] standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent." *Id.* Second, Landmark West! "must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate

representative of those interests." *Id.* Lastly, "it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members." *Id.*; *see also Soc'y of the Plastics Indus.*, 77 N.Y. at 775, 570 N.Y.S.2d at 786, 573 N.E.2d at 1042 (no standing found); *see also N.Y. City Coalition for the Preservation of Gardens v. Giuliani*, 666 N.Y.S.2d 918, 246 A.D.2d 399 (1st Dep't 1998) (holding that an organization was without standing to bring action to enjoin construction).

The Petitioners here cannot meet those tests. The Petition is devoid of any substantive allegation that the variance will block Petitioners' windows, affect their views, affect their light, or limit their ability to enter their buildings. Petitioners can make no such claims and, instead, focus on picayune issues about whether the right official signed the DOB objection sheet and whether there are irrelevant distinctions between the plans before the DOB and BSA. Indeed, as-of-right developments would have greater impacts on the supposed "neighbors," Petitioners 91 Central Park West Corporation and Thomas Hansen, than the variance at issue. (*See, e.g.,* R. 4664; A278.)

Furthermore, Landmark West! makes no assertions regarding the impact of the variance on its members. Instead, the Article 78 Petition merely asserted that Landmark West! works with "individuals and grassroots community organizations to protect the historic architecture and development patters of the Upper West Side

and to improve and maintain the community for all of its members." (A128 ¶8.) Indeed, the only allegations that even remotely relate to Landmark West's organizational standing were contained in an affidavit from Kate Wood, Landmark West's executive director. Specifically, Wood claimed that several of Landmark West's "contributing supporters" "reside and own property (or shares in a cooperative apartment corporation which owns property) in buildings immediately adjacent to the development site." (A237-238 ¶2.) Wood further claimed that a sizable number of "contributing supporters" live on the same block as the development site. (A238 ¶3.) Conspicuously absent from this affidavit was any statement regarding Landmark West's legal members, as opposed to "contributors" and "supporters." Indeed, if Landmark West! had any members that purportedly were affected by this variance, it stands to reason that Wood would have referred to them instead of "contributing supporters." Accordingly, these allegations are wholly insufficient to establish Landmark West's standing.

Furthermore, Petitioners' claims, which focus on purported defects in the BSA's jurisdiction, the BSA's purportedly excessive concern for landmarks and the BSA's analysis of finances, are not germane to the organizational purposes of Landmark West! While Landmark West! purportedly has an interest in all Upper West Side landmarks, it can claim no unique interest in this variance, as it will

protect, not undermine, a significant, landmarked Synagogue. Petitioners clearly lack standing to challenge the BSA Resolution.

II. PETITIONERS' CHALLENGES ARE MERITLESS IN ANY EVENT

A. This Court's Standard of Review is Exceedingly Deferential

The New York Court of Appeals has explained that, in general, under the New York City Zoning Resolution, the BSA may grant a variance if it makes five factual findings: "(a) because of 'unique physical conditions' of the property, conforming uses would impose 'practical difficulties or unnecessary hardship;' (b) also due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property; (c) the proposed variances would 'not alter the essential character of the neighborhood or district;' (d) the owner did not create the practical difficulties or unnecessary hardship; and (e) only the 'minimum variance necessary to afford relief' is sought." *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (quoting N.Y. City Zoning Resolution § 72-21).

Once the BSA makes these five findings, the judiciary's role is extraordinarily limited. The New York Court of Appeals has held that a 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." *SoHo Alliance*, 95 N.Y.2d at 440, 718

N.Y.S.2d at 262, 741 N.E.2d at 108.

Petitioners contend that the lower court should not have deferred to the BSA's conclusions as to whether it had jurisdiction over the Congregation's request for a variance. Yet, there is no "jurisdiction" exception to the administrative law principle that agencies are entitled to deference. *See Matter of Korn v. Batista*, 131 Misc. 2d 196, 199, 499 N.Y.S.2d 325, 327 (Sup. Ct. N.Y. Co.) (deferring to agency conclusion that particular types of applications fall within its jurisdiction), *aff'd*, 123 A.D.2d 526, 506 N.Y.S.2d 656 (1st Dep't 1986); *Park Towers South Co. v. A-Lalan Imports, Inc.*, 103 Misc. 2d 565, 566, 430 N.Y.S.2d 188, 189 (App. Term 1st Dep't 1980) (deferring to agency interpretation of extent of its jurisdiction) (*per curiam*); *see also NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830, n.7, 104 S. Ct. 1505, 1510, n.7, 79 L. Ed. 2d 839, 848, n.7 (1984) ("Respondent argues that because 'the scope of the "concerted activities" clause in Section 7 is essentially a jurisdictional or legal question concerning the coverage of the Act,' we need not defer to the expertise of the Board. . . . We have never, however, held that such an exception [for issues of statutory jurisdiction] exists to the normal standard of review of Board interpretations of the Act; indeed, we have not hesitated to defer."). Petitioners cite cases holding that deference – as to jurisdictional or non-jurisdictional issues – is not appropriate where the statute in question is not a complex scheme with which the agency has developed great

expertise. (Petitioners' Br. at 17-18). Those cases focus on the clarity of the statute, *Teachers Ins. and Annuity Ass'n of America v. City of New York*, 82 N.Y.2d 35, 41-42, 603 N.Y.S.2d 399, 401-02, 623 N.E.2d 526, 528-29, or the absence of technical language or practices unique to the agency involved, *Matter of Raganella v. N.Y. City Civ. Serv. Comm'n,* 66 A.D.3d 441, 445-46, 886 N.Y.S.2d 681, 684-85 (1st Dep't 2009), not on jurisdiction. Moreover, the Court of Appeals has held that "the BSA's interpretation of the statute's terms must be 'given great weight and judicial deference' because the BSA is "'comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution,'" an obviously complex, if not Byzantine, statutory scheme. *Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418, 654 N.Y.S.2d 100, 104, 676 N.E.2d 862, 866 (1996); *Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599, 394 N.Y.S.2d 579, 584, 363 N.E.2d 305, 310 (1977) ("[R]esponsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. . . . It matters not whether, in close cases, a court would have, or should have, decided the matter differently."). Such deference is particularly important in this case since the BSA is familiar with what is "common practice"

and what is seen "all the time." (A632-33.)

B. The BSA's Decision Was Not Arbitrary or Capricious

1. The BSA's Assertion of Jurisdiction Was Rational

Petitioners claim that some sort of technical defect in the DOB's signing of its objections to the Congregation's application for a building permit and an irrelevant change in the Congregation's building plans divested the BSA of jurisdiction to issue a variance to the Congregation. (*See* Petitioners' Br. at 13.) This is nonsense. The BSA considered this issue and concluded that its broad jurisdiction over zoning matters was unfettered by the purported defects. This Court should defer to the BSA's construction of the Zoning Resolution in this regard. The BSA's finding that it had jurisdiction is plainly rational.

The BSA explicitly addressed the jurisdiction issue in footnote two of its Resolution, which states in full:

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

(A275 n.2; *see also* A275-277 (discussing plans).)

Even if Petitioners are correct that no deference should be accorded to the BSA's interpretation of Section 666 of the New York City Charter , their argument that Section 668 of the Charter (cited by the BSA in the paragraph quoted above) has no bearing on the BSA's jurisdiction misses the BSA's point. (Petitioners' Br. at 18-21.) The BSA did not assert jurisdiction solely pursuant to Section 668 – instead, the BSA had jurisdiction pursuant to Sections 666(5) *and* 668. That section provides, in pertinent part: "*Jurisdiction.* The Board shall have power . . . . 5. To determine and vary the application of the zoning resolution as may be provided in such resolution and *pursuant to section six hundred sixty-eight.*" N.Y.C. Charter § 666(5) (emphasis added). It plainly is apparent that that Section 666(5) provides a grant of jurisdiction to the BSA to vary the application of the zoning resolution independent of Section 666(6).[3] Accordingly, the BSA's conclusions that (1) Section 668 (through Section 666) empowers the BSA to grant variances and (2) Section 668 "does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner,"[4] are rational constructions of the Zoning Resolution. Indeed,

[3] Section 666(6) gives the BSA jurisdiction to hear and decide appeals from, *inter alia*, any decision of the commissioner of buildings or any bureau superintendent of buildings acting under a written delegation of power from the commissioner of buildings.

[4] Petitioners do not challenge this conclusion.

several courts have reached the same conclusion. *See, e.g., Highpoint Enters., Inc. v. Bd. of Estimate*, 67 A.D.2d 914, 916 (2d Dept. 1979) (noting that Section 666 (6)[5] gives BSA jurisdiction to "vary the application of the zoning resolution"); *Matter of William Israel's Farm Cooperative v. Board of Standards and Appeals*, 22 Misc. 3d 1105(A), *1 (Sup. Ct. N.Y. County Nov. 15, 2004) (unpublished opinion) (although the respondent apparently filed an application for a variance with the BSA without any review by either of the City officials listed in Section 666(6), the court stated: "The BSA has jurisdiction over applications for variances to the zoning resolution."); *Caprice Homes, Ltd., v. Bennett*, 148 Misc. 2d 503, 505-06 (Sup. Ct. N.Y. County 1989) (distinguishing between claims brought pursuant to Section 666(6) and claims pursuant to Section 666(7)[6]).

Petitioners, however, place great weight on Section 81-a(4) of Article 5-A of the General City Law, which provides:

> Hearing appeals. *Unless otherwise provided by local law or ordinance*, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination, made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the city.

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[5] At the time the *Highpoint Enterprises* decision was rendered, present day § 666(5) was codified at § 666(6).

[6] At the time the *Caprice Homes* decision was rendered, present day § 666(5) was codified at § 666(6) and present day § 666(6) was codified at § 666(7).

General City Law, Art. 5-A, § 81-a(4) (emphasis added). Yet, the New York City Charter *is* a "local law or ordinance" that "otherwise provide[s]." *See id.* Indeed, City Charter § 666(5) clearly vests the BSA with original jurisdiction to handle applications for variances.[7]

Petitioners also argue that, according to the BSA website, the BSA will not grant a variance to a property owner "who has not first sought a proper permit or approval from an enforcement agency." (Petitioners' Br. at 27.) Yet, even if an agency's website could constrict an agency's statutory jurisdiction (which it cannot), Petitioners jurisdictional attack would fail. Petitioners are not alleging that the Congregation failed to seek a permit from the Department of Buildings; they are claiming that the Congregation failed to submit the final plans and that DOB failed to select the correct signatory for its objections. (Petitioners' Br. at 13, 21.) Even assuming, *arguendo*, that the BSA website summary is binding, nothing

[7] By contrast, the cases cited on page 28 of the Petitioners' brief are inapposite the local zoning statutes in those cases, unlike New York City's Charter, expressly limited the jurisdiction of the agencies in question to appeals only. *See, e.g., Gaylord Disposal Service, Inc. v. Zoning Bd. of Appeals of Town of Kinderhook*, 175 A.D.2d 543, 544, 572 N.Y.S.2d 803, 804 (3d Dept. 1991) (jurisdiction of zoning board of appeals is "limited to the appellate jurisdiction specifically given to it by Town Law § 267 (2)."); *Barron v. Getnick*, 107 A.D.2d 1017, 1018, 486 N.Y.S.2d 528, 529 (4th Dep't 1985) (Town of Kirkland "statute clearly gives the Board of Appeals only appellate jurisdiction"); *Kaufman v. City of Glen Cove*, 180 Misc. 349, 356, 45 N.Y.S.2d 53, 58 (Sup. Ct. Nassau Co. 1943) (Glen Cove "Board of Appeals has been vested only with the appellate power of review"); *cf. Klingaman v. Miller*, 168 A.D.2d 856, 857, 564 N.Y.S.2d 526, 528 (3d Dep't 1990) (City of Troy Board of Appeals does not have solely appellate jurisdiction and "is expressly authorized to hear and decide requests for interpretations of the zoning ordinance").

in that website summary bars the BSA from issuing a variance in the alleged circumstances.

a. Petitioners' Complaint Regarding The Signatory To The DOB Objections Is Meritless

In any event, even if the BSA's jurisdiction is limited to claims brought pursuant to Section 666(6)(a) (which it is not), Petitioners' claim that the Notice of Objections was signed by the wrong official still fails. (Petitioners' Br. at14-15) Indeed, there are several independent flaws in Petitioners' logic.

First, the assertions contained in Petitioners' own brief are sufficient to vest the BSA with jurisdiction. Petitioners themselves assert that the DOB Notice of Objections was issued by "Kenneth Fladen, a 'provisional Administrative *Borough Superintendent.*'" (Petitioners Br. at pp. 14-15) (emphasis added) Because (1) Fladen was a Borough Superintendent and (2) Section 666(6)(a) permits the review of any decision or determination "of *any borough superintendent* of buildings acting under a written delegation of power from the commissioner of buildings," the BSA clearly had the authority to "hear and decide appeals" from his determination. (Emphasis added.) Indeed, the BSA's resolution itself states: "the decision of the Manhattan Borough Commissioner, dated August 28, 2007, acting on Department of Buildings Application No. 104250481, reads, in pertinent part . . . ." (A275) Thus, if, as Petitioners assert, Fladen signed the notices of objections, and if, as Petitioners assert, Fladen was a "borough superintendent," the

BSA clearly had the authority to "hear and decide appeals" from his determination. In light of this language, it was not unreasonable for the BSA to conclude that Fladen was acting under written authority from the Commissioner. Petitioners have pointed to no evidence to the contrary.

Second, Petitioners' factual assertions about the process before the DOB are not supported by the record. For example, the March 27, 2007 and August 28, 2007 DOB permit denials are both stamped "Boro Commissioner . . . denied." (A292, A507.) The BSA reasonably could have inferred that these permit denials were either signed by the Borough Commissioner or another authorized employee.

Third, at most, Petitioners' complaints about the DOB process bear on the DOB's decision to *deny* the Congregation a building permit. Petitioners did not file an Article 78 challenge to overturn the DOB denial nor did they name the DOB in this suit. Petitioners cannot challenge the DOB permit denials in this action.

Lastly, Petitioners do not claim that the DOB permit denials were erroneous. Indeed, Petitioners' position is that the DOB – regardless of the official or architectural plans involved – *correctly* concluded that the Congregation's plan would require a variance. It would make absolutely no sense to deprive the BSA of jurisdiction to grant a variance in such circumstances.

b. Petitioners' Complaint Regarding the Trivial Change in the Congregation's Plans is Meritless

Petitioners' contention that the BSA reviewed the wrong plans is equally meritless. (Petitioners' Br. at 26) Relying on their contention that the BSA only has appellate jurisdiction, Petitioners maintain that the BSA improperly reviewed plans that differed (in an irrelevant respect) from those submitted to the DOB. (Petitioners' Br. at 26) Even assuming that, the BSA's jurisdiction is purely appellate (and, as explained *supra*, it is not), the fact that the Congregation's plans naturally evolved over time does not divest the BSA of jurisdiction.

The BSA rationally concluded that the trivial change in plans did not divest it of jurisdiction. The record reflects that while the DOB's initial building permit denial included an eighth objection (based on the inclusion of space between buildings), the Congregation mooted the objection by removing the space from the design. Accordingly, the Borough Commissioner dropped the eighth objection and issued a new building permit denial (with seven objections). (R 348.) The record also reflects that the Congregation provided the BSA with "evidence that the DOB issued their current objections based on the current proposal before the BSA" (R. 308, 310) by submitting, among other things, (i) the revised plans (*i.e.*, without the space between the buildings), dated August 28, 2007, that the Congregation had submitted to the DOB (R. 402-19), and (ii) the Borough Commissioner's revised building-permit denial (with just seven objections), dated that same day (R. 348).

Petitioners filed an untimely administrative appeal of the Borough Commissioner's August 28, 2007 decision (R. 2511-12) but never followed-up with an Article 78 proceeding. The BSA, reasonably, accepted the Congregation's documentation and proceeded to consider the merits of the Congregation's application for a variance.[8] (*See* R. 512).

Even if the plans differed slightly, Petitioners have cited to no authority supporting its assertion that the BSA's jurisdiction was destroyed because the plans it considered slightly differed from those considered by the DOB. Indeed, none of the cases Petitioners cite on page 28 of their brief involved an applicant that submitted plans to a zoning board that differed from those submitted to a building-permit authority, let alone that involved plans that were revised to moot the objections of the permitting authority.[9] Nothing in Charter Section 666(6)(a) divests the BSA of jurisdiction where architectural plans submitted to the DOB are

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[8] Furthermore, contrary to Petitioners assertions on page 26 of their brief, it is clear that Community Board 7 did, in fact, review this application. BSA Res. ¶6.

[9] *See, e.g., McDonald's Corp. v. Kern*, 260 A.D.2d 578, 578, 688 N.Y.S.2d 613, 614 (2d Dep't 1999) (Board of Zoning Appeals improperly raised issue of zoning district boundary lines *sua sponte* and "upon its own inquiry" determined that issue de novo); *Gaylord Disposal Serv., Inc. v. Zoning Bd. of Appeals*, 175 A.D.2d 543, 545, 572 N.Y.S.2d 803, 804-05 (3d Dep't 1991) (Building Inspector sought advisory opinion from Zoning Board of Appeals); *Barron v. Getnick*, 107 A.D.2d 1017, 1017-1018, 486 N.Y.S.2d 528, 529 (4th Dep't 1985) (Zoning Board of Appeals, which only had jurisdiction to hear appeals from determination of Building Inspector, improperly considered application where petitioner filed no application with Building Inspector); *Kaufman v. Glen Cove*, 180 Misc. 349, 357-58, 45 N.Y.S.2d 53, 59-60 (Sup. Ct. Nassau County 1943) (Board of Appeals, which had appellate jurisdiction only, lacked jurisdiction where no application was filed with Building Inspector).

amended upon appeal to the BSA. Indeed, to the extent that the plans differed, they were modified to address one of the DOB's objections – a practice which, as the BSA explained, is common. (*See* A632-33 (Vice-Chair explaining that "that objection is not before us anymore because revised plans were filed and a new objection sheet was filed. It's a common practice. We see it all the time. I think you're seeing demons where none exist."). As the BSA Chair explained, the Congregation was only "requesting a waiver" with respect to the seven objections, and could ultimately be barred from building if the withdrawal of the eighth objection was erroneous: "If there's another objection that they did not identify for the Board, there's no waiver to that." (A631.) It is thus apparent that, as the BSA Vice Chair explained, this claim is "bogus" and lacking "any legal basis." (A632.) Because, as the BSA explained, such modifications are a common part of its unique practice, this Court should not second guess the BSA's conclusion that such modifications are not only permissible, but also preferable. *See Toys "R" Us*, 89 N.Y.2d at 418-19, 654 N.Y.S.2d at 104, 676 N.E.2d at 866 ("The BSA, comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution . . . . Consequently, *in questions relating to its expertise*, the BSA's interpretation of the statute's terms must be 'given great weight and judicial deference, so long as the interpretation is neither

irrational, unreasonable nor inconsistent with the governing statute.'") (emphasis added).

In sum, as the lower court explained, the BSA's conclusion was rational:

> Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB, the footnote in the BSA Resolution reflects that the revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight objections. There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the *Kettaneh* decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the *Kettaneh* decision notes that the BSA often has pre-application meetings with applications for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required finding under Z.R. § 72-21.

(A13.) Petitioners have failed to demonstrate any flaws with this analysis.

2. The BSA's "Five Findings" Were Rational

The BSA made each of the factual findings referenced in Section 72-21 of the New York City Zoning Resolution, referenced in *SoHo Alliance* (*See* BSA Res. ¶¶ 37-215). Each of the five findings is supported by evidence in the record:

- ***"Unique Physical Conditions," ZR § 72-21(a).*** Eighty-five paragraphs of the BSA's Resolution were devoted to the BSA's conclusion that "the unique physical conditions" of the site "create practical difficulties and unnecessary hardship in developing the site in strict compliance with the

applicable zoning regulations" the "required finding under ZR § 72-21(a)." (BSA Res. ¶ 122; *see id.* ¶¶ 37-122.) This finding is supported in the record. (*See, e.g.*, R. 39-43; 139; 319-320; 337-342; 1733-1735; 1739-1740; 1744-1745; 1751; 4565-4576; 4859-4861; 5147-5157; 5763.)

- ***No "Reasonable Return," ZR § 72-21(b).*** Twenty-five paragraphs of the BSA's Resolution addressed the BSA's finding 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." (BSA Res. ¶ 148; *see id.* ¶¶ 123-48.) The BSA's reasonable return finding is supported by the record. (*See, e.g.*, R. 133-161; 342-343; 567-568; 4576-4577; 5157-5159.) (As explained below, this finding, which should be viewed as an alternate ground for affirmance, was unnecessary because the Congregation is a not-for-profit organization. *See* Point II(B)(2)(b), below. The record supports the undisputed fact that the Congregation is a not-for-profit corporation. (*See, e.g.*, R. 43-44; 342; 567; 1729-1733; 4576; 4861-4862; 5763-5764.).)
- ***Neighborhood Character, ZR § 72-21(c).*** The BSA devoted fifty paragraphs of its Resolution to explaining its conclusion that "neither the proposed community facility use, nor the proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare." (BSA Res. ¶ 201; *see id.* ¶¶ 149-201.) This finding is fully supported by the record. (*See, e.g.*, R. 44-45; 121-130; 343-344; 3845-3846; 4577-4582; 4597-4635; 4917-4920; 5159-5164; 5764; 5767-5771.)
- ***No "Self-Created Hardship," ZR § 72-21(d).*** The BSA also explicitly found, in a four-paragraph discussion, that "the hardship herein was not created by the owner or by a predecessor in title." (BSA Res. ¶ 205; *see id.*

¶¶ 202-05.) This finding is supported by the record. (*See, e.g.*, R. 45-46; 344-345; 4582; 5764.)

- ***"Minimum Variance," ZR § 72-21(e).*** Finally, the BSA, in a ten-paragraph review of alternate scenarios – including modifications to the Congregation's proposal that the Congregation had already adopted at the BSA's request – concluded that "none" of the additional "lesser variance scenarios" would be appropriate, such that the variance granted was the "minimum" necessary. (BSA Res. ¶¶ 210-211; *see id.* ¶¶ 206-215.) This finding is supported by the record. (*See, e.g.*, R. 4582-4586; 5164-5167; 5765-5766; 5785.)

Petitioners challenge three of these five findings. Their challenges, which are addressed below, are meritless.

a. The BSA's Finding of "Unique Physical Conditions" Was Rational

Petitioners contend that the BSA based its finding, that the Congregation's property is burdened by unique physical conditions, on only two conditions (the obsolescence of existing structures and the landmarked status of the Synagogue), and that these conditions are not "physical conditions" within the meaning of the Zoning Resolution. (Petitioners' Br. at 29-30 & n.6.) In fact, the BSA based its finding on several conditions ignored by Petitioners, each of which independently warrants affirmance, In any event, the BSA rationally concluded that the presence of obsolescent structures and a historically and culturally important Synagogue are "physical conditions" that can be considered in granting a variance.

First, as a threshold matter, the BSA's "physical conditions" finding does not depend on the existence of obsolescent structures or on the landmarked status of the Synagogue. While Petitioners assert that the fact that the development site is located on a zoning lot that is divided by a zoning district boundary and is further constrained by the "sliver" law "were not the basis of the Resolution" (Petitioners' Br. at 30 n.6), the BSA, in fact, devoted more than 20 paragraphs of its Resolution to those conditions. (*See, e.g.*, BSA Res. ¶¶ 86-106, 122). Since Petitioners have not raised any challenges to the BSA's finding that these conditions were "unique physical conditions" justifying the variance, the lower court's decision may be affirmed on that basis alone. *Matter of Boland v. Town of Northampton*, 25 A.D.3d 848, 850, 807 N.Y.S.2d 205, 207 (3d Dep't 2006) ("As petitioner does not pursue his substantive challenges to the special use permit on appeal, these arguments are deemed abandoned.").

Second, the lack of merit in Petitioners' unsupported one-liner that the obsolescence of the physical structures on the Congregation's property cannot be "physical conditions" within the meaning of the Zoning Resolution (Petitioners' Br. at 30 n.6) offers a second, independent basis for affirming the lower court. The BSA, employing its expertise in applying New York City's complex Zoning Resolution and citing four court decisions, concluded that unique physical conditions "can refer to buildings" and that the "obsolescence of a building is well

established as a basis for a finding of uniqueness." (BSA Res. ¶ 76). Petitioners point to nothing irrational regarding this conclusion. Indeed, it is established that "unique physical conditions" refers to both land and buildings. *See UOB Realty (USA) Ltd. v. Chin*, 291 A.D.2d 248, 249, 736 N.Y.S.2d 874, 875 (1st Dep't 2002).

Third, contrary to Petitioners assertions, the Congregation did not assert, nor did the BSA find, that the landmarked *status* of the Synagogue constituted a "unique physical condition." It is the historical and cultural significance of the Synagogue, not the mere fact that the LPC has designated it as a landmark, that renders the dominating presence of the Synagogue on the property a "unique physical condition." Because the Congregation demonstrated that the vital importance of the Synagogue to the Congregation's mission renders it impossible to modify, the Congregation clearly satisfied the "unique physical conditions" finding. (*See, e.g.,* BSA Res. ¶108 ("because so much of the Zoning lot is occupied by a building that cannot be disturbed, only a relatively small portion of the site is available for development"); R. 4566 ("unique physical conditions" include "the presence of a unique, noncomplying, specialized building of significant cultural and religious importance occupying two-thirds of the Zoning Lot").)

Indeed, in light of the fact that the Congregation did not seek to alter the Synagogue, Petitioners' claim that the BSA's recognition of the Synagogue's

cultural and religious significance "usurped" the jurisdiction of the City Planning Commission ("CPC") and the LPC is meritless. The record belies that claim because it is undisputed that the Congregation never sought a variance to change the landmarked Synagogue and the BSA never authorized the Congregation to alter the landmark. Tellingly, Petitioners do not contend that the BSA lacks authority to grant a variance for a property *containing* a landmarked structure. Yet, that is all that occurred here: the BSA granted a variance for the part of the lot *not containing the Synagogue* because, *inter alia*, the remainder of the lot contains a Synagogue that may not be altered without impairing the Congregation's mission.

Lastly, Petitioners' arguments regarding Section 74-711 of the Zoning Resolution are meritless in any event. That section merely provides: "In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by the Landmarks Preservation Commission, the City Planning Commission may permit modification of the use and bulk regulations." Interpreting this section, both the BSA and the lower court found that an entity, whose property contains a landmarked building, may seek either a special permit from the LPC pursuant to Section 74-711 or a variance from the BSA pursuant to Section 72-21 of the Zoning Resolution. (A42.) This finding is consistent with the

BSA's other administrative decisions.[10] *See, e.g., Matter of 330 W. 86th St.* (BSA No. 280-09-A, July 13, 2010) (available at http://archive.citylaw.org/bsa/2010/07.13.10/280-09-A.doc) (noting that "a form of concurrent jurisdiction is evident" with "landmarks" and DOB); *see also Matter of 67 Vestry Tenants Ass'n v. Raab*, 172 Misc. 2d 214, 223-224, 658 N.Y.S. 2d 804, 811 (Sup. Ct. N.Y. Co. 1997) , ("LPC is not authorized to regulate matters ordinarily considered in the zoning process such as 'the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses'"). Because, as the lower court found, the BSA's construction of the Zoning Resolution was rational, it must be accorded substantial deference. *Toys "R" Us*, 89 N.Y.2d at 418-19, 654 N.Y.S.2d at 104, 676 N.E.2d at 866.

Even if no deference were warranted, no reading of Section 74-711 can support Petitioners' contention that the section vests the LPC or the CPC with

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[10] *Matter of 745 Fox St.* (BSA Res. No. 19-06-BZ May 2, 2006) (noting "existence of . . . historic structure on the site hinders as of right development . . . because of its landmark status") (available at http://archive.citylaw.org/bsa/2006/May%202,%202006/19-06-BZ.doc); *Matter of 135-35 Northern Blvd.* (BSA Res. No. 156-03-BZ Dec. 13, 2005) (considering costs "as a result of the need to protect the interior landmark") (available at http://archive.citylaw.org/bsa/2005/December%2023,%202005/156-03-BZ.doc); *Matter of 543/45 W. 110th St.* (BSA Res. No. 307-03-BZ July 13, 2004) ("lot's close proximity to a landmarked subway station" not common condition in area) (available at http://archive.citylaw.org/bsa/2004/July%2013,%202004/307-03-BZ.doc); *Matter of 400 Lennox Ave.* (BSA Res. No. 73-03-BZ Jan. 13, 2004) (finding site's "proximity to a designated landmark" a "unique physical condition") (available at http://archive.citylaw.org/bsa/2004/January%2013,%202004/73-03-BZ.doc); *Matter of 245 E. 17th St.* (BSA Res. No. 84-02-BZ June 11, 2002) (LPC's requirements "create[] a practical difficulty and unnecessary hardship for the Congregation" in meeting programmatic needs) (available at http://archive.citylaw.org/bsa/2002/84-02-BZ.doc).

exclusive jurisdiction to consider the impact of a landmarking designation on a property owner. At the very least, nothing in that section purports to divest the BSA of its authority under Section 72-21 of the Zoning Resolution to designate aspects of zoning lots as "unique physical conditions" under the Zoning Resolution. Nowhere does that statute suggest that once the LPC designates a structure as a landmark the BSA is divested of authority to grant a variance application that considers the presence and impact of that structure. *See e.g. E. 91st St. Neighbors to Pres. Landmarks, Inc. v. N.Y. City Bd. of Standards and Appeals*, 294 A.D.2d 126 (1st Dep't 2002) (upholding amendment of variance BSA granted for construction on lots containing landmarked buildings); Brief for Petitioner at 3, *E. 91st St. Neighbors to Pres. Landmarks, Inc. v. N.Y. City Bd. of Standards and Appeals*, 294 A.D.2d 126 (1st Dep't 2002) (No. 984), 2001 WL 36097225 (challenging amendment to variance BSA granted for construction on lots containing landmarked buildings); *Matter of 745 Fox St.* (BSA Res. No. 19-06-BZ May 2, 2006) (noting "existence of . . . historic structure on the site hinders as of right development . . . because of its landmark status") (available at http://archive.citylaw.org/bsa/2006/May%202,%202006/19-06-BZ.doc). Indeed, the contrary is the case: If the BSA considered a variance application for a lot containing a landmarked building and blinded itself to that building's presence,

then the BSA clearly would have abused its discretion. The BSA's decision was plainly rational.[11]

b. The BSA's Finding of "No Reasonable Return" Was Rational

Petitioners' challenge to the BSA's "no reasonable return" finding (BSA Res. ¶ 148) is also meritless. Petitioners contend that, in conducting its financial analysis, the BSA disregarded its own precedent by not forcing the Congregation to demonstrate a reasonable return with regard to the community facility. (Petitioners' Br. at 33-36.) Petitioners further claim that non-profit entities are not allowed to earn a reasonable return and thus must, instead, show a nexus between any variance application and its programmatic needs (even though the statute requires nothing of the kind). (*See* Petitioners' Br. at 37-38.) These challenges are

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[11] Petitioners argue that "a court should not find that the Legislature intended two separate agencies to exercise concurrent jurisdiction unless no other reading of the statute is possible." (Petitioners' Br. at 31, *citing Ardizzone v. Elliott*, 75 N.Y.2d 150, 157, 551 N.Y.S.2d 457, 461, 550 N.E.2d 906, 910 (1989)). This is inapposite. First, the BSA did not claim it had "concurrent jurisdiction" of the sort referenced in *Ardizzone*. The BSA did not claim it could issue a Section 74-711 "special permit"; at most, it suggested that it could account for the impact of the landmarked structure on the property. Moreover, Section 74-711 merely provides that the CPC "may permit modification of the use and bulk regulations" affecting landmarked buildings. If its drafters had wished to oust the BSA of its variance power where a Section 74-711 permit may be granted, it could have done so explicitly. *See N.Y. Pub. Interest Research Grp. Straphangers Campaign v. Reuter*, 293 A.D.2d 160, 164-165, 739 N.Y.S.2d 127, 130 (N.Y. App. Div. 1st Dep't 2002) (court must give effect to statute as written) . The BSA rationally concluded that its authority to address areas beyond the landmarked structure is not diminished by the LPC's designation of a landmark. *See Matter of 330 West 86th Street* (BSA No. 280-09-A, July 13, 2010) ("WHEREAS, the Board notes that *concurrent authority* may manifest as multiple agencies, whose approval is required for a single application, review different elements of the same application; this includes instances when, in the process of reviewing plans, DOB may be alerted to another agency's jurisdiction, as it is with *landmarks*, wetland, and flood hazard regulations *and thus a form of concurrent jurisdiction is evident.*") (emphasis added) (available at http://archive.citylaw.org/bsa/2010/ 07.13.10/280-09-A.doc).

nonsense and do not undermine the rationality of the BSA's finding.

As a threshold matter, as explained in Part II(B)(1) of the Congregation's *Kettaneh* brief, the Zoning Resolution explicitly exempts not-for-profit organizations, such as the Congregation, from the "no reasonable return" showing that would otherwise be needed to secure a variance. The lower court's dismissal of the Petition can be affirmed on this basis without considering Petitioners' contentions regarding the BSA's "no reasonable return" finding. In any event, as shown below, Petitioners' assertions are meritless.

Petitioners claim that the BSA's analysis in this case "created a new test for determining mixed purpose variance applications" and, thereby, departed from its prior decision in *Matter of Yeshiva Imrei Chaim Viznitz* (BSA Res. No. 290-05-BZ Jan. 9, 2007) (available at http://archive.citylaw.org/bsa/2007/January%209,%202007/290-05-BZ.doc). (*See* Petitioners' Br. at 33-36.) The BSA faithfully applied its precedent.

Petitioners' misreading of *Yeshiva Imrei* turns on a fundamental misapprehension of Sections 72-21(a) and (b) of the Zoning Resolution. Section 72-21(a) of the Zoning Resolution requires proof that "that 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 Resolution." A non-profit entity is not required to satisfy this requirement if it can demonstrate that accommodation of its programmatic needs requires the variance. (A277-79.) In turn, Section 72-21(b) requires proof that "that because of such physical conditions there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of this Resolution will bring a reasonable return" and states that "this finding shall not be required for the granting of a variance to a non-profit organization."

In *Yeshiva Imrei*, the applicant sought a variance to allow it to create a catering establishment. While the applicant was unable to satisfy the "unique physical conditions" prong, it claimed that it did not need to do so because the catering business was needed to fund its programmatic needs. The BSA disagreed, reasoning that raising funds is not "the type of programmatic need that can be properly considered sufficient justification for the requested use variance." *Yeshiva Imrei* merely concerns the "programmatic need" alternative under Section 72-21(a). The decision has nothing to do with the "no reasonable return" prong of Section 72-21(b). Indeed, *Yeshiva Imrei* stated that not-for-profit entities may proceed as for-profit applicants if they are unable to demonstrate a programmatic need.

Petitioners' second challenge to the BSA's "no reasonable return" finding is also meritless. Petitioners' claim that "[t]he proper inquiry for a not-for-profit

applicant is whether 'unique physical conditions' create a hardship impairing its ability to meet its programmatic needs," and therefore, a non-profit applicant may not seek a variance if it is not related to its programmatic needs. (Petitioners' Br. at 38.) This claim, however, turns Sections 72-21(a) and (b) of the Zoning Resolution on their head. Petitioners essentially reason that because a non-profit entity (1) is *not required* to satisfy the "unique physical conditions" prong of the analysis if it can demonstrate programmatic needs and (2) is *not required* to satisfy the "reasonable return" finding, then the BSA abuses its discretion if it grants a variance to a non-profit entity that, nevertheless, satisfies both subsections. Of course, such a claim is belied by the plain language of the Zoning Resolution and the BSA's prior precedent – nothing in the resolution precludes a not-for-profit entity from satisfying the higher test imposed on for-profit applicants.[12]

c. The BSA's "Minimum Variance" Finding Was Rational

Petitioners' challenge to the BSA's "minimum variance" finding, based on their assertion that the residential floors of the Congregation's planned development are "not necessary" for the Congregation's programmatic needs

[12] Petitioners cases (Petitioners' Br. at 38) are distinguishable because neither involved applications for variances by not-for-profit entities. *See Concerned Residents of New Lebanon v. Zoning Board of Appeals of Town of New Lebanon*, 222 A.D.2d 773, 774, 634 N.Y.S.2d 825, 826 (3d Dep't 1995) (challenging variance application granted to "Lebanon Valley Auto Racing, Inc."); *Citizens for Ghent, Inc. v. Zoning Board of Appeals of Town of Ghent*, 175 A.D.2d 528, 528, 572 N.Y.S.2d 957, 958 (3d Dep't 1991) (challenging variance granted to company that "sells and installs truck-mounted cranes and related equipment").

(Petitioners' Br. at 39-40), is baseless. The BSA found that the few residential floors proposed by the Congregation were necessary, in that without them the Congregation would not be able to meet "its programmatic need" and fulfill "its religious mission." (BSA Res. ¶ 213.) This finding is well supported in the record. (*See, e.g.*, R. 4223-30, 5157-59.)

The BSA listed, in detail, efforts that it undertook to ensure that the "variance sought" was the "minimum necessary to afford relief" under Section 72-21(e) of the Zoning Resolution. (A287 ("Whereas, the Board finds that the requested lot coverage and rear yard waivers are the minimum necessary to allow the applicant to fulfill its programmatic needs and that the front setback, rear setback, base height and building height waivers are the minimum necessary to allow it to achieve a reasonable financial return[.]").) The BSA required the Congregation to scale back its proposal (*see* BSA Res. ¶¶ 207-209) and also considered numerous alternatives to the Congregation's proposal to determine whether an alternative approach would accommodate its needs (*see id.* ¶¶ 210-211). The record is replete with analyses of alternatives, including as-of-right approaches. (*See, e.g.*, *id.* ¶¶ 128, 129, 132, 133, 147, 211). The BSA found, based on the evidence in the record, that the Congregation had "fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission." (*Id.* ¶ 213.)

Based on this record, the BSA rationally determined that the Congregation's final proposal would involve the minimum variance. (*Id.* ¶ 212-15). This Court should not upset the BSA's "minimum variance" finding.

CONCLUSION

For the foregoing reasons, the order of the lower court dismissing the Petition should be affirmed.

Dated: January 14, 2011
New York, New York

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BRIEF FOR RESPONDENT-RESPONDENT CONGREGATION SHEARITH ISRAEL

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Notary Public, State of New York
No. 01HO6118731
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/s/ Daniel Vinci

Case Name: Landmark West! v. City of NY

To Be Argued By:
Alan D. Sugarman

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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.

REPLY FOR PETITIONERS-APPELLANTS NIZAM PETER KETTANEH AND HOWARD LEPOW

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Preliminary Statement[1]

Respondents finally have been pressed to identity the precise evidence upon which the BSA relied for its (b) and (e) findings.[2] For the crucial showing that "no permissible use will yield a reasonable return for the entire property,"[3] the City Brief has identified only two documents from the 6000 pages in the BSA record.[4] *These documents, the December 2007 and the July 2008 Freeman submissions, refute, rather than support, the findings*.

A *"complying, fully residential development"* analysis was never supplied by the Congregation as requested by the BSA in June 2007.[5] Respondents avoid addressing, but do not dispute, that the December 2007 analysis cited by the City was not fully–residential, although still yielding a rate of return exceeding that which the Congregation's sole economic consultant opined was acceptable.[6]

The City also relies upon Freeman's July 2008 submission, a so–called bifurcated analysis, analyzing the profitability of only the two upper floors remaining after the Congregation satisfied its programmatic needs with the community house floors below. Respondents, significantly, do not deny that the

[1] Petitioners' Brief contained the following typographical errors, as to which Respondents were informed: Pet. Br. at 46, n. 119: [A–5115] rather than [A–4115]; Pet. Br. at 61, [A–1010] rather than [A–1011]; Pet. Br. at 45, [A–5115] rather than [A–4115]; Pet. Br. at 29, [A–2972] and [A–2974] rather than [A–2792] and [A–2794].
[2] Respondents' briefs in the related Landmark West appeal, incorporated by reference their briefs herein and responded to some issues raised by Petitioners. Cong. LW–Brief and City LW–Br.
[3] *Fayetteville v. Jarrold*, 53 N.Y. 2d 254, 258 (1981).
[4] [A–2769] cited as R–1969 at City Br. 16 and [A–4223] cited as R–5171 at City Br. 18. Rather than cite to Petitioners' complete Appendix as to which multiple copies are filed with this Court, Respondents provided many citations to the BSA administrative file below [A–249], needlessly inconveniencing this Court.
[5] [A–1496].
[6] [A-1294].

site value used was not the market value of the right to develop two floors of condominiums, but the value of undeveloped space above the adjoining Parsonage that inflated the site value by 300%. Moreover, Respondents do not deny that overstating this two-floor site value understates the return for the condominium part of the approved building, as well as for the approved scheme.[7]

Argument

A. Programmatic needs and deference to religious organization are not part of this appeal.

To narrow the issues Petitioners did not appeal the community house variances extending the lower floors rearward, allowing only 1,500 additional square feet.[8] Petitioners sought to remove from discussion diversionary issues unrelated to the condominium variances, such as deference to religious organization and access and circulation for toddlers and elderly congregants.[9]

Petitioners reasoned that the Congregation's request for these small variances was a ploy to divert attention from its primary goal: earning revenue from condominiums, which account for 90% of the additional floor area allowed by the variances.[10] Petitioners observed that the Congregation is not seeking to use for its religious/community programmatic needs all the space that is available in an

[7] *See* Pet. Br. at 33–37 and 56–57.
[8] ¶ 46 [A–55]. The Congregation diverts *more than* 1500 square feet of space on the lower floors for condominium lobbies, elevators, and stairs, at the same time that the Congregation asserted programmatic need variances to provide only 1500 square feet of space *on the same floors*.
[9] Because the non–leveraged return on investment approach still yields a reasonable return, Petitioners' did not appeal its claim that the leveraged return on equity approach as required by the BSA Instructions was not utilized. The court below, though, was i*ncorrect* that this was Petitioners' "biggest complaint." [A–35]. *See* [A–769].
[10] Pet. Br. n. 16 at 7.

as–of–right building, and chose to rent its adjoining Parsonage rather than use it for programmatic needs.[11] Notwithstanding, the Congregation still peppers its response with its favored red herrings: discussion of deference to religious organizations and programmatic needs that have nothing to do with the issues on this appeal.[12]

B. No evidence shows the Congregation's financial need or that the variances are required for its survival.

The Congregation brief on page 1 accuses opponents of seeking to "block the Congregation's plan to *preserve itself*." This provocative assertion is false. The Congregation contended to the LPC that because of financial hardship, ZR §74–711 relief was required. When the LPC asked for proof, the Congregation withdrew the ZR §74–711 application.[13] The Board rejected the Congregation's "economic engine" argument and asked the Congregation to "forgo such a justification in its submissions."[14] The Congregation ignored the Board's request.[15] In response, opponents pointed out the indications of substantial financial resources of Congregation members.[16]

C. The Court below did not apply a substantial evidence standard.

[11] Pet. Br. n 17 at 8. The Congregation *falsely asserts* that the Board had found that an as–of–right building would not viably resolve circulation and access issues, *when in truth* the Board had referred only to the Parsonage. Cong. Br. at 29. The Congregation *falsely implies* that the Board considered circulation and access as physical conditions in relation to the condominium variances. Cong. Br. at 27. *See* Pet. Br. n. 54 at 17.
[12] *See e.g.* Cong. Br. at 7, 12, 13, 18, 19, 23, 28, 29, 32, 39, and 45. The Congregation *falsely* states the Board found that condominiums were required to meet programmatic needs. Cong. LW–Br. at 36.
[13] Pet. Br. at 11.
[14] ¶ 79–80 [A–57].
[15] *See* Fifth Attorney Statement. [A–4197] and [A–4221].
[16] Pet. Br. at 11. The court below at A–30 *incorrectly* stated "The BSA rejected petitioners' contentions that the Congregation should have sought to raise funds from its members instead of seeking the requested variances…" Petitioners never took this position.

Respondents concede the proper standard for review is the substantial evidence standard as required by ZR §72–21, citing *Soho Alliance* that *each* finding *must have a rational basis and be supported by substantial evidence*.[17] Substantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.[18]

Clearly, the court below applied an arbitrary and capricious standard.[19] To make it appear as if the court below applied a substantial evidence standard, the City brief *improperly and misleadingly* refers to *Soho Alliance* in a way to make it appear as if the court below "correctly determined" there was an absence of substantial evidence.[20] Yet the court below *did not* "determine" that "it cannot be said that there was an absence of substantial evidence." The City *misleadingly* inserts the quoted phrase *"it cannot be said …"* to make it sound as if these words were stated by the court below, when in fact the phrase is an excerpt from *SoHo Alliance*.

(1) Respondents did not show the substantial evidence supporting each of the Board findings.

Respondents rely primarily on the size of the record and the decisions of the Board and the court below as "evidence," but they are not evidence of what is in

[17] *SoHo Alliance v. New York City Bd. of Standards and Appeals*, 95 N.Y.2d 437 (2000). *See* Cong. Br. at 3, 16 ,17, 19, 21, 26, 32. *See* City Br. at 2, 8, 9, 10, 14, 19 and 24.
[18] *Soho Alliance v. New York City Bd. of Standards and Appeals*, 264 A.D. 2d 59, 63, (1st Dep't 2000), *aff'd* 95 N.Y. 2d 437 (2000).
[19] *See* decision below at [A–28], [A–29], [A–36], [A–38], [A–39], [A–41], [A–42], and [A–44].
[20] City Br. at 10.

the record.[21] These decisions make factual assertions not in the record.[22]

Over 50% of the Congregation's and 70% of the City's citations are to these two non–evidentiary decisions. Many of the remaining Congregation references (over 37) are to rhetorical attorney statements.

Other citations are irrelevant, pertaining for example only to the community house variances, such as the testimony of the Rabbi and education director of the Congregation.[23]

More significant than the size of the record is what was *not* provided by the Congregation such as (i) an all–residential as–of–right analysis, (ii) the market value of the two–floor condominium development rights, (iii) an analysis of a building with a front courtyard not obstructing windows, (iv) complete construction estimates for the as–of–right schemes, and (v) a description by the Congregation's architect of the exact changes to the building drawings obviating the need for the 40–foot separation eighth variance.[24]

D. Respondents did not show any evidence that the development site as now zoned is incapable of yielding a reasonable rate of return.

Respondents are unable to show evidence that the development site as

[21] The Congregation padded the record with five versions of its single–spaced 50–page attorneys' statements, 470 pages of LPC transcripts [A–2810] and 500 pages of irrelevant and duplicative "consent" forms from Congregation members living far outside the 400–foot zone. R–2030 to R–2500, 2 RCNY 1–06(g). [A–805].[A–1257], [A–823], [A–232–34].

[22] The Congregation below asked to supplement its response with citations to the record; the court said that it did not need those citations. [A–773] at line 4. *See also* [A–768–69].

[23] Cong. Br. at 3–4 citing R–1736–39 ([A–2487]) and R 1739–42 ([A–2490]).

[24] The Congregation ludicrously claims that the Congregation witnesses had "bested" cross–examination by opponents in the BSA proceeding. Cong. Br. at 26. The Board does not permit cross–examination of an applicant by opponents. Had opponents been able to cross–examine the Congregation witnesses, the answers would have prevented the Board from allowing the variances.

currently zoned is incapable of yielding a reasonable return.

Significantly, Respondents and the court below do not address the merits of the issue — briefed extensively by Petitioners — that the City's own updated computation of the December 2007 "all–residential" scheme would yield an annualized return on investment of 6.7%,[25] exceeding the 6.55% return on investment which the Congregation's expert Freeman had opined was an "acceptable" return.[26] Respondents make no attempt to distinguish, diminish, explain, or refute Freeman's opinion that 6.55% was an "acceptable "return.[27]

Without any explanation, the City now claims: "There is no merit to petitioners' argument that the Board should have required the Congregation to recalculate its December 2007 estimated financial return for an all residential scheme."[28] The City is wrong: the per square foot value used in December 2007 was subsequently reduced from $750 to $625 therefore recomputation is required.[29]

Since Respondents do not dispute that the December 2007 analysis was not really an all–residential analysis,[30] even the 6.7% return computed in the City's Article 78 answer is understated. Respondents do not explain the Board's failure to insist that Freeman provide an all–residential analysis.

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[25] Pet. Br. at 41. The City in its brief at 21 asserts *incorrectly* that the 6.7% figure is "Petitioners' number"; the truth is that the 6.7% computation was performed *by the City* in ¶292 of its answer to the Article 78 Petition. [A–335].
[26] [A–1294]. *See* Pet. Br. at 37–38.
[27] *See e.g.*, City Br. at 21, avoiding mentioning Freeman's 6.55% opinion.
[28] City Br. at 20.
[29] *See* I.E(3) at 10 below.
[30] *See* Pet. Br. at 39–40.

As to what is a minimum reasonable return, the City asserts *falsely* that "The Congregation's experts established that 11% was a reasonable return." *Nothing* in the cited documents supports the City's assertion. The Board decision makes no reference to a 10.93% or 11% return figure; the only reference is in Freeman's Schedule A as the Annualized Rate of Return.[31] Except for Freeman's opinion as to the 6.55%, the record is silent as to what is the minimum reasonable return.[32]

E. Respondents do not show substantial or indeed any rational evidence to support the (b) and (e) findings.

The City attempts to show the factual basis of the (b) and (e) findings in a narrative at page 16.[33] The City describes Freeman's initial submission of April 2007, *incorrectly* stating that Freeman had initially submitted an as–of–right residential analysis.[34]

(1) The November 27, 2007 BSA Hearing — the Congregation is asked to use a site value for the two floors representing what a developer would use and pay for.

The City then moves to the November 27, 2007 hearing where it instructed Freeman to remove the non–residential value from the site value for the development rights for the two floors of condominiums. The Board "asked the Congregation to revise the analysis to exclude it [sic] from the site value and to

[31] City Br. at 21.
[32] [A–1294] cited at Pet. Br. 37–38. In Freeman's March 11, 2008 submission, he seems to imply that 8.56% is a "minimum reasonable return" [A–3340–41], but did not explain the change in his opinion as to the necessary return. *See* n. 46 below.
[33] City Br. at 16–17.
[34] [A–1287] (R–133–61). The City cites to ¶127 (A–59–60]. The Board's decision is *incorrect*. Pet. Br. n. 48 at 16. Thereafter, BSA staff in June 2007 requested a *"complying, fully residential development"* analysis [A–1496], an analysis never provided.

evaluate an as–of–right development."[35] The transcript shows the Board was clear the valuation should not include that area which *"is not going to be used by the developer"* and asked Freeman to take out the space "being used by the synagogue,"[36] clearly intending that the site value in any bifurcated analysis be the market value of the development rights to build the two floors of condominiums useable by a developer.[37]

> *(2) The December 2007 submission did not respond to the Board's request to revise the site value for the right to develop two floors of condominiums.*

The City brief then discusses Freeman's December 2007 submission, implying that Freeman's responded therein to the Board request to revise the site value to include only the market value of the development rights for two floors.[38] Freeman never did so.[39] The Congregation's assertion that Freeman submitted a "revised" analysis is not evidence that the site value was in fact adjusted downward to the value of two floors of development rights.[40]

The City also asserts that Freeman submitted an analysis of an "as–of–right residential building with 4.0 F.A.R."[41] Freeman still had not submitted the *"complying, fully residential development"* analysis requested by the staff in June [A–1496]; instead, he just falsely claimed to have done so by mislabeling the

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[35] City Br. at 16 then cites the transcript of the November 27, 2007 BSA hearing. R–1753 [A–2504].
[36] Pet. Br. at 21–22.
[37] *See* discussion at Pet. Br. 21–22 and 33.
[38] City Br. at 16 citing R–1969 [A–2769].
[39] See pages 16 to 18 below.
[40] The City implies *incorrectly* that the Congregation responded "to questions raised by the Board." City Br. at 16.
[41] City Br. at 16.

F.A.R. 4.0 analysis as "all–residential" in his Schedule A.[42]

Freeman's Schedule A provides a side–by–side display that reveals Freeman did not adjust the site value for the two–floor scheme as the Board requested. Freeman uses the *very same site value*[43] of $14,816,000 for both the 28,724 square foot seven–floor Scheme C and the 7,594 square foot two–floor Scheme A.[44] The following excerpted rows from the Schedule [45] reveal this:

	[Scheme A] Revised As Of Right CF/Residential Development	Revised Proposed Development – Residential Only	[Scheme C] All Residential F.A.R. 4.0
Built Residential Area	7,594	22,352	28,724
Sellable Area	5,316	15,243	17,730
Acquisition Cost	$14,816,000	$14,816,000	$14,816,000

This is conclusive evidence that the site value for the two floors was not reduced in the December 2007 submission as required by the Board at the November hearing and that Freeman applied the same site value both to a two–floor site and a seven–floor site.

Freeman also applies the overstated $14,816,000 figure as the site value for the Proposed Scheme; consequently, the rate of return for the Proposed Scheme must be far higher than 10.93%.

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[42] Freeman's December 2008 Schedule A. [A–2780](R–1980). A clearer version may be found at P–02557, Volume 8 of Petitioners' Appendix A filed below. [A–157].

[43] Freeman incorrectly uses the phrase "acquisition cost" rather than the accurate phrases "site value" or "market value."

[44] Exhibits A [A–2792] and C [A–2794] to Freeman's same December 2007 submission clearly identifies the schemes as Schemes A and C.

[45] [A–2780]. For clarity, only selected rows from Schedule A are shown.

(3) The February 21, 2008 BSA Hearing — the Board ignores the Congregation's failure to reduce the two–floor site value and to provide a fully–residential analysis.

The BSA narrative continues to the next Board hearing of February 21, 2008, following Freeman's December submission. The narrative does not reveal that the Board at the hearing ignored the Congregation's continuing failure to reduce the two–floor site value and to provide a fully residential development analysis. [A–1496].[46]

Instead the narrative merely states that the Board at the February hearing "requested a recalculation of the site value."[47] The transcript shows the Board believed Freeman's per square foot comparable value of $750 was too high.[48] Yet, *the Board ignored the even larger error of Freeman multiplying that figure, not by the area of two floors of condominiums, but apparently by the floor area of the entire building*.[49]

Between November 2007 and February 2008 something happened to the Board: inexplicably, it was now ignoring the crucial issues and focusing on less significant ones.

(4) Freeman's July 2008 final summary analysis uses the overstated site value and conceals its impropriety by not including the all–residential analysis in the summary.

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[46] Freeman may have prepared an all–residential analysis that he did not reveal. [A–3340–41]. Freeman seems to admit that an all–residential scheme would provide a reasonable return. *Id.*

[47] City Br. at 17 citing entire BSA transcripts of February 12, 2008, R–3653–3758 [A–3152–3257] and of April 15, 2008, R–4462–515 [A–3630–83].

[48] *See* [A–3174] *et seq.* Opposition Expert Levine stated the proper value was $500 per square foot. [A–3123], [A–3384] and [A–3622]. In his May 2008 submission, Freeman reduced the value to $625. *See* [A–3819].

[49] The City Brief skips over several Freeman submissions [A–3301], [A–3330], [A–3607], [A–3815], and [A–4028].

The City narrative continues with Freeman's July 2008 submission.[50] This was the Congregation's final reasonable return submission. The City states:[51]

> 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 Board in ¶138 refers to but *one* as–of–right alternative, not the two included in the December 2007 submission. Freeman includes only the two–floor Scheme A alternative in this July 2008 summary Schedule A, omitting the "all–residential" Scheme C analysis. Freeman precludes comparison between the (i) "all–residential" Scheme C site value and (i) the two–floor Scheme A site value. He thereby conceals his fabrication.[52]

Extract From Schedule A – July 2008 Freeman Submission[53]

	[Scheme A] Revised As Of Right CF/Residential Development	Revised Proposed Development
Built Residential Area	7,594	22,352
Sellable Area	5,316	15,243
Acquisition Cost	$12,347,000	$12,347,000
Est. Total Investment	$20,465,000	$26,731,000
Sale Of Units	$12,347,000	$36,394,000
Est. Profit (Loss)	($8,757,000)	$6,815,000
Return On Total Investment		25.49%
Annualized Return On Investment	00.0%	10.93%

[50] City Br. at 18 citing R–5171–81 [A–4223–33], Eleventh Freeman Submission July 8, 2008.
[51] *Id.*
[52] [A–4230].
[53] [A–4230].

Freeman's new site value for just two floors of development rights is $12,347,000 — not the market value of the 7,594 square feet of development rights but the value of 19,755 square feet of undeveloped space above the adjoining parsonage.

(5) Freeman's July 2008 submission uses an entirely new methodology to value the two–floors of development rights, continuing to overstate the site value.

Freeman's May 8, 2008 submission shows that he devised the number $12,347,000 by multiplying the site value per square foot of $625 times 19,755 square feet, representing the supposedly unused developable space over the adjoining Parsonage.[54]

The resulting site value is hardly the market value of the development rights for which a developer of a two–floor condominium would pay, which the Board had requested at its November 2007 hearing.

Had Freeman multiplied $625 times 7,594, the site value would be $3,322,500, not $12,347,000.

Conveniently, Freeman contrived a figure $12,347,000 not very different from the figure used in the December 2007 submission — to avoid revealing the valuation of the two floors had nothing to do with the actual market value of the two floors.

Any true market valuation of the development rights for the two floors based

[54] [A–3818–19]. Pet. Br. at 33–37.

upon area times value per square foot would yield a value too low for Freeman's purposes, as opponents were demonstrating.[55] Respondents cannot explain the relationship between the Parsonage developable space and the two–floors of condominium development rights. Freeman's approach is wholly irrational. Freeman and the Board evidently wished to conceal what was going on, and for good reason.

(6) Freeman uses ordinary arithmetic to compute the annualized return on investment of 10.93% but does not apply that arithmetic using the proper site value.

Freeman uses an ordinary arithmetic formula to compute the 10.93% return in Schedule A of his July 2008 submission:

> (Profit ÷ Development Period in Months) x 12) ÷ Total Investment = Annualized Return on Investment

Using this formula and Freeman's own figures in his Schedule A, Freeman's annualized rate of return of 10.93% is obtained as follows:

> (($6,815,000 ÷ 28) x 12) ÷ $26,731,000 =10.93%

The variables in this formula are (i) Total Investment — the sum of costs including the site value and (ii) Profit.[56] When site value is decreased, Profit increases and Total Investment decreases, both by the same amount.

Multiplying the sellable–area of 5316 square feet times $625, yields a site

[55] *See e.g.* Levine at [A–3123].

[56] Another variable, and one subject to manipulation, it the number of months of development, used to annualize the return. The Board's Instructions for Form BZ contemplate use of the higher non–annualized return. [A–502–03]. *See* note 57 at p. 20 below.

value of $3,322,500 and an annualized return on investment of 38.2%. Multiplying the built–residential–area of 7594 square feet yields a site value of $4,746,250 and an annualized return on investment of 32.30%.

While the Congregation calls this "quibbling," challenging *a single error that more than triples the annualized rate of return of the proposed building* is hardly "quibbling."[57]

> *(7) The court failed to address the fallacious calculation of the site value and the use of the undeveloped space above the parsonage to value the two–floors of development rights.*

Respondents and the decisions below do not address: (i) the improper use of the bifurcated approach; (ii) the *fallacious* methodology to arrive at the two–floor site value; and, (iii) the use of landmarking hardship as the rationale for using the Parsonage undeveloped space to calculate site value.

At most, the Congregation Brief at 9 *falsely* states:[58]

> The lower court rejected Petitioners' assertion that the BSA "never explicitly addressed" the proper reasonable return analysis for "mixed–use profit and non–profit" developments. (A34.)

The decision below at A-34 merely observed that Petitioners objected to the bifurcated approach but did not address Petitioners' legal arguments.

> *(8) Respondents do not justify the BSA's failure to consider actual acquisition cost.*

[57] Cong. Br. at 37. Opposition expert Martin Levine described other discrepancies in the Freeman analysis. *See* Levine report at [A–4363].
[58] Cong. Br. at 9.

Respondents and the court below failed to distinguish the many cases requiring a zoning board to consider the actual acquisition cost.[59] The policy requiring consideration of the actual acquisition cost was stated by the Court of Appeals in *Matter of Douglaston Civic Assn*:[60]

> While present value *most often* will be the relevant basis from which the rate of return is to be calculated, it is important that the "present value" used be the value of parcel as presently zoned, and not the value that the parcel would have if the variance were granted.
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> * * *
>
> We would note further that the *original cost becomes relevant where, despite the prohibition upon converting the land to another use, the land has nevertheless appreciated significantly to the extent that the owner may have suffered little or no hardship* (emphasis supplied).

The BSA Instructions required submission of actual acquisition costs and dates.[61]

The Congregation *incorrectly* asserts the court below found that an applicant need not provide the purchase price.[62] The court attempted to avoid addressing the ample precedent requiring consideration of actual acquisition cost by making a factual distinction: that the Congregation had provided the deeds that included the purchase price, implying the Board had considered the acquisition cost.

But, the Board did not consider this information by requiring Freeman to

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[59] *See* Pet. Br. at 58, n. 141.
[60] *Douglaston Civic Ass'n v Galvin,* 36 N.Y.2d 1, 9 (1974).
[61] *See* Detailed Instructions for Completing BZ Applications. [A–821]. After Petitioners' filed their brief, the BSA released new instructions omitting the requirement to submit acquisition costs and requiring the return on investment approach for both condominiums and rental projects. [A–36–38]. http://www.nyc.gov/html/bsa/downloads/pdf/forms/bz_instructions_september_2010.pdf.
[62] Cong. Br. at 9.

compute the return on investment using the actual purchase price. It did not even state the actual purchase price in its decision. Accepting Respondents' contention that the acquisition costs are shown in the deeds for the three brownstone lots constituting the development site, the actual acquisition price is $11,762,[63] versus the "acquisition cost" of $12,347,000 used by Freeman in his July 2008 Schedule.

Using Freeman's simple arithmetic, and applying the $11,762 acquisition price to the July 2008 Schedule A, produces an annualized return of not 10.93%, but of 57% and a total return of 133%.[64]

Absent consideration of the acquisition price, there is no predicate to support a finding of economic hardship.[65]

(9) The Congregation deliberately submitted incomplete, spoliated construction estimates.

The City's response to the Petitioners' objections respecting the spoliated construction comments is to state without explanation that "There is no merit to petitioners' argument."[66] Respondents do not deny that Freeman did not provide complete reports for the key as–of–right scenarios. The City's rationalization is that the Board *could* have reviewed base unit price.[67] The City's cited pages show no computation of base unit price and are wholly irrelevant.[68] The City does not

[63] *See* Pet. Br. at 25, n. 70.
[64] *See* Section 0 at 17 above.
[65] *Cowan v. Kern*, 41 N.Y.2d 591, 597 (1977). *Loujean Properties, Inc., v. Town of Oyster Bay*, 160 A.D.2d 797 (2d Dep't 1990).
[66] City Br. at 20.
[67] *Id.*
[68] The City cited R.–1997 [A–2797] (incomplete estimate), and R–5178–79 [A–4230]. Pet. Br. at 26.

claim the Board actually analyzed the base unit price – only that it *could have* done so. That the Board did not do so is clear from the following figures from Freeman's July 2008 Schedule A:[69]

	Revised As Of Right CF/Residential Development [Scheme A]	Revised Proposed Development [Scheme C]
Built Residential Area	7,594	22,352
Sellable Area	5,316	15,243
Base Construction Costs	$3,722,000	$7,398,000
Soft Construction	$3,977,000	$6,322,000

Performing the simple division described by the City, the unit cost for the two–floor condominium Scheme A is $490 per square foot, while for the proposed five–floor condominium the base unit price is $331 per square foot – an unexplained substantial difference showing that the as–of–right costs were inflated.

Whether the Board *could have* analyzed the unit cost does not change the fact that Freeman failed to provide the complete documents,[70] and the Board was aware that they had not been provided but deliberately did not ask for them. Not only does this establish bad faith by the Board, the spoliation destroys the value of the construction costs as evidence to support the Board findings.

The only explanation for the Board's failure to require the submission of the complete construction cost documents, which undoubtedly were in Freeman's

[69] [A–4230].
[70] Certainly Freeman had the complete documents; he just would not produce them.

possession, is deliberate blindness.[71]

F. The Board refused to consider the financial return for a scheme with a courtyard such that the front windows in the adjoining building would not be obstructed.

The Congregation asserts: "As discussed throughout this brief, the BSA required a litany of alternative proposals and concluded that the variance granted was the minimum needed to afford relief."[72] What the Congregation does not reveal is that the "litany of alternative proposals" did not include a feasibility analysis of a building with courtyard that would not obstruct the front windows of the adjoining building, the one scenario requested by opponents whose requests the Board deliberately and capriciously ignored.

The Board deliberately failed to request an analysis of a small front courtyard eliminating only 771 square feet of condominium space.[73] Instead, as the Congregation boasts, it submitted and the Board accepted six irrelevant lesser variance scenarios: a) without penthouses and terrace; b) without penthouse but with terrace; c) without 8th floor and without terraces; d) without eighth floor and with terraces; e) without penthouse; and f) without eighth floor.[74]

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[71] *See* Cong. Br. 33, n. 5. There is ample evidence of the deliberate blindness shown by the Board as to core issues; deliberate blindness is evidence of bad faith. A zoning board's determination may be set aside if there are indications of bad faith on the part of the board. *Cowan v. Kern*, 41 N.Y.2d 591, 599 (1977).

[72] Cong. Br. at 43.

[73] The drawings show that the size of the rear courtyard is 15.75 feet x 15 feet, or 237 square feet. [A–3853–54]. The courtyard reduces space on each of floors six, seven, and eight by 237 square feet and on the penthouse floor by 60 square feet. [A–3855].

[74] To support this "litany," the Congregation cites Freeman's last gasp, August 12, 2008 submission summarizing six previously submitted alternatives. [A–4440–441]. Cong. Br. at 24–25.

G. Respondents do not show physical conditions such as irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions.

There is no evidence showing "physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions" creating a hardship that may only be remedied by variances for the condominiums.[75]

Respondents' first raise a straw man – focusing on the word "unique" in the phrase "unique physical condition," an issue never raised in either Petitioners' Article 78 petition or in its Appellate Brief.[76]

Next, the Congregation *falsely claims without citation* that the Board *found* the development site was an irregular "L–shaped" site:[77]

> Petitioners have failed to demonstrate that the BSA irrationally found that a "unique physical condition" arises from the fact that the Congregation, faced with an inability to develop the underdeveloped land occupied by the Synagogue, can only use *the remaining "L" shaped portion of the lot*. (A4199–4209.)

The *critical* fact is that the Board never made such a finding as to an "L" shaped lot. Desperate, the Congregation cites to [A–4199] , which relates only to the community house related hardships and provides *no* support for the Congregation's claim.[78]

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[75] ZR §72–21 (a).
[76] Cong. Br. states *incorrectly* at 8: "The lower court rejected Petitioners' assertion that the division of the lot by a zoning district boundary is not 'unique'" citing [A–31–32]. The court did not state this at all. *See also* Cong. Br. at 28.
[77] Cong. Br. at 32.
[78] The Congregation does not assert that obsolescence was found to constitute a physical condition. Still, any

(1) The Board may not use landmarking as a factor in granting for–profit variances under ZR §72–21.

While the City properly admits that the Board took the landmarking hardship into account under its (a) finding,[79] the Congregation confusingly asserts that the Board did not,[80] and then seems to change its mind and argue the BSA had jurisdiction to do so.[81] Yet on this issue, the City brief does not attempt to respond to Petitioner's brief,[82] effectively conceding that the Board has no jurisdiction to provide relief for landmarking hardships. Evidently, the City did not wish to take a position on this sensitive issue in a formal appellate brief. Neither Respondent addressed the use of landmarking hardship in the artifice of transferring the Parsonage value to the two as–of–right floors.[83]

Respondents do not address the comprehensive legislative scheme described by Petitioners in footnote 157 of their brief at page 64, listing eighteen different zoning resolution provisions addressing procedures to obtain relief from landmarking hardships, *none of which provide any role for the BSA*. A legislature's desire to provide exclusive jurisdiction "may be inferred from … the legislative enactment of a comprehensive and detailed regulatory scheme."[84] Accordingly, "[a] court should not find that the Legislature intended two separate agencies to

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obsolescence (see Cong. LW–Br. at 27) is unrelated to the condominium variances. Pet. Br. at 43 and 61–62.

[79] City Br. at 10: "The BSA determined 'that there are unique physical conditions' (ZR §72–21(a) in three particular respects …"

[80] Cong. Br. at 32.

[81] Cong. Br. at 31.

[82] Pet. Br. at 62–64. Petitioners argued below the lack of BSA jurisdiction to consider landmarking. *See* Pet. Reply below at [A–417–18].

[83] The court below did not provide legal reasoning to support its conclusion of concurrent jurisdiction. [A–42].

[84] *New York State Club Ass'n v. City of New York*, 69 NY 2d 211, 217 (1987).

exercise concurrent jurisdiction unless no other reading of the statute is possible."[85]

Respondents do not dispute that the Congregation applied for, but then withdrew, its application for ZR §74–711 relief[86] and that Board failed to restrict future development of the Parsonage and Synagogue, while using a novel transfer of development value over the Parsonage to the development site.[87]

(2) The Board may not grant a variance under ZR §72–21 merely because a lot is located in two zoning districts.

The Congregation mistakenly claims that *Elliott v. Galvin* holds that "location of zoning lot within two different zoning districts constituted 'unique physical conditions' within the meaning of the zoning resolution."[88] The Court of Appeals[89] relied upon an actual physical condition: "the irregular shape and small size of the C1–9 portion of the zoning lot", stating only that the split zoning could "contribute" to unique *physical conditions*.[90]

The City's brief at 11 *misrepresents* the substance of ZR §73–52 and ZR §77–00 as authorizing the Board's use of a split–lot as a "physical condition." Rather, *these provisions prohibit the action taken by the Board.* The proposed variances are *bulk* variances not *use* variances to which ZR §73–52 applies. The "finding" referred to as well is a finding is a special, not a variance proceeding.

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[85] *Ardizzone v. Elliott*, 75 N.Y. 2d 150 (1989).
[86] Pet. Br. at 11 and 63–64.
[87] *See* Section I.E(5) at page 16 above.
[88] Cong. Br. at 27. The Congregation's citation to BSA decisions at Cong. LW–Br. at 30, are properly distinguishable as involving either a true physical condition or a non–profit where programmatic need was a factor.
[89] *Elliott v. Galvin*, 33 N.Y.2d 594 (1973).
[90] Neither the Court of Appeals in *Elliot v. Galvin*, nor the Appellate Division below, considered ZR §73–52 and ZR §77–211. *Elliott v. Galvin*, 40 A.D.2d 317 (1st Dep't 1973).

Finally, ZR §73–52 limits extension of the zoning to a maximum for 25 feet from the zoning boundary, not the *entire* lot the Board approved.

ZR 77–00 cited by the City refers to the entire Article 7, Chapter 7 of the Zoning Resolution. In that chapter only ZR §77–211 appears to be remotely related to the bulk variance relief sought by the Congregation. ZR §77–211 is expressly limited to situations involving single or two–family residences zoned sites or commercial or manufacturing zoned sites — inapplicable here. Further, ZR §77–03 makes clear that ZR §77–211 is the exclusive means under the zoning resolution to provide bulk relief from a split lot in two zoning districts.

So, the two provisions cited by the City demonstrate that the Board acted beyond its authority. These two provisions apparently were enacted in the zoning resolution because the Board lacked authority to provide similar relief in a variance proceeding based solely on split-zoning.

(3) Respondents fail to explain why ZR §23–711 and the eighth DOB objection are inapplicable and how the BSA could approve a building with known violations of the zoning resolution.

The Congregation's architects, the BSA staff, and the initial DOB objection letter all put the Board on notice that the proposed building would violate ZR §23–711.[91]

The Congregation asserts that there had been a "space between the buildings" and that "trivial changes in plans" obviated the need for the eighth

[91] Pet. Br. at 16–17. *See* Transcript of BSA Hearing held February 12, 2008 [A–3227], line 1668 where Respondents Collins states that it does not matter what changes were made.

objection but fails to cite anything in the record supporting this assertion.[92] The Congregation's architects Platt Byard Dovell White, who represented the Congregation before the DOB and testified at the BSA hearings, *never* supported these assertions.[93]

Given the Congregation's stated primary programmatic need for better access and circulation, there could be no space between Synagogue and community house buildings, which must be joined to meet the "requirements to align its ...east elevation with the existing Synagogue building" to allow elevators and corridors to provide access to the Synagogue from the community house.[94]

Respondents conjure up "evidence" because it is improper for the Board to approve a building that it knew would violate the zoning resolution: ZR §23–711.

H. The Board's ex–parte meeting was wholly improper and, together with the Board's refusal to disclose what occurred, is further evidence of bad faith by the Board.

Respondents rely upon the BSA's "Procedure for Pre–Application Meetings and Draft Applications" (Procedures) as allowing these improper *ex parte* meetings,[95] while simultaneously stating other BSA Instructions are inapplicable to the feasibility studies.

The Procedures do not support the Congregation's view. Nothing in these Procedures can be read to authorize the Chair and Vice Chair to hold formal,

[92] Cong. LW–Br. at 21.
[93] *See* DOB objection [A–1656] and BSA hearing transcript. [A–3157]. After the last hearing, the architects in August 2008 submitted a letter to the BSA, without explaining why the eighth objection was removed. [A–4447].
[94] Cong. Br. at 32.
[95] Cong. Br. at 13–14.

secret, *ex parte* meetings with an applicant team, and then refuse to disclose what occurred. The Board's General Counsel states that: *"the Board has a strict policy prohibiting commissioners from communicating with applicants or the general public* — outside of the public hearing process — on pending/filed cases."[96]

Sanctioning this *ex parte* meeting would be no different from this Court allowing parties to discuss their upcoming appeals privately with members of this Court, but only if discussion took place prior to filing the appeal.[97]

I. The City has no response to the Board's defective (c) finding.

The City Brief does not respond to the Board's having made a finding under the standards of CEQR for its finding (c), rather than under the standards of ZR §72–21(c).[98] The fundamental purpose of zoning regulations in New York is to provide "adequate light, air [and] convenience of access" for the City's residents.[99] The purposes of the height and setback zoning requirements is to protect light and air in the narrow side streets, not just protect public areas like Central Park to which the CEQR standards relate. A tall building with no setbacks on a narrow residential street would have just the negative shadow impact against which contextual zoning was intended to protect, yet this did not concern the Board.

J. Non–profits proposing income–producing buildings must show that the entire site will not yield a reasonable return.

[96] *See* Board's General Counsel stating that the *ex parte* meeting was proper because it took place prior to the filing of the application. [A–2239].
[97] *Id.*
[98] Pet. Br. at 65–67.
[99] General City Law §20.

Because §72–21(b) provides that "this finding shall not be required for the granting of a variance to a non–profit organization," the Congregation asserts that (b) findings "are not required 'for the granting of a variance to a non–profit organization' and thus applies without regard to whether the non–profit is seeking a variance that may facilitate the construction of residential homes."[100]

The Congregation then asserts "the Congregation, ha[s] the same right to generate a reasonable return from their property as any private owner."[101] We agree —– the Congregation has the same rights, but subject to the same limitations, applicable to any other private owner, including showing that the entire development site is unable to generate a reasonable return.[102]

Conclusion

The condominium variances should be vacated. There is no need for remand to the BSA, for the Congregation had ample opportunity to make its case, and chose not to do so.

Dated: March 10, 2011
New York, New York

Respectfully submitted,

[100] Cong. Br. at 36. The Congregation cites *Fisher v. New York City Bd. of Standards and Appeals*, 21 Misc. 3d 1134(A), (Sup. Ct. N.Y. County 2008), failing to note the First Department decision in *Fisher v. New York City Bd. of Standards And Appeals*, 71 A.D.3d 487 (1st Dep't 2010) upholding the variances on the express grounds that the variance sought only minor modifications.
[101] Cong. Br. at 39.
[102] There is no merit to the Congregation's attempt at Cong. Br. at 39 to distinguish the cases cited at Pet. Br. 54–55.

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PRINTING SPECIFICATIONS STATEMENT

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AFFIRMATION OF SERVICE

I, Alan D. Sugarman, Attorney for Petitioners-Appellants, hereby affirm that I served the **Petitioners-Appellants Reply dated March 10, 2011,** upon counsel for Respondents to the physical and e-mail addresses below as follows:

An Acrobat PDF file, 2008-113227_Kettaneh v BSA_Kettaneh_reply.pdf, by electronic mail to the e-mail addresses below.

Two paper copies by Federal Express for delivery on March 11, 2011.

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Dated: March 10, 2011
New York, New York

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To Be Argued By:
David Rosenberg

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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

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

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- against -

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Respondents-Respondents,

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

Respondent.

- 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

---

[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

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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