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

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

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, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents.

Index No.

Petitioners Kettaneh et al.

Revised Memorandum of Law In Support of Petition.

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Revised January 2, 2009 -V.2

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PRELIMINARY STATEMENT

Petitioners Nizam Peter Kettaneh and Howard Lepow respectfully submit this memorandum of law pursuant to CPLR Article 78 in support of their application for an order reversing, or in the alternative annulling and setting aside, the determination of the Board of Standards and Appeals of the City of New York ("BSA" or the "Board") of August 26, 2008 and filed August 29, 2008.[1] The 230-paragraph Decision, applying Zoning Resolution §72-21, granted seven separate area variances to the Respondent Trustees of the Congregation Shearith Israel (the "Congregation" or "CSI") for a mixed-use community house/luxury condominium building at 8 West 70th Street in the Borough of Manhattan.

Despite the Decision's extreme length and appearance of judiciousness, the Decision ignores inconvenient facts, ignores objections repeatedly emphasized by opponents and ignores the opinions of qualified opponent experts, mischaracterizing their objections. The Decision focuses on irrelevant issues and ignores the BSA's own written requirements for variance application and accepts, without analysis, a wholly irrational analysis of the reasonable return from a conforming building. The Decision would be 60

[1] Because of the length of the decision, Petitioners have inserted paragraph numbers in the Board's August 26, 2008 decision ("Decision") at P-00001, R-00001 and have provided a reformatted large-type version with paragraph numbers at P-00019 (Exhibit A to Verified Petition). References to " P-" are to Petitioners' Appendix A, which consists of 13 volumes of documents filed with the BSA in this matter. Attached as Exhibit B to the Petition is the Table of Contents for the 13 volumes. On January 2, 2009, this Memorandum of Law was revised and corrected to include citations to the BSA Record served December 2, 2008. Citations to the BSA Record are to R-xxxxx, The Verified Petition also was revised and may contain parallel citations to the record not included herein.

pages in length, if formatted as this memorandum is formatted; it includes the irrelevant and omits the relevant.

The Decision implies that use variance and the propriety of accessory uses was an issue, but it is not. The Decision suggests that the lower floor variances for the school were a significant part of the application, when, in fact, they represent only 10% of the variance space — thus all the discussions of deference to religious organizations and programmatic need are disproportionate. The Decision's extensive discussion of the transfer of zoning floor area is completely irrelevant — no transfer of zoning floor area is included in the variances requested and is not needed. The discussion of the need for a new building to resolve programmatic needs for access, accessibility, and circulation of the 1896 Synagogue is irrelevant for the simple reason that an as-of-right building, as admitted by the Congregation's experts, resolves these issues.

What is apparent is that the Decision ignores the important issues — it glosses over the §77-21(b) requirement that the owner cannot earn a reasonable return and provides a completely conclusory finding while ignoring nearly all of the objections of opponents. Importantly, it conceals a completely aberrant method to determine site value — inflating site value so as to artificially create a loss. The Decision fails to explain why windows in the rear of the adjoining building deserve protection from being blocked, but windows in the front do not. As to the mid-block zoning regulation most impacted, the BSA substitutes its judgment for that of the City Council, which expressly sought to protect light and air on the narrow side streets.

Finally, the BSA engaged in a charade, for the record is clear that the BSA provided the variances to the Congregation so as to subsidize the programs of the

Congregation, and thereby the membership. Because the BSA wanted to escape the "hard place" that it had been put into by the application, it decided to stretch §72-21 beyond recognition.

THE FACTS

1. The Site

The building site is a rectangular 64 x 100 foot site just off Central Park West on West 70th Street and constitutes the entirety of Tax Lot 37. The proposed building is a 105-foot tall building with four floors of community space, with sub-basements and five floors of luxury condominiums. A conforming, as-of-right mixed-use building would allow, without the need for variances, a four-story community house with sub-basements and two floors of luxury condominiums, with setbacks and height consistent with the brownstones on the street. A conforming all-residential building would allow seven floors of condominiums, with two sub-basements.

2. The Sanctuary

Adjoining the building site to the east is the 1896 Sanctuary. The Decision at ¶16 misleadingly states that the Synagogue has a height of 75 feet. That is true as to the peak of the roof only; in actuality, the West 70th Street wall of the Synagogue rises to approximately 53 to 62 feet and sets back before rising to the peak of the roof. See EX-14, Elevation West 70th St. (P-01365, R-0000068), and EX-13, Existing Elevation, West Side of Central Park West (P-01364, R-000067). Thus, as seen in the Congregation drawings for a conforming as-of-right building, at AOR-14 (P-01349, R-000083), the Synagogue, although on a corner, substantially complies with the height and setback that is required by mid-block contextual zoning, reflecting the sensitivity of the original

architects as to the narrow width of West 70th Street. See also Exhibit B to the Verified Petition.

3. The Split Lot

A small part of the development site (Lot 37) is in the R10A zoning district, with most of the site being in the R8B zoning district, which is also known as contextual mid-block zoning with height and setback limitations. The Decision materially confuses the facts when it suggests in ¶20 that the district boundary is at a "depth of 47 feet within the lot". As noted, the lot is 64 feet by 100 feet. The width of the lot is 64 feet. Viewing the lot from West 70th Street looking south, 17 feet of the left easterly portion of the lot is in R10A and 47 feet of the right (westerly) portion of the lot is in R8B. Thus, 73.4% of the development site — Tax Lot 37 — is in the R8B district with the more restrictive zoning. The BSA decision later holds, essentially, that because 26.6% of Tax Lot 37 is in R10A, the height and zoning restrictions in 73.4% of the lot should be ignored.[2]

4. Condominium Variances Account for 90% of Variance Area

Using floor area as a measure, 90% of the variances floor area is provided by the four variances for the luxury condominiums, with the other 10% relating to three rear yard variances allowing an additional area of 1500 square feet of school space. The four upper floor variances provided an additional area of 12,715 square feet of luxury condominium space. Even though the variances do result in additional floor area, no variances are required to transfer zoning lot floor area to the development site, though the

[2] ¶¶21 and 22 of the Decision confuse the facts by describing, not the percentage within Lot 37, but the division within Lot 36 and Lot 37 combined, i.e., the sanctuary, the parsonage, and the community house site. The Decision then, in paragraph ¶21, refers to the Zoning Resolution §77-21, which permits zoning floor area averaging, even though no averaging is required for the proposed building.

Decision's discussion of transfer of zoning lot floor area provides an incorrect impression that they are.

5. Windows and Light Blocked

Not only do the upper floor variances violate the contextual mid-block zoning implemented in 1984 to protect the narrow neighborhood streets[3], but they will result in the bricking up of windows of three apartments in the adjoining building, including two cooperative apartments owned by Petitioner Lepow. A conforming as-of-right building would not block any windows in the adjoining building. Petitioner Kettaneh owns a historic brownstone directly across the street from the proposed building and is directly impacted by the loss of sunlight and light and air intended to be protected by the contextual zoning. The claim by the Congregation's expert that only a few buildings are impacted by shadows is of no importance to Petitioner Kettaneh.

6. Physical Conditions under §72-21(a)

The Decision purports to justify the variances for the condominiums on the basis that unidentified physical conditions on the site create unidentified hardships not resolved in an as-of-right building, which hardships prevent the Congregation from obtaining a

[3] By its action, the BSA has engaged in spot rezoning, rejected the 1984 contextual zoning, and supplanted the decisions of the City Council in adopting the 1984 revision. See report of the City Planning Commission, April 9, 1984, Calendar No. 3 (P-02642, R-001927).

The Midblocks
The midblocks have a strong and identifiable sense of enclosure, scale and coherence. They form enclaves within the larger community and offer quiet refuge from the busier avenues. They are also an important housing resource for a range of income groups.
Present regulations on the midblocks encourage a building type that is incompatible with the existing context and out of scale with the narrow 60-foot-wide streets. The objective of the proposals is to protect the existing character and use by encouraging contextual building types. The proposal is to map a new district R88 in all R7-2 and R8 midblocks in the Study Area that evidence the brownstone or tenement scale.

reasonable financial return from the site based upon "feasibility" studies submitted by the Congregation.[4] The BSA ignored the five specific references to "physical" as a requirement for any unique condition. Since there is nothing remotely relating to a "physical" condition on this site, the BSA effectively has by fiat rewritten §72-21(a) to delete the five instances from the provision.

7. Economic Engine

Yet, the rationale for the luxury condominiums consistently offered by the Congregation in seven years of proceedings is that the luxury condominiums were an "economic engine" needed to create funds for the Congregation to permit the construction of the community house. Having raised this argument repeatedly, the Congregation, the oldest and one of the wealthiest synagogues in the City, made no showing of financial hardship, and acted offended (and the BSA acted offended[5]) when opponents offered evidence of the financial resources of the Congregation. The Congregation complained that it was unable to build a skyscraper on top of its historic sanctuary and parsonage on Central Park West, but was unwilling to accept the restrictions of record on those properties restricting future development.

As the BSA acknowledges in its Decision, raising funds is not a programmatic need recognized as a legal justification for a variance. See Decision at ¶78 and ¶79. The

[4] The Congregation was so unconvinced by its own claims of loss presented in its own feasibility studies, that in its final submissions, after having filed 300 pages of feasibility studies, it contended that its own feasibility studies were irrelevant and not required because the Congregation was a religious non-profit. August 12, 2008 Friedman & Gotbaum Reply Statement in Response, page 11 (P-03973, P-03984; R-005752); June 17, 2008 Friedman & Gotbaum Reply of Congregation Shearith Israel to NYC BSA, P-03741 at P-03745; R-004859.

[5] Vice Chair Collins castigated opposition witnesses for the audacity of offering evidence of financial resources of the Congregation in response to the Congregation's implicit claims of need. See BSA Transcript, February 12, 2008, p. 85-85 (P-02810 at P-02896: R-003653).

Respondent Chair noted in the first BSA hearing that the Congregation with its financial need claim had put the Board in a "hard place" (November 27, 2007 BSA Transcript,line 510 (P-02440 at P-02463, R-001726 at R-001749)[6]; at the same time, counsel for the Congregation was boasting to CB7 that the project had "the imprimatur of the Bloomberg Administration." (Community Board 7 Land Use Committee Hearing, October 17, 2007 , Page 7-8 (R-002833-4) (Also filed as Opp. Ex. N at P-00334-5, R-003458-9). A trustee of the Congregation, and the lead witness in the 2002 LPC proceedings, was Jack Rudin, well-known real estate developer and confidant of Mayor Bloomberg. See, November 26, 2002 Landmarks Preservation Commission Transcript, p. 50, line 1(R-002594) (Filed as Opp. Ex. D-2-3, P-00259-60, P-00260, R-003373-74). Another fact witness appearing at this hearing on behalf of the Congregation was Louis Solomon, who subsequently filed an appearance for the Congregation is the present litigation. (Id., p. 79, at R-002623). The New York City Corporation Counsel, Michael A Cardozo, was formerly a litigation partner in Proskauer's 275 lawyer litigation department, for which Mr. Solomon is co-chair.

Ignoring the Congregation's inability to meet the requirements of Zoning Resolution §72-21(b), the BSA was willing to accommodate the Congregation's desire for variances, but only if the Congregation would file a new version of its Statement in Support, deleting the offending phrase "addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough capital funds to correct the

[6] November 27, 2008 BSA Transcript, p. 26, line 571 (P-02440 at P-02466, R-001726 a6 R-001752)::

571 COMM. OTTLEY-BROWN: Just a comment back that
572 it's my opinion that residential use to raise capital funds to correct programmatic
573 deficiencies is not in and of itself a programmatic need. It may be a resolution to a
574 problem or a way of financing a resolution to a programmatic need.

programmatic deficiencies described throughout this Application."[7] The Congregation (CSI) complied and deleted this phrase in the fifth do-over of its Statement in Support filed in July 8, 2008 (although leaving in other offending references). See Applicants July 8, 2008 Statement in Support at p. 4, line 7: p. 43, second line from bottom; and at pp. 54-55, R-005118, R-005157, R-005168-9. See e.g., Sugarman Statement in Opposition, July 29, 2008 pp. 10-11, P-03923 at P-03925-7; R-005311 at R-005323-24). The Board then granted variances — fabricating a new rationale to substitute for the true rationale.

8. Reasonable Return

In order for the BSA to grant the condominium variances, the BSA needed to find that the Congregation would be unable to earn a reasonable return, under Zoning Resolution 72-21(b), from a conforming building on the property[8]. Decision, ¶148. This key finding — reasonable return from the condominium construction — concerns 90% of the variances' benefits, but is addressed by the Board in only 16 of the 230 paragraphs, paragraphs lacking any factual findings.[9] The Decision's key finding is wholly

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[7] June 24, 2008 Official Transcript BSA Hearing, p. 36 (R-004937 at R-004973, P-03762 at P-03798):

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

[8] The July 8, 2008 Congregation Statement in Support at pages 3-4 (R-005117-18, P-03826-27) states: "As further described throughout the Application, the New Building addresses the programmatic difficulties by providing: ...(3) residential use on floors 5 - 8 (plus penthouse) to be developed as a partial source of funding to remedy the programmatic religious, educational and cultural shortfalls on the other portions of the Zoning Lot."

[9] The Decision ¶¶125 -148 cursorily addresses whether a conforming as-of-right building would return a reasonable return under Zoning Resolution §72-21(b). But seven of these paragraphs (130 and 132-137) address the financial return of the proposed building (apparently as to finding (e)). Even worse, these 16 paragraphs are lacking any finding of facts — containing only a conclusory final finding at ¶148.

conclusory; in a capricious manner, the Decision completely ignores the six separate submissions of an opposition expert, Martin Levine, who is a certified MAI real estate valuation expert, who deconstructed the Congregation's submissions. Levine showed that the BSA ignored the detailed requirements for §72-21(b) findings as set forth in the BSA's own written guidelines (which are consistent with valuation practices and case law) and showed that a conforming as-of-right building would earn a positive return. Even worse, the BSA wished to conceal from others the basis of the §72-21(b), which was the use of a site value based upon development rights in another part of the site, because it well knew that every developer in New York City would be lining up to assert the same position. The most astute zoning and land use counsel in New York City would be unable to decipher from the Decision this extraordinary overreaching by the BSA, and it may be that the BSA does not wish to create a precedents by fully disclosing what it had done..

Further, the BSA ignored the fact that all of the programmatic needs of the Congregation would be satisfied in a conforming building, raising the question as to whether a religious non-profit is entitled to receive variances so that it can both meet its programmatic needs and simultaneously earn a reasonable return on the property.

9. The Congregation Never Provided The Reasonable Return Analysis Of The As-Of-Right Schemes As Requested By BSA Staff And As Required By Law

Although not readily apparent from the Decision, the cornerstone of the upper floor condominium variances is the reasonable return analysis for the conforming as-of-right schemes under §72-21(b). The Congregation argued that the literal requirements of §72-21(b) relieved non-profits of the requirement to satisfy the (b) finding, even for a profit-making project such as condominiums. The BSA rejected this strict reading of the

§72-21(b), apparently holding that, despite the language that "this finding shall not be required for the granting of a variance to a non-profit organization," such provision did not apply where a non-profit was seeking variances for a total or partial for-profit building. Closing Statement in Response to Opposition of Certain Variances, August 12, 2008, P-03972, R-005793. The BSA's position is consistent with the derivation of the reasonable return requirement, which is the judicial consideration addressing when a land use regulation constitutes a taking.

An issue not explicitly addressed by the BSA was how to conduct the reasonable return analysis, since §72-21(b) does not explicitly address either the mix of profit and non-profit in the same structure or the mix of profit and non-profit on the same zoning site. Again, resolution of this statutory interpretation question is informed by reference to the many cases that discuss the reasonable return issue.

The BSA apparently first asked the Congregation to evaluate a conforming as-of-right scheme ("Scheme A"). Then, the BSA staff asked for an evaluation of reasonable return for an all-residential building on the site ("Scheme C"). The Congregation never complied with the request to provide analysis of an all-residential building, providing instead a part residential building and not including valuable basement and sub-basement space.

As discussed below, the Congregation studies, prepared by Freeman, Frazier and Associates ("Freeman Frazier" or "FFA"), purported to show that an owner could not obtain a reasonable return, principally by inflating the largest single cost component — the site value.

The Decision notes only that the studies "indicated" that there would be no reasonable return (¶130), but never made the requisite factual findings concerning the studies.

The BSA thereafter never mentions the fallacious approach of the Congregation. However, Martin Levine of Metropolitan Valuation Services ("MVS"), the opposition's valuation expert witness, repeatedly pointed this out. Nowhere in its decision does the BSA deal with this anomaly, which is fatal to a finding that the requirements of §72-21(b) of the Zoning Resolution have been met.

The response of the Congregation is telling — the Congregation does not deny that it failed to provide proper analysis of Schemes A and C, rather, its defense, as presented by the Congregation's consultant Freeman Frazier in their last submission of August 12, 2008, is as follows:

> Sugarman Allegation #1: Sugarman alleges that a revised Scheme C was not provided in the FFA submission of May 13, 2008, the original Scheme C having unexplained high loss factors, and not including a valuable sub-sub-basement."
>
> FFA Response to Allegation #1: 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.
>
> * * *
>
> MVS Allegation #1: MVS alleges that FFA failed to respond the BSA's request to provide an all Residential Scheme in response to the Notice of Objections dated June 15, 2007. (Page 2)
>
> FFA Response to Allegation #1: FFA provided a response to the BSA's request on page 26 of the December 21, 2007 Response, that eliminated all community facility related programmatic needs from the building. The ground floor

> synagogue lobby and core remained to alleviate the circulation problems. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

Freeman Frazier Letter for Applicant of August 12, 2008, pp. 2-3, (P-03952 at P-03955-55; R-005773 at R-005774-75.

10. Site Details

The development site, Tax Lot 37, currently is occupied by a to-be-demolished, four-story community house and vacant lot. It is a perfect rectangular site, 64 by 100 feet. The site is located adjacent to the Congregation's historic 1896 synagogue sanctuary at Central Park West and 70th Street. The site has excellent subterranean conditions, allowing the construction of both a basement and a sub-basement. The sub-basement alone will provide the Congregation with an additional 6400 square feet of meeting area, permitting the assembly of 340 persons, where the Congregation proposes to create a large banquet hall. The site is in a prime Manhattan residential location, 100 feet from Central Park West and a subway station and bus stop. The site is a developer's dream. The Congregation does claim a programmatic need/hardship to construct an elevator to access the sanctuary, but admits that such an elevator would require only 100 square feet on each of the 5000 to 6400 square foot first four floors of a conforming building.[10]

[10] Congregation's Statement in Support dated July 8, 2008, p. 38, 4th line from bottom (P-03823 at P-03861, R-005114 at R-005152): "the allowable footprint above the first floor, which is 64 ft. wide by 70.5 feet deep, minus approximately 100zsf from each floor "taken" by the Synagogue for its elevator shaft on each floor." Access and lobby space requires minimal area in the adjoining building. See also "Areas in AOR Requiring Access" Opp. Ex. GG-12, R-004168, P-00477, filed with Letter from Mark Lebow dated March 25, 2008 (R-003967) as discussed in Letter from Craig Morrison dated March 24, 2008 at p. 2 (P-03093 at -94; R-003930 at -31). (Attached to the Petition as Ex. H.)

11. Site History

Originally owned by the Congregation when the synagogue was constructed, what is now Tax Lot 37 was conveyed in 1896 by the Congregation to developers; three row houses were constructed thereon. In 1949, the Congregation reacquired two of the row houses and then in 1954 reconstructed the row houses, demolishing their façade, eliminating the setback and creating the existing four-floor community house. This community house provided lobby space and an elevator for access to the synagogue building. In 1965, the Congregation reacquired the third lot and in 1970 demolished the row house thereon, leaving a non-income-producing vacant lot. The primary user of the community house is a private day school, Beit Rabban, which is not only unaffiliated with the Congregation, but is Jewish nonsectarian, as contrasted with the orthodox Congregation. The school pays the Congregation as much as $500,000 a year in rent for a building the Congregation describes as obsolete and dilapidated. The programmatic need charts submitted by the Congregation on December 27, 2007 are clear: the exclusive user of the second floor in the existing community house is the Beit Rabban School. See Applicant Programmatic Drawings, Community Facility Second Floor Existing, Prog E-8, December 26, 2007, P-02604 at P-02606, R-002009 at R-002012 attached as Petitioners Exhibit J.

12. Sites Acquired To Satisfy Programmatic Needs

Importantly, in all of its five versions of its statements in support submitted to the BSA, the Congregation states that the three lots (now comprising the single Lot 36) were acquired to meet the development needs of the synagogue and the community house:

> CSI acquired Lot 36 in 1895 and the separate portions of Lot 37, in 1949 and 1965, respectively. Both were purchased specifically for development of the Synagogue and Community House, respectively.

See for example, Statement in Support, July 8, 2008, p. 50, second line in first paragraph (P-03823 at P-03873, R-005114 at R-005164).

The Congregation now asserts the right to satisfy all of its programmatic needs and also receive a return on its property as if there were no development needs of the Congregation being satisfied on the site. It also attempts a back-door use of zoning floor area rights over the Parsonage to trump the specific height and setback limitations of contextual zoning.

13. §74-711 Application

Prior to the initiation of the BSA variance proceeding in April 2007, because the site is located in a Landmark District, the Respondent Congregation first was required to apply for a Certificate of Appropriateness from the Landmarks Preservation Commission, which it did in 2001. Initially, the Congregation asked for a special permit under Zoning Resolution §74-711, but perhaps because the Congregation realized that unacceptable conditions might be placed on such a permit, the Congregation withdrew its application and requested only a Certificate of Appropriateness.[11]

[11] See LPC Hearing, January 17, 2006, p. 7 (R-002406 at R-002412; P-01213 at P-01214) ("we are no longer requiring 74-711 transfer of bulk across the district boundary … the building is now as for right as to the distribution of bulk across the site."

The fact that the Congregation withdrew its request for a special permit under §74-711, as the BSA was aware, makes this statement in the Decision all the more peculiar:

> ¶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,

The Board seems to be stating that even though the Congregation failed to meet the requirements for a special permit, the BSA would in substance provide the same relief to the Congregation for which it did not qualify, and as to which the BSA had no authority to grant in a variance proceeding.

As noted New York City zoning authority Norman Marcus observed at page 40 of the February 12, 2008 BSA hearing (R-003693, P-02850):

> 878 The last time I was here, Commissioner Collins, you asked me suppose they had
> 879 applied for a Special Permit? And, I said to you, gee, that makes all the difference or
> 880 makes a big difference because they did not apply that way. Why? Because the
> 881 Landmarks Commission would not join that application for a Special Permit and so the
> 882 applicant had to come, on its own, here, for a 72-21 variance which is very different
> 883 findings then a Special Permit.[12]

After hearings and modifications finally, in March 2006, the LPC approved a Certificate of Appropriateness, not as to the appropriateness as to impact on the neighbors, or as to shadows or bulk, or as to zoning, or as to compliance with zoning laws, but solely as to appropriateness for a landmark district.

The fact remains, though, that the Congregation did not pursue its administrative remedies provided by §74-711, and, because it did not exhaust its administrative remedies, it cannot now in disguise seek the same relief from the BSA. For that reason alone, the BSA should not have entertained the application in light of the Congregation asserting the same landmark hardships and economic need inherent in a §74-711 application.

14. Ex Parte Meeting

The Congregation waited for over a year after the 2006 LPC approval to file its application for variances with the BSA, in the meantime holding an ex parte meeting or meetings with the Chair and Vice-Chair of the BSA. After the Congregation's filing for

[12] Essentially, the BSA variance issuance can be viewed from the perspective that Commissioner Collins and the BSA seemed to feel that the LPC and City Planning should have provided the Congregation with a special permit under §74-711, and so the BSA substituted its judgment for that of not only the City Council's mid-block zoning, but also for the judgment of the LPC and City Planning that would have, but did not formally, rejected a §74-711 special permit. The question that Respondent Collins could have asked is whether the Congregation should have first exhausted its administrative remedies under §74-711 before coming to the BSA.

the BSA variances in April 2007, the staff of the BSA issued on June 15, 2007 (P-01724, R-000253) and October 12, 2007 (P-02071, R-000512) two separate letters of objections, citing major omissions and discrepancies in the Congregation's application.[13] On June 20, 2007, opponents also sent to the BSA a letter with 65 objections. Letter of Alan D. Sugarm

an to BSA (P-01777, R-000263; see also P-01733).

15. Community Board 7

The Community Board 7 Land Use Committee held two hearings in October and November 2007. As well, the Congregation held ex parte meetings between the Congregation and Community Board 7, which excluded opponents of the project. See March 11, 2008 Letter, Friedman to BSA (P-03036, R-003841), responding to Sugarman Letter to BSA, March 7, 2008 (P-02985, R-00382). The Committee rejected, by a virtually unanimous vote, the variances for the condominiums, but on a split vote approved the smaller lower floor variances (described below). With the opponents having used the BSA objections to defeat the condominium variances before the CB7 Committee, the BSA Commissioners had a change of heart, and, over the objection of the opposition, changed the hearing schedule. Without waiting for the various omissions and discrepancies noted by its staff and by the opposition to be remedied (which indeed, never were remedied), the BSA went ahead, over the objections of the opposition and the Community Board, with a scheduled hearing for November 27, 2007, on short notice[14],

[13] As will be discussed below, the Congregation never provided the conforming as-of-right reasonable return analysis to meet the specific objections of the staff. It would appear the BSA Commissioners — without explanation — overruled the objections raised by their own professional staff.

[14] The Rules of The City of New York, Title 2, BSA, § 1-06, provide that 30 days' notice be provided — the BSA only provided 29 days (P-00130). See letter dated October 31, 2007 from Mark Lebow, Esq. to BSA (P-02314, R-001628). The same rule requires the BSA examiners to "have determined the application

even before Community Board 7 was able to hold its own full board meeting on this issue.

With more complete information, including the testimony from the BSA hearing of November 27, 2007, on December 4, 2007, the full Community Board 7 rejected all the variances after a thoughtful analysis of the Congregation's presentation.[15]

16. The Decision

All seven variances were approved by unanimous decision of the BSA on August 24, 2008 in an 18-page, 230-paragraph Decision. If irrelevant matters, non-findings of fact, and conclusory findings of fact were removed, the Decision would be reduced substantially in size.

17. Description of the Variances

The Decision is misleading in that it devotes substantial attention to matters wholly irrelevant to the proceeding. Simple matters are made to seem complicated and unimportant matters receive disproportionate attention. Only some less significant objections of opponents were noted, and these are mischaracterized and rebutted in the Decision, yet significant testimony and detailed submissions by opponents' qualified experts are just ignored. Following are a few of the gross distortions reflected in the BSA Decision.

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to be substantially complete." Such a determination was never provided by the examiner, and, clearly, the Congregation had yet to respond to the BSA Objection letters, although claiming to have done so.

[15] See Transcript of December 4, 2007 at P-02528, R-003160; December 4, 2007 Resolution of CB7 Opposing Variances at P-02554; October 17, 2007 Transcript of CB7 Land Use Committee P-02080, R-002827; November 19, 2007 Transcript of CB7 Land Use Committee at P-02330; Resolution of CB7 Land Use Committee at P-02376, R-002979.

18. The Seven Variances

The BSA variance proceeding granted seven variances described in ¶1 of the Decision, as reflected in the letter of objection from the Department of Buildings dated August 24, 2007. See DOB Letter of Objection (P-01796).[16] The Decision describes these seven variances as falling into two categories: Community Center Use and Residential Use. Four upper floor variances permit the construction of the condominiums, and three lower floor variances provide rear setbacks for the school facilities.

The three lower floor variances allow the addition of ten feet in depth to each of floors two, three, and four, allegedly to allow larger classrooms. Because the lot is 64 feet wide, these three variances would allow an additional 1960 gross square feet, or apparently 1500 square feet of additional net space as stated by the Decision in ¶46. ee Rear Yard Variances for Proposed Scheme (right column), Opp. Ex. GG at GG-10 (R-004156 at R-004166, P-00465 at P-00475.

Disproportionate attention is paid in the Decision to the lower floor variances, and, much of the attention discusses irrelevancies. Any and all discussion sprinkled

[16] The initial application of the Congregation to the BSA sought eight variances based upon the DOB Notice of Objections of March 27, 2007, Objection 8 (R-000018, P-01301). The Eighth Variance, as to ZR §23-711 related to a 40-foot separation required between the sanctuary and the upper floors. The BSA cited the Congregation for failing to describe this separation in the zoning schematics filed with the application. BSA Objection Letter to Applicant, June 15, 2007 at page 3, Objection 25 (R-000253 at R-000256, P-01724 at P-01727). On August 28, 2007, without explanation, the Congregation refiled its plans with the DOB and a new set of objections was issued eliminating the eighth objection. DOB Notice of Objections, August 24, 2007 (P-01796). Although the Decision states in the footnote to ¶7 that the Congregation had filed revised plans, insofar as any plans implicating the 40-foot separation, no changes at all were provided to the DOB by the Congregation. Opponents through FOIL requests sought information as to the elimination of the eight variances, but DOB refused to provide information, claiming that the building was "9/11" sensitive. See e.g. Letter dated October 30, 2007 from David Rosenberg to Shelly Friedman, (P-02306, R-001620). The Congregation would not provide information and the BSA would not ask for or subpoena the information from the DOB. The Congregation's maneuver is related to its §77-21(a) argument as to the split lot and to its inability to build on the R10A portion of the lot because of the sliver rule. But, clearly, §23-711 would not permit the construction of tall condominiums on the R10-A portion, and the record is completely absent of an explanation as to the surreptitious elimination of variance 8.

throughout the Decision that refers only to religious deference, religious uses, schools, programmatic need, etc., relate only to the 10-foot rear extensions and the 1500 square feet, less than 10% of the space provided by the seven variances. Because the rear 10 feet of the proposed building has no elevators, stairs, or access points with the synagogue, there is no relationship between the 10-foot extension and access and circulation.[17]

The upper floor variances allow the construction of luxury condominiums on top of the community house. To accomplish this, variances for height and setback are required. Two of the condominiums on floors five and six could be built as of right, so the upper variances relate primarily to floors seven, eight, and nine, although setback variances are requested for floor six. The BSA states in its Decision:

> ¶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

To clarify this, the upper floor variances would allow 4347 square feet (seventh floor) plus 4347 square feet (eighth floor) plus 2756 square feet (ninth floor). The proposed sixth floor is 4347 square feet, which is 1265 square feet larger than a conforming as-of-right sixth floor, which would have 3082 square feet. Thus, the upper variances for the condominium add 12,715 additional square feet of condominium space.

Comparing the upper floor condominium variances at 12,715 square feet to the lower floor "school" variance at 1500 square feet, the upper floor variances represent

[17] As discussed below, the lower floor variances in fact are related directly to the condominium project, for the simple reason that the programmatic needs claimed to support the 1500 square feet of variances could easily be accommodated in the fifth and sixth floors of a conforming as-of-right building.

90% of the area for which variances are sought. Despite the impression that might be given in the Decision, these condominium variances are unrelated to the religious status of the applicant or to any programmatic needs for classroom or access space and require no transfer of zoning area rights from any other part of the zoning lot. A review of the DOB objections shows that there is no objection at all relating to floor area ratio and no variances are needed for the bulk of the proposed building — only the height and setbacks in the front and rear on the upper floors are relevant. Thus, all discussion of the transfer of zoning bulk is wholly irrelevant.

19. No Use Variances Were Requested or Granted

Notwithstanding the impression that could be obtained from an initial reading of the Decision, the Congregation did not apply for a "use" variance for its proposed project, or for the day care "Toddler" center, the private rental school, the banquet hall, or the luxury condominiums. Nor did opponents argue that these uses were not proper accessory uses for a Synagogue. There were no issues suggestive of a desire by opponents to persuade the Board to engage in any restrictive or exclusionary zoning against religious or educational institutions. The opponents who testified, many of whom are Jewish, uniformly supported the Congregation in its desire to build a new conforming Community Center. Yet, the Decision repeatedly cites to court cases involving use variances where often there was a clear indication of hostility or discrimination against the religious and accessory uses sought. Even worse, the BSA wrote its decision in such a way as to mischaracterize the opposition. All that the opposition demands is a fair and equitable application of the zoning law and in particular the mid-block contextual zoning regulations.

The BSA goes so far in its decision to cite ZR §73-52 as a basis for a "unique physical condition."

> ¶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;

But ZR §73-52 does not in any way state, suggest or imply that a split is a physical condition. Importantly, under that provision, a split lot variance clearly applies only to use variances, not to height and setback variances.

> 73-52
>
> Modifications for Zoning Lots Divided by District Boundaries
>
> Whenever a zoning lot ...is divided by a boundary between two or more districts in which different uses are permitted, the Board of Standards and Appeals may permit a use which is a permitted use in the district in which more than 50 percent of the lot area of the zoning lot is located to extend not more than 25 feet into the remaining portion of the zoning lot, where such use is not a permitted use, provided that the following findings are made:

Finally, the Decision's obsessive attention to these issues of use and the non-existent discrimination in fact apply only to the lower floor variances, accounting for only about ten percent of the area allowed by the variances.

> *20. No Variances for the Transfer of Zoning Lot Floor Area or FAR Were Requested or Granted*

Similarly, despite the repeated discussion in the Decision of the transfer of zoning lot floor area from one part of the zoning lot to another, no variances whatsoever are required for any transfers of zoning floor area (also referred to as a transfer of FAR). Indeed, even a conforming as-of-right building under the applicable height and setback requirements in no way requires transfer of zoning floor area. See Friedman & Gotbaum

letter to BSA dated February 4, 2008, R-003615, P-02772 ("CSI's Application does not request additional floor area..."); Statement of Shelly Friedman, LPC Hearing Transcript, January 17, 2006, p. 7 (R-002406 at R-002412; P-01213 at P-01214). ("We are no longer requiring 74-711 transfer of bulk across the district boundary ...The building is now as of right with regard to its distribution of bulk..."). In a gross abuse of discretion, the BSA seemed to use §74-711, not as authority to transfer bulk, but as authority to ignore the height and setback restrictions for the condominium portion of the building.

The BSA was well aware that floor area transfer was a non-issue, for the irrelevancy of such a transfer was pointedly raised by the opposition. Yet knowing this, the BSA engaged in lengthy irrelevant discussions of floor area transfer at ¶¶ 97, 99, 108, 109, 113, 114, 115, 117, and 120.

21. Access, Accessibility and Circulation

The Congregation describes the need for resolving existing problems relating to access, accessibility and circulation as the "heart" of its application and sprinkled references to these issues throughout its submissions from the counsel for the Congregation. Yet, because these problems are resolved fully by a conforming as-of-right building, the issue is wholly irrelevant to this variance application, as discussed below. Even the most cursory comparison of the conforming as-of-right building to the proposed-approved building shows that these issues are handled the same way in both, as opined by the opposition architectural expert Craig Morrison. Most significantly, Mr. Charles Platt of Platt Byard Dovell White, the architects for the Congregation, agreed that the conforming as-of-right schemes addressed this issue, as discussed below. Letter from Charles A Platt on Behalf of Applicant dated February 4, (P-02768, R-003611). Yet, the BSA, in disregard of all reality and evidence not refuted, notwithstanding, seemed to

dis[agree]agree and found that this was a programmatic need and hardship and used this hardship as a basis for the (a) finding for both the lower floor variances and even the upper floor condominium variances in this so-called finding related to the condominium variances.

> ¶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

The BSA was also in error when making the following findings because the ¶213 reference to programmatic need suggests a reference back to circulation in ¶212, and, if so, then the BSA finding in ¶213 is highly erroneous and flawed.

> ¶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

These findings were made in the discussion of finding (e) as to both the upper condominium variances and the lower school variances. If ¶213 refers only to the lower floor variances, and includes circulation as a programmatic need, then ¶213 is demonstrably false. In addition, if ¶213 does not refer to the condominium variances, then no (e) finding was made for the condominium variances.

ARGUMENT

I. THE FIVE FINDINGS AND THE REQUIREMENT OF SEPARATE FINDINGS

Under New York law, the Congregation had no reasonable expectation that its property would not be rezoned in 1984 or subjected to landmark regulation in 1974 and 1990, and such rezoning or landmarking does not provide alone any rights to the Congregation.

> Under New York law, the source of plaintiffs' property rights, a landowner has no vested interest in the existing classification of his property. Shepard v. Skaneateles, 300 N.Y. 115, 89 N.E.2d 619 (1949). Indeed, a zoning ordinance which changes a particular district, if a rational and proper exercise of the police power, Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926), does not offend the Constitution as a "taking" of property; rather, it sets forth the "rules and understandings" which define the property interests of those affected by the ordinance - interests which, when so defined, would be entitled to constitutional protection.

Ellentuck v. Klein, 570 F.2d 414, 429 (2d Cir. N.Y. 1978).

> Our decisions, however, evince a fundamental desire to limit "the power of the board of zoning appeals to grant variances" .... As early as 1927, Cardozo warned, in the course of an opinion annulling the grant of a variance, that "[there] has been confided to the Board a delicate jurisdiction and one easily abused * * * judicial review would be reduced to an empty form if the requirement were relaxed that in the return of the proceedings the hardship and its occasion must be exhibited fully and at large.

Village Bd. of Fayetteville v. Jarrold, 53 N.Y.2d 254, 259 (N.Y. 1981)

A. §72-21 Of The Zoning Resolution

> 72-21 Findings Required for Variances
>
> 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, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board of Standards and Appeals may, in accordance with the requirements set forth in this Section, vary or

modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.

Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this Resolution in the specific case, provided that **as a condition to the grant of any such variance, the Board shall make each and every one of the following findings (emphasis supplied):**

(a) that there are unique **physical** conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other **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; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the zoning lot is located;

(b) 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 that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such zoning lot; this finding shall not be required for the granting of a variance to a non-profit organization;

(c) 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;

(d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however where all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship; and

(e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for.

> It shall be a further requirement that the decision or determination of the Board shall set forth each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be supported by substantial evidence or other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board. Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection.

B. New York City's §72-21(a) Requirement Of Unique Physical Condition Is Specific And Is Not Found In New York State Law

New York City's variance resolutions, as enacted by the City Council, are substantially different from comparable New York State regulations, given the density and vertical nature of much of the City. New York State law distinguishes between Use Variances and Area Variances. New York State Town Law §267-b (P-00180-P-00181). New York State law notably does not include the requirement in §72-21(a) requiring the existence of a "unique physical condition." This is a longstanding provision applicable in New York City, and the BSA has not been authorized to omit this provision from the law. Moreover, many New York State decisions involve the interpretation of the language of the state statute, and where statutory interpretation is involved, may not be applicable to a New York City case.

C. Conclusory Findings Are Not Sufficient

The key findings, such as they were, of the BSA in the Decision are entirely conclusory and merely restate the criteria of the Zoning Resolution. The Decision must provide findings of fact supported by the evidence in the record. Statements such as "the applicant represents" (¶48), "the applicant further states" (¶48), "the applicant has asserted" (¶52), "the feasibility study indicated" (¶130), are not findings of facts — these

are merely claims of the Congregation and in many cases are conclusory claims of counsel for the Congregation.

> Conclusory findings of fact cannot support a ZBA determination; the [***5] ZBA must set forth how and in what manner granting the requested variance would be proper or improper (Human Dev. Serv. of Port Chester, Inc. v. Zoning Bd. of Appeals of Vil. of Port Chester, 110 AD2d 135, 493 NYS2d 481 [2d Dept 1985], affd 67 NY2d 702, 490 N.E.2d 846, 499 NYS2d 927 [1986]; Gabrielle Realty Corp. v. Bd. of Zoning Appeals of Vil. of Freeport, 24 AD3d 550, 808 NYS2d 258 [2d Dept 2005]; Salierno v. Briggs, 141 AD2d 547, 529 NYS2d 159 [2d Dept 1988]; Margaritas v. Zoning Bd. of Appeals of Vil. of Flower Hill, 32 AD3d 855, 821 NYS2d 611 [2d Dept 2006]). Further, it is not enough to simply restate the criteria in the statute (see Leibring v. Planning Bd. of the Town of Newfane, 144 AD2d 903, 534 NYS2d 236 [4th Dept 1986]; 147 A.D.2d 984; Necker Pottick, Fox Run Woods Bldrs. Corp. v. Duncan, 251 AD2d 333, 673 NYS2d 740 [2d Dept 1998]. Finally, the ZBA's findings of fact must be supported by evidence in the record (Kontagiannis v. Fritts, 131 AD2d 944, 516 NYS2d 536 [3d Dept 1987]; Witzl v. Zoning Bd. of Appeals of Town of Berne, 256 AD2d 775, 681 NYS2d 634 [3d Dept 1998]).

Glacial Aggregates, LLC v. Town of Yorkshire Zoning Bd. of Appeals, 19 Misc. 3d 1125A (N.Y. Sup. Ct. 2008)

A finding under §72-21(b) for the condominium variances is critical, yet, the Board never made these findings. The Decision only contains these paragraphs:

> ¶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
>
> ¶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

This is the sum total of the factual findings on the key issue, and they are wholly conclusory in nature.

See Morrone v. Bennett, 164 A.D.2d 887, 889 (N.Y. App. Div. 2d Dep't 1990)

> However, we are unable to resolve these conflicting arguments on the present state of the record. In its resolution the Board made only conclusory statements, which in effect, merely restated the statutory requirements and failed to set forth the factual bases and calculations for its determination denying the application. Thus, it is unclear whether the Board rejected the petitioners' financial analysis itself as failing to substantiate the hardship claim, or whether the Board determined that an 8% return on equity was not an unreasonable return. This lack of clarity constitutes a failure to specify factual support for the determination and forecloses intelligent judicial [**567] review of the issues raised by the parties on appeal (see, Leibring v Planning Bd., 144 AD2d 903; Matter of Greene v Johnson, 121 AD2d 632; Matter of Farrell v Board of Zoning & Appeals, 77 AD2d 875; Matter of Kadish v Simpson, 55 AD2d 911).

Matter of Deon v. Town of Brookhaven, 12 Misc. 3d 1196A (N.Y. Misc. 2006)

II. UNIQUE PHYSICAL CONDITIONS WERE NOT SHOWN SATISFYING THE REQUIREMENT OF §72-21(a)

New York City Zoning Resolution §72-21(a) is quite specific and clear as to the requirement that a unique condition must be both physical and the resulting hardship must arise out of the strict application of the zoning law. As stated briefly above, the alleged hardship of access, circulation, and accessibility should not even be mentioned in the Decision — when the facts are so clear and when the Congregation's own architect agrees that these issues are satisfactorily addressed in a conforming as-of-right building, then assertions to the contrary, if verified or otherwise made under oath, raise serious issues.

Further, the other supposed physical conditions referred to in the Decision — obsolescence, the landmark status of the adjoining building, and the split lot — do not meet the standards of §72-21(a)(emphasis supplied):

> (a) that there are unique **physical** conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other **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**; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the zoning lot is located;

A. There Are No Unique Physical Conditions That Result In Any Hardship That Would Not Be Addressed by An As-Of-Right Building

The Congregation is unable to satisfy any of the three tests set out in §72-21(a):

- The unique condition that exists must be a physical condition.
- The condition must result in practical difficulties or unnecessary hardship.
- The unnecessary hardship must result from the strict application of the zoning resolution.

As will be seen, the Congregation alleges all kind of uniqueness, conditions, hardships, difficulties and other problems, but one thing is clear: the strict application of the height and setback zoning law is not the cause of any of the difficulties and hardships alleged by the Congregation.

1. The unique condition must be physical.

The word "physical" is used four times in §72-21:

> Three times in §72-21(a):
> that there are unique **physical** conditions
> other **physical** conditions
> as a result of such unique **physical** conditions.

Once in §72-21(b): "(b) that because of such **physical** conditions there…."

As to the meaning of "unique physical condition," there are countless court cases that state that the condition must be physical. The BSA believes apparently that when §72-21 states that the BSA may "vary or modify the provision" of the Zoning Resolution creating a hardship, that this means that the BSA may vary and modify §72-21(a) itself by eliminating the requirement that a condition be "physical."

In many cases, the BSA appears to stretch the definition of physical, but this is upheld only when there is a sloping lot, poor ground condition, etc. In this case, the BSA came up short — the Congregation's lot is a perfect piece of real estate, 64 x 100, perfectly rectangular, and even has perfect underground conditions to allow a sub-basement. So, in this Decision, the BSA has just dispensed with the requirement that the condition be "physical."

As part of its effort to distract and confuse, the Congregation lays the groundwork for this deception by its July 8, 2008 Statement with references to allegations of all types of unique situations and conditions, none of which are unique physical conditions. For example, its Statement in Support, the Congregation states (P-03823, R-005114):

- unique attributes at page 7
- unique environment at page 8
- unique role at page 18
- unique noncomplying building at page 33
- regulatory constraints are unique at page 33
- zoning lot's unique conditions at page 37
- unique aspect at page 40
- singular and unique condition at page 41 (twice)
- singular and unique condition at page 42 (twice)
- unique and substantially distinct zoning lot at page 52
- unique and substantially distinct at page 52

None of these references to "unique" has anything whatsoever to do with the "unique physical condition" required for the (a) finding. This was all a part of the disingenuous effort by the Congregation to create complexity out of nothing.

The Decision's vain attempt to identify a physical condition led the BSA to two physical conditions — the access problem and the alleged obsolescence — which do not meet the "arise in complying strictly" test. The other two grounds cited in the Decision — the landmark status of the Synagogue and the split lot — are not physical at all, as well as otherwise not complying with §72-21(a).

Court cases have consistently determined that the condition must be physical as well as unique. In a decision rejecting the BSA finding of unique physical condition, a court found:

> The BSA so found, premising its conclusion on the narrowness and depth of the subject lot, ignoring the undisputed evidence on the record that the two adjoining lots are identical in size and that such narrow lots are characteristic of the neighborhood. Indeed there was no evidence before the BSA that this lot was unique in its dimensions or in any other physical characteristic. In making its finding that there was a lack of substantial evidence to support this BSA [**934] finding, the Board of Estimate properly concluded: "There are no unique physical conditions peculiar to and inherent in the subject zoning lot compared to the lots in the neighborhood, resulting in practical difficulties or unnecessary hardship".

Galin v. Board of Estimate, 72 A.D.2d 114, 116 (N.Y. App. Div. 1st Dep't 1980), *aff'd*, 52 N.Y.2d 869, 870 (N.Y. 1981).

Another case reversing a BSA finding of unique physical condition is *Matter of Vomero.* There, the owner asserted:

> GAC claims in its answer that the existing one-family house located on the property suffered from an adverse location and the effects of economic obsolescence such that it would never be capable of producing a sufficient cash flow. GAC also claims that the irregular shape of the lot reduces its development potential, and that the commercial character of the surrounding areas constitute a unique circumstance precluding viable residential development. In addition, GAC claims that its land use study shows that there are only two other corner lots

> within 30 linear blocks of the subject property that retain a residential character, thereby demonstrating it's claim that the likelihood of producing a reasonable return from residential development is negligible.
>
> * * *
>
> Similarly, the Court finds that so much of the BSA's determination as is predicated upon the supposed "uniqueness" of the lot finds no support in the proceedings before it. The lot itself is of a substantial size (approximately 5800 sq. ft) which, according to the land use map submitted by GAC, is approximately the same size as the other residential lots situated in the subject area, i.e., on the southeast side of Hylan Boulevard between Otis Avenue and Bryant Avenue. Pertinently, each of these others parcels is encumbered with a conforming use of the land. Thus, there is no proof that the size of the property was ever an issue making it unsuitable for residential development. In this context, while the limited potential for on-site parking may render the lot unsuitable for use as a medical office or a multiple dwelling, there are other permissible uses not so affected. The fact that such usage may not provide GAC with the rate of return which it expected is not a permissible basis for granting of a use variance (see infra).

Matter of Vomero v. City of New York, 13 Misc. 3d 1214A, 824 N.Y.S.2d 759 (N.Y. Sup. Ct. 2006)

In *Douglaston Civic Assn. v. Klein,* 51 N.Y.2d 963, 965 (N.Y. 1980), however, a swampy nature of the property was found to be a physical condition. No such physical condition exists here. There is no irregular shape of the property as discussed in *Kingsley v. Bennett*, 185 A.D.2d 814, 816 (N.Y. App. Div. 2d Dep't 1992), finding that the irregular shape was not unique. In *Kallas v. Board of Estimate*, 90 A.D.2d 774, 774-775 (N.Y. App. Div. 2d Dep't 1982), *aff'd*, 58 N.Y.2d 1030, 1032 (N.Y. 1983), the physical condition found not to be unique was "the subject lot is not as deep as some of the lots in the area, does not itself support a finding of uniqueness," overruling a BSA determination finding a unique physical condition. *See also Albert v. Board of Estimate*, 101 A.D.2d 836, 837 (N.Y. App. Div. 2d Dep't 1984) ("the peculiar wedge shape of the subject lot constitutes a unique physical condition militating in favor of the grant of a variance."). *SoHo Alliance v. New York City Bd. of Stds. & Appeals*, 95 N.Y.2d 437, 441 (N.Y. 2000) ("were L-shaped, measuring only approximately 25 feet deep in places"). *Matter of*

Vomero v. City of New York, 13 Misc. 3d 1214A, 824 N.Y.S.2d 759 (N.Y. Sup. Ct. 2006) ("the mere fact that the subject parcel is narrow is insufficient to establish that it is unique under the governing Zoning Resolution (see, New York City Zoning Resolution § 72-71[a];").

See also the following cases:

Colonna v. Board of Standards & Appeals, 166 A.D.2d 528 (N.Y. App. Div. 2d Dep't 1990)

> In this regard, the mere fact that the subject parcel is narrow is insufficient to establish that it is unique under the governing Zoning Resolution (see, New York City Zoning Resolution § 72-71[a]; see, Faham v Bockman, supra; Matter of Kallas v Board of Estimate of City of N.Y., 90 AD2d 774, affd 58 NY2d 1030). The petitioner failed to demonstrate the irregular shape of his parcel is unique as compared to neighboring property. Moreover, even assuming that the petitioner's property is physically unique, it is capable of being used as a two-family residence in conformity with the zoning regulation, and the fact that other uses may be more profitable, does not support a finding that petitioner cannot realize a reasonable return on his investment.
> (emphasis supplied)

Marchese v. Koch, 120 A.D.2d 590, 591 (N.Y. App. Div. 2d Dep't 1986)

> The Board of Estimate's determination disapproving the variance was correct. The following findings required by New York City Zoning Resolution § 72-21 were not supported by substantial evidence before the Board of Standards and Appeals: (a) that there are unique physical conditions peculiar to and inherent in the particular zoning lot which cause practical [*591] difficulties or unnecessary hardship to arise in strictly complying with the Zoning Resolution; (b) that, because of such physical conditions, there is no reasonable possibility that development in conformity with the resolution will bring a reasonable return; [***3] (c) that the hardship was not self-created, and (d) that the variance, if granted, is the minimum necessary to afford relief.

> The petitioner argues that his lot is not suitable for residential use because of its large size, unusual depth, trapezoidal shape, and proximity to another lot which is being used for commercial purposes. However, the petitioner presented no evidence to show how these conditions prevent him from being able to construct residences or obtain a reasonable return from such a use. The evidence in the record shows that many lots in the area are of trapezoidal shape and are close to a commercial property but are nevertheless used for residential purposes. There is nothing about a lot's large size which causes it to be inherently unsuitable for residential use. The petitioner's evidence on the anticipated return of various proposed uses shows no more than that commercial use is more lucrative than residential development in the neighborhood generally. This does not justify a variance (see, Matter of Douglaston Civic Assn. v Klein, 51 NY2d 963).

The Congregation's development site is a completely regular 64 x 100 rectangle with excellent subsurface conditions permitting construction of two basements. The Zoning Site as well is a perfect rectangle with no known physical condition. All the conditions referred to by the Congregation are regulatory conditions: i.e., zoning and landmarks regulations.

2. <u>The physical condition must result in "practical difficulties or unnecessary hardships."</u>

A unique physical condition standing alone does not satisfy the (a) finding, for an applicant must also show that the particular unique physical condition results in "practical difficulties or unnecessary hardships."

For example, the court of appeals in the *Fayetteville* case was careful to note that merely having a sloped property did not in and of itself created the hardship:

> On the present record, therefore, it must be concluded that the facts adduced at the hearing did not justify the grant of a use variance. The conclusory testimony of the witnesses, unsupported and unsupplemented by underlying concrete facts in dollars and cents form, provides no basis for the board or the courts to evaluate whether the property at issue

> is being subjected to unnecessary hardship. Indeed, even the dissenting opinion points to no fact on the record that demonstrates the inability of the landowner to realize a reasonable return. While the dissenting opinion notes that the parcel is sloped and will require special preparation for residential development, it does not and cannot specify the extra cost of the preparation, the potential value of a house on the site, the cost of the property and other such information. Without this proof, it is simply impossible to say, other than by pure speculation, whether residential development will or will not yield a reasonable return.

Village Bd. of Fayetteville v. Jarrold, 53 N.Y.2d 254, 260 (N.Y. 1981)

3. The hardship must be caused by the strict application of the zoning resolution.

Even if a site possesses a unique physical condition, the unique condition must bear a relation to the variance being requested. In other words, the hardship must result from the strict application of the zoning resolution. That would mean that even if a unique physical condition caused a difficulty such as access, the access difficulty must be caused by the strict application of the zoning resolution. In this situation, an as-of-right building is one that will strictly comply with the zoning resolution. So, if an as-of-right building resolves the access issues, then the hypothetical condition would not be a condition satisfying the (a) finding.

Clearly, neither the alleged access nor obsolescence conditions arise out of the strict application of the zoning resolution.

B. Access, Accessibility And Circulation Are Not Hardships Under §72-21(a) Because They Do Not Result From The Strict Application Of The Zoning Regulations

In an attempt to identify a physical condition in order to support a finding under §72-21(a), the Congregation and the BSA have diverted attention by discussing the problems of access, accessibility and circulation (collectively referred to herein as the

"access issue.") The specific hardship for the Congregation is that the sanctuary first floor is not at ground level and has an inadequately sized lobby, thus lobby space is needed in the adjoining building, as well as an elevator that stops at all levels of the sanctuary. The 1954 community house was intended to resolve these issues but did not. Resolving the issued require either rehabilitation or a new building, but only an as-of-right building.

The references to access are not hardships under §72-21 (a) of the Zoning Regulations for the simple reason that this alleged hardship is resolved completely by a conforming as-of-right building, without even the lower floor variances. The Zoning Resolution is quite clear that any hardship upon which a variance is based must arise out of the strict application of the Zoning Resolution. The mere existence of a hardship is not sufficient — there must be a logical relationship between the hardship, the Zoning Resolution, and the variance. Here, there is none.

In the Congregation's own words, the need to remedy alleged access and circulation issues relating to the synagogue is "the heart of its application" as stated in its June 17, 2008 filing[18]. To emphasize this claim, the Congregation mentions this issue on 30 separate occasions of its final version of its Statement in Support, and similarly in the four earlier versions of the report.[19] The issue of access has great emotional and public

[18] "... the significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application." June 17, 2008 Friedman & Gotbaum to BSA, page 2, two lines from bottom of second full paragraph,(P-03742 at P-03724; R-004859 at R-004860).

[19] The public relations emotional appeal is shown in this quotation attributed to Shelly Friedman in the *Jewish Week*, which is the same as statements made in the proceeding.

> "There are real benefits here, providing for better circulation outside the sanctuary," says Shelly Friedman, a land use lawyer who represents both Shearith Israel and Kehilath Jeshurun. "A number of services end in the sanctuary and continue downstairs in the social hall. Many of the older congregants and even younger congregants who are physically challenged literally had to be carried downstairs."

relations appeal. The BSA acceptance of this false issue would suggest that the BSA acted emotionally or cynically.

Yet, it is indisputable that access and accessibility issues are fully resolved by a conforming as-of-right building that provides the large lobby and modern elevator needed to resolve these problems. A simple comparison of the as-of-right plans to the proposed plans shows that the access and accessibility (i.e., elevators and lobbies) are designed identically in both schemes. See "Access Comparison - Conforming AOR to Proposed, filed January 28, 2008 as Opp. Ex. FF" (P-00460 to P-00464, R-003600).

But comparison of the floor plans is not needed to establish this point. The opposition expert witness Craig Morrison, an AIA certified architect, stated unequivocally that a conforming as-of-right building resolved all of the access and circulation issues. Letter from Craig Morrison, Opposition Expert, dated January 28, 2008 (P-02730, R-003282). In response, the Congregation's rebuttal expert witness, Charles Platt, its architect from Platt Byard Dovell White, acknowledged that Mr. Morrison was absolutely correct in a letter submitted February 4, 2008 to the BSA:

> Access and circulation in the proposed and as-of-right schemes are discussed in these paragraphs. Mr. Morrison 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 adjacent to the historic synagogue building. In each scheme, the proposed elevator serves both the historic synagogue and the community facility floors of the proposed building. Unlike the existing non-compliant elevator, the proposed elevator is sized and configured to meet program needs and ADA requirements. Most importantly, it stops on all levels of

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September 10, 2008 NY Jewish Week - On The Upper West Side, A Building Battle Continues (P-00049). Mr. Friedman neglects to mention that without any variances, a conforming building would permit physically challenged congregants to use a modern elevator.

> both the existing synagogue and the community facility floors of the proposed building. Because the current elevator does not stop at the level of the main sanctuary, disabled congregants must now be carried up a flight of stairs to reach the main sanctuary. The proposed elevator is a necessary and required improvement to the synagogue's everyday circumstances and is used in both the proposed and as-of- right schemes.
>
> (emphasis supplied)

Letter from Charles A Platt on Behalf of Applicant dated February 4, (P-02768, R-003611)

Yet even after the definite statement of its expert witness to the BSA that access and circulation problems were resolved by a conforming as-of-right building, the Congregation's counsel persisted in hundreds[20] of false references to assert the contrary (without objection or question from the BSA). See Sugarman Letter of June 10, 2008 (P-04219).

For example, in a statement repeated many times, the final version of the Congregation's July 8, 2008 Statement in Support (P-03823, R-005114) states at page 53 that

> Without the waivers requested in this Application, CSI will not be able to build a Community House in a manner which addresses the access deficiencies of the Synagogue.

We are waiting to see if any of the respondents in a verified answer will claim that this statement, made in unverified and unsworn conclusory filings signed by counsel for the Congregation, is true.

Because the access hardship is fully resolved by a conforming as-of-right building, the Decision should have ignored the access hardship. This is variance law 101.

[20] The false assertion was stated or implied at least 30 times in each of the multiple versions of the Statements in Support filed by the Congregation, in addition to being referred to in other documents and in testimony.

Zoning Resolution §72-21(a) is quite clear that the hardship upon which a variance is granted must result from the strict application of the zoning resolution. A conforming as-of-right building is a building that strictly applies this zoning resolution. If a hardship is remedied by a conforming building, then it is not a hardship cognizable under finding (a).

Why would the BSA refer to something that is completely irrelevant to the variances requested, unless it was to cloud the facts, evoke sympathy, and subsequently mislead this Court? The references by the BSA to access and accessibility in its Decision are clear evidence of the lack of impartiality and the bias of the BSA.

Petitioners repeatedly objected to the BSA as to the abusive repetition by the Congregation of the false claims concerning access and circulation. (See, June 10, 2008 Sugarman Supplemental Opposition Statement at p. 15-20 (P-04200 at P-02417, R-004818 at -35), where opposition counsel identified 30 instances of false statements just in the Congregation's latest version of its Statement in Support;[21] see also, June 19, 2008, letter brief to the BSA, which devotes two pages to this issue (June 19, 2006, Sugarman to BSA SurReply Letter at page 3, (P-03746 at P-03748; R-004925 at R-004927).[22]) At

[21] "So, why does the Applicant persist with its irrelevant assertions? Primarily, because the BSA allows them to do so. The BSA Board does not engage in questioning of the witnesses of Applicant's in such a way as to create a clear record of the facts — here the clear fact that the as-of-right and proposed buildings resolve access issues identically. One result is that 15 months and thousands of pages into this proceeding, the BSA has utterly failed to narrow the issues, which it quite clearly could accomplish if it so wished. So rather than the BSA board engaging in a few minutes of careful questioning of the Applicant and its consultants (and not only the Applicant's conclusory attorney) designed to elicit clear admissions, we have again the same irrelevant, and indeed false, statements polluting the record and creating complexity out of nothing. Unlike most administrative adjudicatory proceedings, the BSA does not allow opponents to cross-examine of the applicant's for relief." See, June 10, 2008, Sugarman Supplemental Opposition Statement, n. 6, page 16, P-04200 at P-04128; R-004818.

[22] "For too long in this proceeding, Applicant has fouled the record and wasted the time and energy of all by its wholly irrelevant assertions as to access and circulation. Rather than explain or respond to our detailed discussion in our June 10, 2008, brief and previously, the only response from the Applicant is to now assert 'Moreover, development of the Parsonage parcel would do nothing to remedy the significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application.' Page 2, second full paragraph, June 17, 2008 Applicant Reply Statement."

the final hearing, counsel for Petitioners confronted the BSA Commissioners as to their refusal to clear the record.

> 16 Now, in this case, the applicant has kindly stated in its last submission that access
> 17 and accessibility of hardships are the heart of its application.
> 18 In fact, it referred to it thirty times in its last submission. And, yet, the Board has
> 19 really never gone into that to figure out what they are talking about as it relates to finding
> 20 (a), which requires that connection between the hardship arising from the strict
> 21 compliance with the Zoning Resolution.
> 1 So, here we have an issue that is without question legally relevant in the
> 2 mandatory findings and the applicant says is the heart of its application. So, what do we
> 3 have in the record?
> 4 We keep asking the Board to ask and get into these issues and, frankly, I think
> 5 we're ignored.
> 6 I don't understand how this wasn't taken care of months or over a year ago where
> 7 we [unintelligible] not see it thirty times; thirty times in one submission?
> 8 So, here's the question. Can the applicant explain how a building strictly
> 9 complying with the Zoning Resolution, does not address the access and accessibility
> 10 difficulties; a hardship described by the applicant as the heart of its application.
> 11 I've never heard that question asked. Has the Chair asked that? No. Has the
> 12 Vice-Chair? No. Has Commissioner Hinkson so inquired? No. Neither Commissioner
> 13 Ottley-Brown or Commissioner Montanez? Has the applicant answered this? No.
> 14 Where is the connection of the heart of its application to this mandatory finding which
> 15 wasn't even referred to yesterday?
> 16 So, I don't know how the Board is going to make this finding (a), which is
> 17 critical, particularly as it applies to the upper buildings.
> 18 We have provided our expert architect providing information on that. We have
> 19 provided schematics, analysis, everything you can possibly do. And, interestingly, when
> 20 the opposition testifies, no one questions it. None of the Commissioners question it. The
> 21 applicant doesn't question it.
> 22 So, it seems to me that the answer to the question is there is no relationship
> 23 whatsoever between this hardship and any requested variance.[23]

In response, the BSA did and said nothing and did not ask the questions, apparently channeling the proverbial three monkeys. Instead, in its Decision, the BSA repeated the Congregation's false claim, ignoring in the hearing and in its Decision the objections of the opponents on this issue.

Notwithstanding the overwhelming facts and in the face of the specific and repeated objections by opponents, the BSA in its decision referred to this irrelevant issue repeatedly, sometimes directly (¶¶41, 45, 61, 72, 73, and 74), and other times indirectly,

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[23] June 24, 2008 Official Transcript BSA Hearing, Pages 14-15 (P-03762 at P-03776; R-004937 at R-004951).

having included resolution of this "hardship" as a programmatic need or as related to "floor plates" or "obsolescences" (¶¶44, 46, 47, 50, 57, 69, 75, 76, and122).

In searching the record, the only obsolescence that is asserted is the fact that the existing elevator in the community house is not ADA compliant and does not stop at all floors, and that the lobby in the community house is not adequately sized or convenient — all parts of the access hardship and all conditions resolved in a conforming building. The importance of this is that in order to satisfy the language of (a), a "physical" condition is required — the Congregation and the BSA are trying to bootstrap the physicality into the requisite facts required for finding (a).

The Decision thus bootstraps the so-called physical access hardship as part of both the programmatic need and as physical obsolescence. Then, the hardship and obsolescence are conflated into programmatic need, which is then used to support both the school and condominium variances.

In relying upon the Congregation's claim of access and accessibility hardship to support the variance, the BSA was not confused, but rather was making a deliberate effort to mislead this Court on a basic issue and was trying to disguise the fact that variances are being provided to the Congregation solely to provide money to the Congregation, and for no other reason. Most importantly, the BSA's conduct on this issue demonstrates the BSA's lack of impartiality and the denial of procedural due process to opponents.

C. There Is No Physical Obsolescence Condition Creating A Hardship Resulting From Strictly Complying With The Zoning Resolution

The Decision seems to describe "obsolescence" as a physical condition under Zoning Resolution §72-21(a), but provides neither (i) a factual finding identifying the obsolescence; (ii) a factual finding identifying the building that is obsolete, nor (iii) a

factual finding that the alleged obsolescence is not cured by a conforming as-of-right building.

To the extent that "obsolescence" is just another way to describe the access hardship, certainly that hardship does not satisfy an (a) finding.

The BSA spends a great deal of effort discussing the concept of obsolescence without telling us what is obsolete, but it seems apparent that the obsolescence is that within the existing community house.[24] It is apparent that the BSA expends this effort so as to conjure up something that is "physical" in nature in an effort to satisfy finding (a). For all practical purposes, the existing community house for §72-21(a) purposes is the same as a vacant lot: it will be demolished and a replacement building resolves any hardships relating to the alleged obsolescence.

Without even identifying the obsolescence, the Decision at ¶76 cites to *Homes for the Homeless v. BSA*, 103324/04 (N.Y. Sup. Ct., July 1, 2004) for the proposition that "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" in responding to a contention never made by the opposition. It is curious to cite this decision, since it overruled the BSA, though this was later reversed by the Appellate Division. (____A.D. 2nd _____). *Homes for the Homeless* involved two parcels of land, one was occupied by an obsolete building, and the other was vacant. The applicant sought, and the BSA

[24] The Decision mentions that the Commissioners had made on-site inspections (¶5), but the Commissioners fail to identify the facts gleaned from the inspections, to the extent these are relied upon in the Decision. It also seems that, if an inspection were made within the building, the Commissioners would have been guided by someone at the Congregation and that this would have constituted an improper ex parte contact. The BSA refused to allow opponents to join the on-site visits, or to require the Congregation to make the site available to the opposition architectural expert. See for example Letter dated March 4, 2008 from Shelly Friedman on behalf of Applicant refusing to allow inspection. P-02984, R-003825. Also see Sugarman Letter to BSA dated March 17, 2008 (P-03055, R-003906). The hearing remained open for five months after the initial inspection request.

granted, a legalization use variance for the occupied parcel where the obsolete building was to remain, but refused to provide a variance to construct a new building on the vacant lot. The BSA argued that the obsolescence of the existing building was a physical condition for a use variance for that building, but did not support a use variance on the adjoining vacant lot.

The BSA's discussion in the instant Decision as to whether a building can be a physical condition is just another example of the BSA's infusing the Decision with irrelevancies. Even assuming for the sake of argument that the alleged obsolescence of the existing community house is a physical condition, it does not matter under §72-21(a), for the resulting hardship does not result from the strict application of the zoning resolution as to Lot 36.

D. The Landmarked Sanctuary And The Split Lot Is Not A Physical Condition Under §72-21(a)

Despite the Congregation's not-so-subtle references to a "taking," there has been no taking here, neither by the 1984 rezoning limiting the height of a building to 75 feet in the R8B portion of its lot 37, nor in the 1974 designation of the Synagogue as landmark, nor the 1990 designation of the district as a historic district. As the Second Circuit stated in *St. Bartholomew's Church*, in describing the U.S. Supreme Court holding as to the challenge to the landmarking of Grand Central Station:

> The Supreme Court squarely rejected Penn Central's claim that the building restriction had unconstitutionally "taken" its property. Central to the Court's holding were the facts that the regulation did not interfere with the historical use of the property and that that use continued to be economically viable: The New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we

> must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York, 914 F.2d 348, 356 (2d Cir. N.Y. 1990).

Moreover, no discriminatory zoning has taken place as to this variance application. As stated in the Penn Central (Grand Central Station) case:

> It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. See 2 A. Rathkopf, The Law of Zoning and Planning 26-4, and n. 6 (4th ed. 1978). In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, n28 and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 132 (U.S. 1978), *aff'g* 42 N.Y.2d 324 (1977).

Zoning laws are no less applicable, even where a religious institution is involved, especially where the zoning law is a neutral law of general applicability. The mid-block zoning law, which protects the scale to that of the row houses, is no doubt of general applicability, and there can therefore be no claim by the Congregation that it was or has been singled out. See *St. Bartholomew's Church* at 451 F. 3d at 651.

The Congregation can fully satisfy its religious programmatic needs within the zoning envelope of an as-of-right building. The Congregation is also able to satisfy the purposes for which it purchased the Lot 37 property, which, in their own words in their own conclusion to their most recent July 8, 2008 Statement in Support, "for development of the Synagogue and Community House, respectively."

The Congregation repeatedly invokes the landmark status of the Synagogue and location of the site in a historic district as a hardship that forms a basis for the variances, contending, essentially, that the Congregation should be compensated for the landmarking by being provided a zoning variance. As the case law cited above shows, a taking resulting from landmark status and the impact of landmark status is not a ground for providing compensation to the owner for the taking in the form of granting a variance. Yet, the Congregation wishes these well-accepted principles to be ignored. The Congregation sprinkles its submissions with statements such as the following, but at the same time claims that the Congregation is not claiming a taking based upon the landmark status as shown in the Applicant's July 8, 2008 Statement in Support (P-03823, R-005114):

- "The original proposed building submitted to LPC was reduced by 6 stories ' necessitated due to the LPC's concerns that the height of the initial submission was not in keeping with the character of the Historic District.'" July 8, 2008 Statement, p. 14.
- "In returning to the LPC with the smaller New Building, CSI indicated its willingness to seek the variance requested in this Application." July 8, 2008 Statement, p. 16.
- "By seeking relief from LPC, CSI thereby exhaust[ed] its administrative remedies prior to the filing of this Application." July 8, 2008 Statement, p. 16.
- "... combined with the interests of the LPC in providing a front elevation harmonious-with both the designated landmark and the historic district -- render it impossible to provide any useful development" July 8, 2008 Statement, p. 40.
- "... and has been limited by the LPC to the same height as 18 West 70th to its west." July 8, 2008 Statement, p. 45.

- "Inasmuch as the zoning floor area being transferred was being taken from air space over the designated landmark, and because the proceeds of the development of the residential portion of the New Building (ten floors in the initial Application) were being directed to the continued restoration and maintenance of the landmarked Synagogue." July 8, 2008 Statement, p. 15.
- "Zoning and landmarked restrictions now severely limit significant reconfiguration of the site." July 8, 2008 Statement, p. 6.
- "In every category the demand for these programmatically required elements is increased, and CSI considers it essential to provide these services without compromising the landmarked Synagogue building." July 8, 2008 Statement, p. 53.

Having repeatedly invoked the landmark status of the Synagogue as a basis for the variances, the Congregation qualifies its position, stating that "no claim is made herein for the granting of a variance based solely on the landmark status of the Synagogue or its location within a historic district." (July 8, 2008 Statement, p. 5). The Congregation does not state on what basis it seeks a variance, other than landmark status and the 1984 rezoning. In its Decision, the BSA accepts the Congregation's unsupported argument.

Although the Congregation states that the landmark status is not the sole basis for a variance, the Congregation still asserts that the landmark status may be a factor in granting the hardship. There is no legal basis for this claim.

Quite clearly, the landmark status cannot be any factor at all in granting the variances. This was the holding in the seminal cases of *Penn Central* and *Ethical Culture*, and the Congregation seems to suggest that these cases are not correct and

should be revisited. But the BSA cannot do this. It must follow the law as articulated by the courts.

The Congregation must establish a hardship based upon a unique physical condition and the strict application of the zoning law. It has not done so.

E. The BSA Erroneously Relied Upon Religious Programmatic Need In Finding That a Physical Condition Existed As To The Condominium Variances

The Decision having first found in ¶¶32, 33, and 34 that programmatic need of a religious institution could not be used as a basis for commercial or revenue producing variances, it then reversed itself in the key finding §72-21(a) for the upper floor condominium variances. Without even identifying with any specificity the nature of the "programmatic needs," the Decision at ¶122 uses programmatic need as a basis for the unique physical condition requirement of finding §72-21(a).

> ¶122. WHEREAS, the Board agrees that the unique physical conditions cited above, <u>when considered in the aggregate and in light of the Synagogue's programmatic needs</u>, 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

Paragraph 122 is also not specific as to what the "physical condition" is or even as to what the difficulties and unnecessary hardships might be. For these reasons, it is apparent that ¶122 is an insufficient finding under §72-21(a) for the condominium variances, and, accordingly, these variances must be annulled.

III. THERE IS NO BASIS IN THE RECORD FOR THE CONCLUSORY FINDINGS OF THE BOARD THAT A CONFORMING AS-OF-RIGHT BUILDING WOULD NOT EARN A REASONABLE RETURN

The BSA's finding as to the inability of the owner to earn a reasonable return has no support in the record. A review of the record establishes the arbitrary, capricious, and

irrational nature of the so-called finding. The record will be reviewed in this section based upon the averments in the petitions, all of which are substantiated by specific references to the record.

A. The Applicant Failed To Demonstrate That a Conforming As-Of-Right Building Would Not Provide a Reasonable Return To The Owner

For the Congregation to obtain variances for the upper floor condominiums, the Congregation, under Zoning Resolution §72-21(b), has the burden of proving that an as-of-right development in strict conformity with the zoning requirements will not bring a reasonable return to the owner.

If the Congregation does not meet this burden of proof, then the BSA must deny the variances for the upper floor condominiums. In order to attempt to meet this burden, the Congregation provided purported analyses of a conforming mixed-use building with two condominium floors (aka "Scheme A") and a conforming "all-residential" building (aka "Scheme C"). The "all-residential" building was incorrectly described in that it was not "all residential" and included community space; as well, the "all residential" failed to include the value of the potential basement and sub-basement areas.

The Congregation failed to meet its burden to show that it could not earn a reasonable return, and for that reason alone, the upper floor condominium variances must be denied. Analyses of reasonable return that are based upon expert opinions that are confusing, disorganized, conflicting, and varying and that rely upon unsubstantiated and incomplete cost reports, and that reach irrational conclusions and are opposed as well by qualified expert opinion are insufficient to support a finding that an owner cannot earn a reasonable return.

A court need not defer to the expertise of an administrative agency when the agency's decision shows no evidence, as with the reasonable return analysis, of the application of its supposed expertise and rationality as to the material issues.

"Reasonable return to the owner" is a legal concept used by the New York and federal courts in assuring that property owners do no suffer an unconstitutional taking as a result of land use and zoning regulation. The use of "reasonable return" in ZR §72-21 is to be interpreted according to case law. When the City Council adopted this provision, there is no evidence that it assigned to the BSA the right to depart from the accepted meanings of this phrase. Analysis of the possible reasonable return from conforming as-of-right structures on the site is a key element in a zoning variance proceeding under ZR §72-21.

The BSA has issued formal instructions for use by an applicant for a variance under ZR §72-21 that includes detailed instructions for the feasibility/reasonable return analysis as well as other requirements. See Detailed Instructions for Completing BSA Application ("BSA Instructions") (P-00139 also submitted as Opp. Ex. KK-1 R-004267, P-00450). Instructions for so-called feasibility studies are found at Item M of the BSA Instructions (P-00145-47, R-004273-75).

In Item M of the Detailed Instructions, BSA uses the term "Financial Feasibility Study" in describing the reasonable return analysis required under ZR §72-21(b) and under case law. The BSA has admitted in response to a FOIL request by Petitioners' attorney that, other than the BSA Instructions, there are no guidelines, policy statements, or regulations of the BSA as to the reasonable return analysis. Letter dated May 7, 2008, BSA to Sugarman (P-03371, Opp. Ex. PP-104 at R-005511 responding to Sugarman

FOIL request of April 22, 2008 at R-005622). . The BSA attempted to conceal these important letters from the court by excluding them from its chronological Record, but, did not realize that these documents were included in exhibits filed by the Opposition and included in the Record.

The Congregation retained the services of Freeman Frazier to conduct the feasibility studies of conforming as-of-right buildings on the property. Between April 2, 2007 and August 12, 2008, Freeman Frazier provided approximately 14 submissions to the BSA with a total of 298 pages and provided testimony at several BSA hearings. The Congregation and Freeman Frazier had ample opportunity during the 17-month proceeding to provide reasoned, rational, and clear proof and explanations of the reasonable return from conforming as-of-right buildings.

A conforming as-of-right building is one that can be constructed "in strict conformity with the provisions of the [Zoning] Resolution." §72-21(b). Under variance case law, a reasonable return analysis considers whether the owner can obtain a reasonable return using the maximum rights available under the zoning regulation. The proof must consist of a real world, rational, "dollars and cents" proof.

The conclusions from the Freeman Frazier reports were not consistent and varied widely from report version to report version. The value per square foot claimed by Freeman Frazier varied between $450 per square foot and $750 per square foot.

The number of square feet in the two-floor site claimed by Freeman Frazier to be appropriate for valuation ranged from 19,755 to 37,889 square feet, rather than the actual 5022 square feet on the two floors being developed.

It is not possible to review a single Freeman Frazier report version and receive a complete explanation as to either of the as-of-right analyses described below. Freeman Frazier uses terminology not in the zoning resolution or guidelines, and uses varying terminology to refer to the same issues or schemes.

Freeman Frazier uses the phrase "acquisition cost" apparently to refer to the "market value" of the land. The Guidelines refer to "market value of the property" and "acquisition costs and date of acquisition." Freeman Frazier improperly conflates the two terms. The BSA in its decision uses the term "site value," e.g., at ¶128, rather than either the term "acquisition cost" used by Freeman Frazier or "market value" as used in the Instructions. The inconsistent use of terms is intended to create complexity and make it difficult for courts to review the assertions of the Congregation and the findings of the BSA.

In support of the construction costs for the conforming schemes, Freeman Frazier provided incomplete, unsigned reports by the estimator of construction costs, and refused to provide the missing pages despite repeated objections by opponents.

The conclusion by Freeman Frazier that the Congregation could not obtain a reasonable return from this prime piece of residential real estate is highly improbable, if not completely irrational.

The opposition retained a professional real estate valuation expert, Martin Levine of Metropolitan Valuation Services ("MVS"). Mr. Levine holds an MAI certification in real estate and provides real estate valuations for banks and insurance companies. Mr. Levine provided over 76 pages of detailed professional real estate analysis in multiple reports responding to the multiple submissions of Freeman Frazier as follows:

January 24, 2008 P-02681, R-002506

February 8, 2008	P-02785, R003630
March 25, 2008	P-03167, R-004093
April 15, 2008	P-03310, R-004254
June 10, 2008	R-004800
June 23, 2008	R-004932
July 29, 2008	P-03907, R-005210

Mr. Levine concluded that all of the Freeman Frazier reports were highly flawed and both the Scheme A and Scheme C conforming as-of-right buildings would earn a reasonable return for the owner whether using return on investment or return on equity. Mr. Levine states in his final submission of July 29, 2008, page 11-12, (P-03907 at P-03917-18, R-005210 at R-005220-21), attached as Exhibit F to the Verified Petition:

> We are both troubled and puzzled by Freeman/Frazier's reliance on their repeated statement of justification for their questionable procedures and methodology as contained within their July 8, 2008 letter (Opp. Ex. M:M-110) that:
>
> > "As stated above, in our response to a similar concern expressed in the MVS Report, the methodology utilized in our submissions is typical for BSA condominium project applications, and has been a long standing accepted practice at the BSA."
>
> It would appear that Freeman/Frazier are absolving themself from rendering expert opinion and judgment, but rather are merely processing mathematical models. By making this statement they absolve them self of professional responsibility and authority for the conclusions that result. Accordingly, the value of their opinions concerning feasibility are worthless.
>
> Repeated attempts by Freeman/Frazier to prove that this regularly shaped rectangular level site, located just off Central Park West is not economically feasible to develop within as of right zoning criteria is a notion that defies rational discussion. Through gross distortions, manipulative and questionable arithmetic, uncertain and apparent bias in the apportionment of construction costs, unsound economic assertions and conflicting value assumptions, does the applicant make a case for economic hardship. Given the enormity of the flaws, errors and misrepresentations contained within all their submissions, it should be a simple matter to conclude that granting a variance based upon economic hardship is totally without merit.

Mr. Levine also testified at the hearing criticizing issues such as Freeman Frazier's noncompliance with BSA guidelines, construction cost estimate fallacies and

incomplete documents, exaggerated soft costs, etc. Every single issue raised by Mr. Levine was ignored in the Decision, save for one relating to return on equity, which received a purely cosmetic, ex cathedra response without rational explanation. The BSA's failure to address these issues suggests that the BSA failed to apply any expertise in its conclusory finding approving the unsubstantiated and unidentified conclusions of Freeman Frazier. ¶¶141-144

B. Scheme A — The Analysis Of The Reasonable Return Of Two Floors Of Condominiums

As part of the Congregation's initial Application, the Congregation provided the first of many reports from its consultant Freeman Frazier. (P-01414-P-01442). Freeman Frazier's first report, filed with the Application on April 2, 2006 (P-01414-P-01442), contained an analysis of a conforming as-of-right Scheme A building consisting of (i) a four-floor, basement and sub-basement community house and (ii) a two-floor market-rate area on floors 5 and 6 dedicated to luxury condominiums. The building was referred to as "AOR Scheme A," although the same building in other submissions by Freeman Frazier is referred to as the "As of Right Residential Development."

Subsequently, Freeman Frazier revised its Scheme A analysis in five further submissions. Thus, the following Freeman Frazier reports analyzed Scheme A: March 28, 2007 (P-01414); October 24, 2007 (P-02224, R-000516), December 21, 2007 (P-02557, R-001968), March 11, 2008 (P-03005, R-003847), May 13, 2008 (P-03494, R-004648), and June 17, 2008 (P-03688, R-004863). The May 13, 2008 report did not analyze Scheme A as such, but provided an analysis of site value used in the June 17, 2008 report. The reports reached widely divergent conclusions as to the results, raising

the question as to whether the conclusions offered were the expert opinion of Freeman Frazier.

Following is a summary of conclusions reached by Freeman Frazier. (The last column is a computation using Freeman Frazier's figures: the computation multiplies (i) the built residential area in the two condominium floors times (ii) the value per square foot.)

Date	Cite	Value/sq. foot	Area	Acquisition Cost	Loss/Profit	Market Site Value Sellable 5022 sq. ft.	Built 7594 sq. ft.
Mar. 28, 07	P-01414 R-000133	$500	37,889	$18,944,000	($8,672,000)	$2,511,000	$3,797,000
Oct. 24, 07	P-02231 R-000522	$450	27,772	$17,050,000	($7,468,000)	$2,259,900	$3,417,300
Dec. 21, 07	P-02568 R-001980	$750	19,755	$22,875,000	($6,109,000)	$3,766,500	$5,695,500
Mar. 11, 08	P-03005 R-003847	$750	17,845	$13,384,000	NA	$3,766,500	$5,695,500
May 13, 08	P-03432 R-004863	$625	19,094	$12,347,000	NA	$3,138,750	$4,746,250
Jun. 17, 08	P-03688 R-004863	$625	19,094	$12,347,000	($8,757,000)	$3,138,750	$4,746,250
July 8, 2008	P-03811	same as June 17, 2008					

Freeman Frazier is transparently manipulating the numbers. In the different report versions, as value per square foot increases, the number of square feet decreases, all keeping the project in a loss. Because Freeman Frazier uses an artificial approach to determine the site size, an approach that is unrelated to the actual number of square feet on the two floors of condominiums, the project is then forced to show a loss. The last two columns show the value if Freeman Frazier's Sellable Area of 5022 square feet and Built Residential Area of 7594 square feet are used in the computation.

The supposed objective of the reports as to Scheme A was to ascertain whether the two floors of condominiums atop the community house would provide a reasonable return to the owner.

Freeman Frazier's reports assumed that the two condominium floors contained 7596 of built residential area and 5022 square feet of sellable area (P-01422). (In some versions of the report, these figures were 5316 and 7594, respectively.) MVS concluded that the 7594 square foot figure is overstated due to including as condominium space areas that should have been allocated to the school space and that 5022 is closer to the appropriate figure.

Part of the Freeman Frazier analysis was to determine the "acquisition cost" of the site. (The Decision uses the term "site value.") The site value is a component of the project cost including other costs such as construction costs. In the Freeman Frazier analysis, increasing the site value increases the loss and diminishes the rate of return.

The site value in the Freeman Frazier reports was the largest component of the costs. In the various Scheme A reports, Freeman Frazier concluded that an as-of-right building would result in a loss. Only by artificially inflating costs was Freeman Frazier able to "conclude" that the site could not earn a reasonable return.

In all five versions of the Scheme A analysis, Freeman Frazier arrived at the acquisition cost/site value by using a three-step process: (i) an estimated value of "land" or "development rights" was based upon comparables in other land sites; (ii) a determination was made as to the number of square feet of space to be valued; and (iii) the results of (i) and (ii) were multiplied together.

The aforesaid process is the same process used by ordinary people buying and selling apartments, homes, and land, i.e., multiplying the number of square feet times a comparable value per square foot. The multiplication of value per square foot times the number of square feet does not require any expertise beyond the use of arithmetic.

The BSA was unable or unwilling in reviewing the Freeman Frazier studies of Scheme A to multiply the number of square feet in the two floors of condominium by the value per square foot estimated by Freeman Frazier to arrive at site value. Had they done so, the site value would have been substantially diminished. If the diminished site had been used, any loss would have been converted to a profit.

C. March 28, 2007 Report — Scheme A

The March 28, 2007 Freeman Frazier study concluded that the vacant land sale price was $500 per square foot based upon comparable vacant properties. (Section 2.10, P-01417).

In the March 28, 2007 report, rather than use the actual number of feet relating to the two condominium floors (either 5022 sq. ft. or 7594 sq. ft.), the study used the "potential residential zoning area" of 37,889 square feet. Thus, the site value estimated by Freeman Frazier was $18,944,000 for the two floors, resulting from multiplying $500 a square foot times 37,889 square feet.

Freeman Frazier states at 2.10 of the March 28, 2007 report:

> The site area is approximately 6,427 sq.ft. with a potential residential zoning floor area of 37,889 (sic) sq.ft., therefore, the acquisition cost for Lot 37 for residential use is estimated at $18,944,000.

Using "potential residential zoning area" was an irrational and deceptive approach to valuing the development rights pertaining to the specific "site" being valued, which was the two floors of three-dimensional space available for the two condominium floors. Thus, rather than use land values of $2,511,000 to $3,798,000, Freeman Frazier used the absolutely outrageous value of $18,944,000, causing the property to show a loss. The project would have shown a profit if the lower site values were used.

Community opponents identified this deception in a Community Objection #44 to the BSA report dated June 20, 2007, p. 8 (P-01784). See Exhibit E attached to Verified Petition.

> COMMUNITY #44 ... The study states that the residential sellable area in the as of right proposal would be 5,002 sq ft., which the report then assigns a land cost of $18,944,000, or $3,787.29 per square foot, which is far higher than the selling price per sq. ft. of an apartment... Does this not then suggest that the land cost to allocate to residential has been greatly exaggerated, or even "cooked."

The BSA ignored Freeman Frazier's improper use of "potential residential zoning area" as the multiplier, but, in an apparent effort to demonstrate objectivity, the Board objected to the $500 per square foot comparable.

D. October 24, 2007 Report — Scheme A

In response, on October 24, 2007, Freeman Frazier prepared a new report, slightly changing the recipe, and reducing the per square foot value from $500 to $450, reducing the site value slightly from $18,944,000 for the two floors of space to a new value of $17,050,000.

By this time, opponents and the Land Use Committee of Community Board 7 had objected to this ridiculous approach, where, in concept, the Congregation was selling land to the developer, but was still using most of it for the community house and grossly overstating the value of the site so as to show a loss and satisfy the §72-21(b) finding.

Had Freeman Frazier and the Congregation responded by multiplying $450 times the actual number of square feet relating to the two condominium floors, the project would have shown a profit, not a loss, and there would have been no chance for the Congregation to obtain the condominium variances because the §72-21(b) finding could not be made.

Evidently stung by these universal denunciations of Freeman Frazier's approach, the BSA, at its first hearing on November 27, 2007, asked that the Congregation consider only the value of the residential portion of the site. See Decision ¶128:

> ¶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;

E. December 21, 2007 Report — Scheme A

Freeman Frazier and the Congregation devised a new approach to valuing the land and arrived at a value of $750 per square foot, rather than the original $500 and then $450 per square foot (P-02561). See the December 22, 2007 Scheme A Analysis at P-02557.

At the same time, in a cosmetic ploy, in this version, Freeman Frazier and the Congregation reduced the number of square feet from 37,889 square feet to 19,755 square feet, yielding a land value of $14,816,000 (P-02562).

Yet, even then, it was erroneous and irrational to use 19,755 square feet rather than actual number of feet relating to the two condominium floors (either 5022 sq. ft. or 7594 sq. ft.). Freeman Frazier did not respond to the plain meaning of the BSA request. Opponents again pointed out the absurdity of this approach.

The BSA evidently realized that any reasonable analysis of the two-floor condominium would show a profit. Rather than act impartially, the BSA thereafter did not pursue the issue again, ignoring a constant stream of objections from opponents and opponents' experts, and then, astoundingly, in the Decision, completely ignoring the issue of the appropriate square feet for valuation.

F. March 11, 2008 Report — Site Area Reduced From 19,755 To 17,845 Square Feet

So, on March 11, 2008, Freeman Frazier was back again with another report (P-03005), reducing the square foot valuation from 19,755 to 17,845 square feet. Opponents continued to castigate the Congregation for its duplicitous approach and the BSA for turning a blind eye to that duplicity.

G. May 13, 2008 Report — Freeman Frazier Devises Entirely New Approach To Site Area, Using Development Rights Over Parsonage

The May 13, 2008 report analyzed a new "acquisition cost," which was then used in the June 17, 2008 report and is discussed below. No analysis of Scheme A was provided on May 13, 2008.

H. June 17, 2008 — Valuing Development Rights Over The Parsonage To Value Two Floors Of Condominium Development Rights

In another cosmetic move, the BSA objected to the $750 figure, but gave the Congregation yet another chance to create a defensible Scheme A valuation. So, the Congregation and Freeman Frazier returned with another recipe from their cookbook, which resulted in another slight reduction in land value, this time to $12,347,000 in the June 17, 2008 report (P-03688, P-03694) using a land value arrived at in the May 13, 2008 report (P-03494).

The land value approach used in the May 13, 2008 report was novel and completely ridiculous, disingenuous, and insulting to any rational person. The May 13, 2008 report valued the remaining "allowable floor area" over the Parsonage in Lot 36. The report concluded that 19,094.20 square feet of remaining allowable floor area existed (P-03510) and then multiplied that number by a land value of $625 per square foot to arrive at a site value of $12,347,000.

The May 13, 2008 valuation is irresponsible and absurd if it is valuing the ability for the Congregation to earn a reasonable return on the remaining two floors of space in a conforming building. As a hypothetical, if the Congregation decided to use the fifth floor for school space, under the Congregation's theory, it would not matter — the "acquisition cost" would still be the same: $12,347,000. Indeed, the further extension of this argument suggests the question with this approach: what if the Congregation wished to use all the floors of a conforming building for school space? Under the Congregation's approach, they could still value zero square feet of space at the same $12,347,000.

The Congregation still retains the right to engage in development of the Parsonage site, so this type of approach would have required analyzing the development of the Parsonage site. The Congregation has expressly reserved the right to develop the Parsonage space. See the group exhibit at P-00247-P-00256, filed with the BSA as Opp. Ex. C on January 28, 2008. See Transcript of October 17, 2007 excerpts at P-00256:

> 7 MS. NORMAN: Would it be
> 8 possible then the synagogue would come
> 9 back at a later date and suggest that
> 10 they need to use those air rights to
> 11 build above the parsonage.
> 12 MR. FRIEDMAN: Anything is
> 13 possible.

Most objectionable to valuing development rights over the Parsonage is that the BSA adamantly refused to inquire about or even consider the rental income being earned by the Congregation from renting the Parsonage as a single-family six-bedroom house. This is only one example of the Congregation and Freeman Frazier, acting in concert with the BSA, looking at only the loss or cost side of the income statement, contriving creative losses throughout the zoning site, and ignoring the income side.

The BSA not only cast a blind eye toward the substantial Parsonage rental income, but also to the much larger, commercial rental income from the Beit Rabban school, the potential rental income (or value) from the proposed sub-basement banquet hall rental, and day care center income from its planned and greatly expanded Toddler program. See the group exhibit at, filed with the BSA as Opp. Ex. C on January 28, 2008 (P-00247, R-003359 as Submitted To BSA By Sugarman Affirmation of January 28, 2008 (P-00202, R-003311). See IRS filings by Beit Rabban showing $450,000 a year in rental payments, presumably to the Congregation, at P-00478, R-004169.

I. Other Scheme A Errors

Although the approach to site valuation is the largest error in terms of dollars, other egregious errors were made in the Scheme A valuation, as shown in the Levine expert analysis, cited above, and which are incorporated herein.

1. Freeman Frazier failed and refused to explain how the construction costs were allocated to the condominiums.

Of particular interest, and which would objectionable even to a court applying the most relaxed evidentiary concepts, is the failure of Freeman Frazier and the Congregation to provide an explanation of the construction costs allocable to the condominiums. The construction costs were contained in a "report" by a construction estimator, McQuilkin Associates, and this is the source of the construction costs shown in the last Freeman Frazier schedule of June 17, 2008 (P-03694-P-03695, R-004863).

However, although the June 17, 2008 Schedule contains reports for the proposed schemes (e.g., at P-03697, R-004863), the only Scheme A construction cost estimate is found attached to the December 21, 2007 report at P-02584, R-001968 at R-001996. The attachment is dated August 6, 2007. It is not signed or sealed and contains no indication

of the schematics reviewed. There is no explanation of how costs in this mixed-use scheme were allocated between the school and the residential areas.

The Scheme A construction cost estimate included with the Freeman Frazier December 21, 2007 report is an incomplete document and is missing pages 3-15. Opponents repeatedly pointed this out and demanded that a complete copy be filed. The response from Freeman Frazier and the Congregation to these requests for the missing pages was essentially that the "BSA did not ask for any additional material."

Clearly, Freeman Frazier provided false, altered, incomplete documents with the intention to mislead the BSA and opponents. This was not immediately apparent: only a year after the April 2007 submission did a neighborhood opponent see 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. The fact that the document was altered was brought to the attention of the BSA.

After having been advised of this omission by the opposition, the BSA did not ask for the missing pages, nor did it remonstrate with Freeman Frazier and the Congregation. Freeman Frazier and the Congregation never provided the missing pages 3-15 for the construction cost estimate for Scheme A.

Although in an administrative proceeding the strict rules of evidence do not apply, an incomplete, unsigned document prepared by an entity under the control of the party submitting the document should never be admitted or considered. The BSA acted arbitrarily and capriciously for not demanding that the missing pages be supplied.

The Congregation, by choosing to conceal and withhold the missing 13 pages from the construction estimates included in the reasonable return analyses, destroyed any

evidentiary foundation in the reports, and the Freeman Frazier reports should be rejected. Without the Freeman Frazier report, the Congregation fails to establish its burden under §72-21(b).

Opposition expert Levine described several construction cost allocation issues for which answers are required and for which the missing pages would assist, although further information would be required.

- The estimates improperly allocate to the condominium development the cost of construction of the caretaker's apartment.
- The estimates appear to improperly allocate to the condominium development the cost of access stairs and service areas, though the Congregation submissions describe these as school costs.
- The estimates provide no explanation of why the school development is not charged for the costs of the roof.

As to the proper allocation of space between community house and school, it is clear that the service elevator and stairs in the new building are on floors 1-4, and are needed for the school regardless of whether there were residential condominiums or not. As the final Statement in Support of July 8, 2008 states on page 38, 2 lines from bottom (P-03823 at P-03861; R-005114 at R-005152):

> "When taking into account that each floor must provide for adequate circulation and two egress points to stairs ..."

Yet, it appears that this space has been allocated to the condominiums, increasing both construction cost and site acquisition cost.

The Levine reports cited above detail other deficiencies including:

- The cost to market a mere two condominiums, not including the fee to the broker, was $198,000.
- Other issues set forth in the Levine reports included improper construction interest, excessive soft costs, double developer's profit, and other items.
- The failure to follow the BSA Instructions to provide an analysis of return on equity.

The Decision addresses only one of the many issues raised by Levine — the failure of Freeman Frazier to provide a return on equity analysis. Decision ¶141 to ¶144. In rejecting the need for return on equity analysis, the Decision failed to mention the following in Item M of the BSA Instructions: "Generally, for cooperative or condominium development proposals, the following information is required...percentage return on equity (net profit divided by equity)."

The Decision provides no reasoned analysis why a return on equity analysis was not appropriate in view of the Instructions and, considering the minimal risk involved in the sale of a two highly desirable condominiums (the BSA never asked the obvious question as to whether the two condominiums might be pre-sold to Trustees and members of the Congregation, thereby eliminating all risk.)

As stated by Levine, Scheme A (and Scheme C, discussed below) would show reasonable returns not only on a return on investment basis, but also for a return on equity basis. The Decision discussion of return on equity is not only not candid, but suggests, falsely, that this was the only issue raised by opponents as to the reasonable return/feasibility reports. This is so untrue as to undermine any credibility in the Decision.

Moreover, the Decision refers, in ¶141 and ¶143, to "financial return based on profits." There is no such concept as a "financial return based on profit." That the BSA ignored such a simplistic misstatement reveals that the BSA did not exhibit or apply any expertise in reviewing the Freeman Frazier reports, and, therefore, it would not be appropriate for the Court to defer to the BSA's wholly conclusory finding at ¶148.

The Congregation and Freeman Frazier intended to confuse and confound any analysis and oversight on its valuation of Scheme A by providing a multitude of inconsistent reports, spreading information amongst the different reports, changing terminology, providing incomplete documents, and not providing rational explanations. Freeman Frazier had a year prior to the April 2, 2007 filing to prepare a proper report. Subsequently, it had repeated opportunities to respond to elementary questions. The burden of proof to satisfy § 72-21(b) is upon the applicant. The Congregation failed to meet its burden.

J. Conforming As Of Right Scheme C — The Supposedly All-Residential Scheme

After submission of the initial financial report in April 2007, the BSA asked the Congregation and Freeman Frazier to provide an analysis of an all-residential as-of-right building on the development site. The analysis of this scheme suffers from many of the same deficiencies as the Scheme A reports.

In a mixed-use project such as this, where the applicant is arguing that there has been a taking in a sense in that it cannot earn an economic return, the applicant should not be able to slice off an uneconomic piece and then claim the inability to earn an economic return.

Accordingly, the BSA staff properly asked for an all-residential analysis. In response, Freeman Frazier provided a purported analysis in its report of September 6, 2007 (P- 01904, R-00289 described as "As of Right Residential F.A.R Development," but later described in other reports as "Scheme C.")

The September 6, 2007 Scheme C building is shown as having 25,642 square feet of built residential area and 15,883 square feet of sellable area. The acquisition cost is shown as $18,944,000. A loss of approximately $5 million is shown.

Once again, Freeman Frazier played games with the acquisition cost. Rather than multiply $450 x 26,642 square feet and obtain a land value of approximately $12,000,000, Freeman Frazier contrived a value of nearly $19,000,000. Making this correction alone would have made the project return positive.

The final Freeman Frazier report on the so-called all-residential Scheme C building is in the December 21, 2007 report (filed December 22, 2007). P-02557, R-001968. That report described this scheme as "All Residential F.A.R. 4.0." Although claiming to be all-residential, the Scheme C was in fact not all-residential.

This report used a new acquisition value of $14,816,000 and found an estimated profit of $2,894,000. Had Scheme C utilized all the space for residential purposes and assigned value to the 6400 square foot sub-basement, it would have shown a substantially higher profit than $2,894,000.

When Freeman Frazier provided its final report, the acquisition value for all of the other schemes had become $12,347,000, but Freeman Frazier never modified the conforming all-residential Scheme C analysis of December 21, 2007, which, using the same methods of December 21, 2007 would have resulted in a $5,363,000 developers' profit.[25] When challenged, Freeman Frazier stated in its July 8, 2008 report at page 7 (P-03803 at 03810: R-005170 at R-005177):

> Revised Scheme C
> Mr. Sugarman is concerned that a revised Scheme C was not provided.

[25] The Freeman Frazier report is dated December 21, 2007 and filed the following day, December 22, 2007 as part of a multiple document submission by the Congregation.

> We note that the BSA did not request a submission of an analysis of a revised Scheme C.

When challenged again, Freeman Frazier responded thusly in its final reply statement of August 12, 2008 at page 2 (P-03952 at P-03954; R-005772 at R-005774):

> Sugarman Allegation #1: Sugarman alleges that a revised Scheme C was not provided in the FFA submission of May 13, 2008, the original Scheme C having unexplained high loss factors, and not including a valuable sub-sub-basement. (Page 5)
>
> FFA Response to Allegation #1: 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.

Clearly, the failure to revise Scheme C was a deliberate act by the Congregation and Freeman Frazier in collusion with the BSA.

Had Freeman Frazier and the Congregation updated the Scheme C analysis with the latest reduced site value/acquisition cost, then the profit would have been $5,363,000 as compared to the $6,815,000 profit the BSA found sufficient for the Proposed Scheme, and this would be without taking into account the additional value and income from a residential first floor and the valuable sub-basement.

However, despite the name "all-residential," the actual analysis performed by Freeman Frazier still allocated the first floor for community use. And, although the proposed building developed the sub-basement with an enormous 6400 square foot hall, the proposed Scheme C building fails to include the same sub-basement that was included in the community space schemes. Thus, the Scheme C analysis ignored over 11,000 square feet of developable real estate — 6400 square feet in the sub-basement, and 4480 square feet on the first floor.

An all-residential FAR 4.0 building on Lot 37 using all space solely for residential purposes and using the available basement and sub-basement for rental to other tenants would result in a positive return to the owner. These factors alone, as Martin Levine shows, would result in a reasonable return.

This glaring error, identified by the Opposition expert Martin Levine in his July 29, 2008 Statement (P-03757 at P-03758; R-005210 at R-005211) was defended by Freeman Frazier in their last report of August 14, 2008, page 3, P-03952 at P-03995, R-005772 at R-005775 as follows:

> MVS Allegation #1: MVS alleges that FFA failed to respond the BSA's request to provide an all Residential Scheme in response to the Notice of Objections dated June 15, 2007. (Page 2)
> FFA Response to Allegation #1: FFA provided a response to the BSA's request on page 26 of the December 21, 2007 Response, that eliminated all community facility related programmatic needs from the building. The ground floor synagogue lobby and core remained to alleviate the circulation problems. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

There are two undisputed omissions in the Congregation's Scheme C analysis: failure to update the acquisition cost and failure to provide a best use all-residential conforming scheme. Freeman Frazier admits these omissions and consequently, its use of the phrase "all-residential" is deceptive. It is not for the BSA to advise the applicant as to when it has not proved its case. The burden is on the Congregation, not the BSA. The Congregation failed to provide this analysis, and thus cannot even make the §72-21(b) argument.

K. Is It Reasonable Return To The Owner Or Reasonable Return To A Hypothetical Developer?

Both the case law and the zoning variance refer to the return to the owner, which in this case is the Congregation. ("that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return" ZR §72-21(b).)

L. The Amount An Owner Paid For A Site Is A Reasonable Starting Point For Analyzing The Return To The Owner

For this reason, case law, the language of §72-21(b), and the BSA Guidelines address the return to the owner as distinguished from a hypothetical third party.

To evaluate the return to the owner, the BSA Instructions require information such as the date of acquisition and acquisition costs.

> Item M of the BSA Instructions 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;

Financial Feasibility Study, Item M to BSA Detailed Instructions Opp. Ex. KK at KK-7 (P-00512 at P-00518; R-004267 at R-004273)

The Congregation failed to provide either the market value of the property or the acquisition cost and date of acquisition as required by Item M. The "acquisition cost" as provided by Freeman Frazier not only is an artificial contrivance and would not seem to meet the definition of market price, it certainly does not meet the meaning of "acquisition cost" as used in Item M.

Case law is very clear that failure to provide the acquisition costs at which the owner acquired the property in and of itself is sufficient grounds to deny a variance where the owner claims that it cannot earn a reasonable return.

M. The Amount Of Cash To Be Received By The Owner Is An Obvious Measure In Computing The Owner's Reasonable Return In The As-Of-Right And Proposed Scenarios

Zoning Resolution §72-21(b) refers to the reasonable return to the owner, yet the Freeman Frazier reports only discuss the return to a hypothetical developer. Under the Freeman Frazier approach, the hypothetical developer pays an acquisition cost, between $12,000,000 and $19,000,000, depending on which version of the report is used.

In fact, all the Freeman Frazier reports assume, but also conceal, that the "acquisition cost" is being paid *to* the Congregation as the owner.

Under the final Scheme C scenario of December 21, 2007, the $14,816,000 "acquisition cost" would result in a cash payment to the Congregation of $14,816,000.

Under the latest Scheme A scenario provided by Freeman Frazier, where the Congregation is able to develop its community house, the Congregation receives a cash payment of $12,347,000. Under the final Revised Proposed Development scheme for the building approved by the BSA, the Congregation would receive $12,347,000 as a cash payment for the acquisition cost. Thus, in the scheme approved by the BSA, a hypothetical developer would earn $6,815,000, after making the $12,347,000 payment to the Congregation.

If the Congregation as owner acted as its own developer, in a Revised Proposed Development, it would receive the sum of $19,162,000, which is the "return" to the owner.

The Congregation had stated that it would act as its own developer. One of the Congregation's trustees, Jack Rudin, is one of the largest real estate developers in New York City. P-00332; P-00257.

The BSA was aware of these facts and failed to mention the actual financial return to the Congregation as to any of the schemes, so as to disguise what it was in fact approving.

IV. THE BSA REASONABLE RETURN FINDING WAS IRRATIONAL, ARBITRARY AND CAPRICIOUS

The necessity for the Congregation to satisfy finding (b) arises only if the Congregation has first satisfied the conditions of §72-21(a) by showing a unique physical condition and that as a result of such unique physical condition, practical difficulties or unnecessary hardship arise in complying with the zoning regulations. Having not satisfied finding (a), and since all of the Congregation's alleged programmatic needs are unrelated to the upper floor condominium variance, there should be no need to then address finding (b).

The Congregation takes the position that as a non-profit, it is not required to satisfy the (b) finding even for a for-profit development; this position was rejected by the BSA in its decision at ¶ 126. Thus, the Congregation is required to provide a reasonable return analysis. Here, the BSA, apparently considering the constitutional underpinnings of the reasonable return provision, engaged in statutory interpretation to ignore the strict words of §72-21(b). The BSA was silent as to whether the reasonable return analysis should be performed just on the three-dimensional "site" occupied by the two floors of condominiums (the Scheme A analysis) or whether the analysis should be assuming that the entire development site would be developed as a for-profit development (the "Scheme C" analysis).

Initially, as described in detail below, the BSA required an analysis of two conforming as-of-right schemes: (i) As of Right Scheme A, which estimated the return

upon two floors of condominiums in the mixed-use building and (ii) Scheme C, which the BSA asked to be an all-residential building (although the Congregation never provided that analysis as requested). The Scheme C analysis, though flawed, still showed a positive return, and would have shown a reasonable return. The Decision's failure to provide any factual (as opposed to conclusory) findings on this issue or to provide a reasonable return analysis prevents understanding whether the BSA considered the Scheme C analysis in its Decision.

Petitioners believe the record conclusively demonstrates that not only did the Congregation fail to show that either of the schemes would not produce a reasonable return to the owner, but in fact the record shows that both schemes would provide a reasonable return. For that reason, it does not particularly matter which of the two standards — the bifurcated approach or the single structure approach — is found to be the proper approach.

On balance, it is the position of the Petitioners that a non-profit has two basic choices: it can seek to use its property to satisfy its programmatic needs, or it can choose to uses its property to earn a profit. Once it chooses to use part of its property for programmatic needs and satisfies those needs, then it cannot argue that the remaining developable area under a conforming scheme would not earn a reasonable return.

Freeman Frazier, over a 17-month period, submitted over 298 pages of reasonable return reports in 14 separate submissions. They provided widely varying results and varying approaches to estimating the value per square foot of the site and the number of square feet. The Congregation and Freeman Frazier had ample opportunity to establish

that the Congregation could not earn a reasonable return, and were provided with multiple do-over opportunities by the Board.

In its initial submission of April 2, 2007, the Congregation and Freeman Frazier, in order to arrive at the site value, used the standard method of estimating the site value, which is familiar to anyone who has bought or sold a home, cooperative apartment, or condominium. This is a method where the number of square feet in the piece of real estate is multiplied by a comparable value per square foot. Although there may be real estate expertise in arriving at the comparable value or determining the exact number of square feet, the basic methodology is familiar to all. When valuing raw land, one would multiply the comparable per square foot value by the number of square feet that can be built under applicable zoning regulations, or "development rights."

A. The Feasibility Study — The §72-21(b) Finding

1. Zoning law provides no authority for a bifurcated feasibility study of only a portion of the property.

Analysis of a reasonable return to the owner is intended to avoid an unconstitutional taking of property resulting from the arbitrary application of zoning laws. The issue presented is whether the zoning regime imposes a burden on the owner by making it not possible to earn a reasonable return from the property.

If the owner can profitably use his property under the strict application of the zoning laws, then the fact that the owner intends to reserve part of the site for non-income purposes, and is unable to earn a reasonable return on the remaining portion, is not a taking.

The Congregation suggests that even if it is shown that a reasonable return can be obtained by developing the entire development site, which is the Scheme C analysis, it

can demonstrate financial hardship if it cannot obtain a reasonable return from two floors of air rights consisting of the 5th and 6th floors of an AOR building. This is the scheme described as AOR — Scheme A, and the resulting development is referred to herein as the "Two-Floor Condominium" or the "Two-Floor AOR Condominium."

This is not the proper standard. First, §72-21(b) refers to development of the "zoning lot" and does not speak of earning a return from just a portion of the zoning lot. Second, case law provides that reasonable return is to be analyzed based upon the total property.

The problem presented is that an owner can easily pull out a part of its property that is not economic, and claim that, based upon its non-profitability, it needs a variance to create a profitable development. For example, in this project, the Congregation could have decided that it needed 70 feet of space for seven 10-foot floors of a Community House. But zoning allows 75 feet of height, so the owner could claim the 5-foot slice available was uneconomic and request a variance for several more floors so that the development would be "economic."

This approach of analyzing only a portion of the property is not accepted in the case law, most notably in the U.S. Supreme Court decision in *Penn Central*:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the "landmark site."

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

New York state courts have followed the same approach. *See Northern Westchester Professional Park Associates v. Bedford*, 60 N.Y.2d 492, 503-504 (N.Y. 1983) ("An owner will not have sufficiently established his confiscation claim, therefore, if the adverse factors demonstrated affect but a part of the property but do not prevent a reasonable return from the tract as a whole."); *Koff v. Flower Hill*, 28 N.Y.2d 694 (N.Y. 1971) ("because there was no proof that financial returns on the whole tract would not permit recovery of the purchase price if the property were developed as permitted by the ordinance, there was no showing of confiscation"); *Concerned Residents v. Zoning Bd. of Appeals*, 222 A.D.2d 773, 774-775 (N.Y. App. Div. 3d Dep't 1995) ("The primary deficiency is that its analysis of the rate of return of the property as currently zoned is limited to its 8.2-acre leasehold rather than the 96.4 acres owned by Lebanon Valley ... Thus, given these deficiencies, we concur with Supreme Court's finding that the evidence before the ZBA did not support the granting of a use variance to KRM.").

2. There is no taking because development of the entire site as an as-of-right scheme provides a reasonable return to the owner.

As a preliminary issue, the Congregation could exercise its right to commercially develop the entirety of Lot 37 for condominiums and other permitted income producing uses. Hence, the Board asked for an all-residential as-of-right analysis, which is described as the AOR Scheme C/FAR 4 Scheme. The last analysis by the Congregation of this Scheme C was in the December 21, 2007 filing, and is shown as column 4 in the Freeman Frazier analysis. This analysis suffers from several fatal defects, including the following:

- The return is computed based upon return on total project cost, rather than return on equity.
- The analysis ignores the reasonable return to the owner resulting from the return on the original acquisition cost by the owner — and, in the analysis, the return to the owner would result from the "sale" of the development rights for $14,816,00 to the Congregation as well as the use of the property during its ownership, which would include rentals ($500,000 a year from Beit Rabban) and use.
- The use factor for this analysis is 62% as opposed to the normal 85% to 90%. Since the $500 per sq. ft. comparable value assumes ordinary use factors, the $500 should have been adjusted downward.
- Scheme C does not fully develop the property. It does not develop the 6400 sq. ft. sub-basement, which would have commercial value for a number of permitted uses, nor does it include the entire first floor for residential or professional office or other uses.

Additional submissions by opponents' consultants and other individuals demonstrate other defects in the analysis, and show that the property indeed would provide a reasonable return to an owner. Indeed, only an imperfect valuation process would have yielded a negative return — either through overvaluation of the land or the use of excessive construction and other costs, or both.

3. For a religious entity, there is no taking since the Congregation can meet its programmatic needs within an as-of-right development.

Zoning Resolution §72-21(b) does not require a showing that a reasonable return cannot be earned if the owner is a non-profit entity. For a religious entity, apparently a showing that programmatic needs cannot be met in an as-of-right structure was intended to substitute for this finding to show hardship that rises to the constitutional level that would result in a taking. The Congregation here argues for a unique proposition — although it is able to meet its programmatic needs within the lower floors of an as-of-right structure, it argues that should be able to earn a reasonable return on just a small portion of the property that it does not wish to use for programmatic needs. This distorts

the constitutional taking principles that underlie the concept of evaluating the reasonable return; that is, whether the government has deprived the owner of the use of its property.

Moreover, as stated, the Congregation acquired the three former row houses on Site 37 for the express purpose of meeting its programmatic needs. So, having satisfied the programmatic needs from the site, there is accordingly no taking.

4. The BSA Guidelines are based on sound economic analysis consistent with the constitutional underpinning of such analysis.

The BSA Instructions for feasibility studies, also referred to as Item M, provide an inclusive list of factors to be considered in evaluating reasonable rate of return. As testified to by opponents' valuation expert, Martin Levine, these practices are reflective of accepted practices in real property valuation. Freeman Frazier, however, contends that ignoring these Instructions is the proper methodology, as Freeman Frazier claims it has done so in other cases, which it does not cite. All of the deviations recommended as proper by Freeman Frazier result in a bias for an owner attempting to minimize the determination of return. The Board should follow generally accepted economic practices as reflected in its written guidelines, which are consistent with case law.

5. The Congregation ignored, with the arbitrary assent of the BSA, BSA instructions for filing a variance.

The BSA has issued "Detailed Instructions for Completing BSA Applications" under §72-21 and these instructions are made available to potential applicants on its web site. (P-00139). These are the only written guidelines provided by the BSA as to the contents of applications. As stated by the Executive Director in a letter to Petitioners' counsel dated May 7, 2008 (P-03371) in response to a FOIL Request:

> Your request was for documents that in any way relate to the following:
>
> 1. All rules, regulations, policies, procedures, and other explanatory documents as to requirements for preparation, filing, analysis, and or interpretation of feasibility studies submitted with reference to finding (b) of 72-21 of the Zoning Resolution.
>
> 2. Information as to the drafting, adoption, modification, release date, and supporting studies or reports or comments upon Item M of the Detailed Instructions for Completing BSA application.
>
> You also asked us to exclude formal adjudicated decisions of the BSA.
>
> I am aware that you are familiar with the Board's guidelines, posted on the website, for completing a financial feasibility analysis (Item M of the Detailed Instructions for Completing BSA application). Therefore, I am not providing you with a copy of those guidelines. Based on our review, there are no other documents responsive to your request.

As was pointed out by the opposition expert appraiser Martin Levine, the BSA did not require the Congregation to document its reasonable return analysis. The BSA Decision ignored the opposition's objections, <u>providing no rational explanation at all</u> as to why the BSA allowed the Congregation to ignore Item M, Financial Feasibility Study. Each "pass" provided by the BSA to compliance with the instructions had the effect of increasing costs, thereby diminishing income. The result then was that the BSA's failure to enforce these guidelines resulted in diminishing the reasonable return of a conforming as-of-right building.

6. <u>Return on equity is the proper standard to apply</u>.

Even though opponents showed that on an unleveraged basis, as-of-right versions of the project would earn a reasonable return, a "leveraged" or "return on equity" analysis provide very high returns to the Congregation. In an earlier round of submissions,

opponents convincingly showed that using return on equity as the basis of analysis substantially increases the return and provides a positive return to the owner. Financial Feasibility Study, Item M to BSA Detailed Instructions. ¶ 4, Opp. Ex. KK at KK-8 (P-00512 at P-00518; R-004267 at R-004273). Item M requires an analysis based on return on investment and Martin Levine testified that this was the proper approach. In response, Freeman Frazier states in his May 13, 2008 letter, page 7 (P-03925 at P-03501) :

> Whereas, return on equity is a typical measurement for income producing residential or commercial rental projects, the rate of return based on profits is typically considered on an unleveraged basis, not only for submission prepared for the BSA but in typical condominium and/or home sale analyses.

Not only did the BSA in its decision at ¶ 144 not explain why its guidelines ask for analysis on a leverage basis, many reported court cases show that return on equity is the factor commonly used. For example, even Freeman Frazier has used return on equity in analysis for the BSA, as discussed in the *120 Imlay/Red Hook* decision:

> During the course of the public hearings process, the BSA heard from people both in favor of and opposed to the variance and reviewed numerous documents which were submitted. Among these documents was a "dollars and cents" economic analysis performed by Freeman/Frazier & Associates, Inc., which projected a rate of return of only 1.56% if the premises was developed as a conforming manufacturing building as opposed to a projected return of 11.41% if the premises was developed as the proposed residential building.
>
> * * *
>
> Moreover, Imlay submitted a "dollars and cents" analysis which concluded that a return on equity for as-of-right conforming "manufacturing" use would be 1.56%, while the return on equity for a nonconforming residential use would be 11.41%.

Matter of Red Hook/Gowanus Chamber of Commerce (N.Y. Sup. Ct. 2006),

Freeman Frazier and the BSA were both unwilling and unable to explain why a leveraged return on equity analysis was the proper method for the Red Hook project, but not for the Congregation Shearith Israel project.

Many other cases mention return on equity as the measure of determining reasonable return: *Kingsley v. Bennett*, 185 A.D.2d 814, 816 (N.Y. App. Div. 2d Dep't 1992) ("the petitioners claim that the subject premises would only realize a 3.6% return on equity"); *Morrone v. Bennett*, 164 A.D.2d 887, 889 (N.Y. App. Div. 2d Dep't 1990) (Appeal from BSA) ("On this appeal the petitioners allege, inter alia, that their financial analysis unequivocally satisfies finding (b), as the existing 8% return on equity is a lower return than is paid on a government-secured stock investment."); *Lo Guidice v. Wallace*, 118 A.D.2d 913, 915 (N.Y. App. Div. 3d Dep't 1986) ("The statement indicates that its present use results in a cash flow as a per cent of equity invested of 3.6%, while the proposed use as a restaurant will yield a 14.2% of invested equity.").

7. The original acquisition cost is a factor.

The BSA guidelines specify that an applicant should provide the original acquisition price. The Congregation indeed wishes to have the Board completely ignore the fact that when the Freeman Frazier "acquisition cost" is paid to the Congregation, the Congregation has received a return on its original investment. In addition, the Congregation wishes to have the BSA ignore the value of the use of, and income derived from, its property over the years. But the Congregation, has refused to disclose this information from its touted archives.

> We would merely add that in affirming the decision below we do not intend to imply our approval of the Appellate Division's statement that the board acted correctly "in apparently concluding that a projected return of income, for

> a parcel for which a variance is sought, may be based on present value, rather than its original cost." (43 A.D.2d 739, 740.) 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. … 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. (See *Matter of Jayne Estates v. Raynor*, 22 N.Y.2d 417, 421-422, 293 N.Y.S.2d 75, 239 N.E.2d 713.)

Douglaston Civic Assn. v. Galvin, 36 N.Y.2d 1, 9 (N.Y. 1974)

> Rather, the proper test is whether the owner can presently receive a reasonable return on his property (McGowan v Cohalan, supra, p 436; Loretto v Teleprompter Manhattan CATV Corp., 53 NY2d 124). Such an owner must establish affirmatively that the regulation eliminates all reasonable return (Penn Cent. Transp. Co. v City of New York, 42 NY2d 324; Williams v Town of Oyster Bay, 32 NY2d 78; Mary Chess, Inc. v City of Glen Cove, 18 NY2d 205), and this must be accomplished by "dollars and cents" proof (Matter of Village Bd. of Vil. of Fayetteville v Jarrold, 53 NY2d 254; Spears v Berle, 48 NY2d 254; Matter of National Merritt v Weist, 41 NY2d 438). To establish de facto confiscation, evidence of the market value of the property at the time of acquisition as well as the value of the property as presently zoned is required (H.J.E. Real Estate v Town of Hempstead, 55 AD2d 927; see Matter of Village Bd. of Vil. of Fayetteville v Jarrold, supra).

Curtiss-Wright Corp. v. East Hampton, 82 A.D.2d 551, 553-554 (N.Y. App. Div. 2d Dep't 1981)

> The owner must submit proof of the market value of the property at the time of the acquisition as well as the value of the property as presently zoned.

Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267, 272 (N.Y. App. Div. 2d Dep't 1983). *See Also 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).

V. THE VARIANCES SUBSTANTIALLY IMPAIR ADJACENT PROPERTY AND ARE DETRIMENTAL TO THE PUBLIC WELFARE

A. Although A Conforming Building Will Not Brick Up Windows In The Adjoining Building, The Variances Will Result In The Bricking Up Of Windows

The building initially proposed by the Congregation would have resulted in the closure of 7 windows in six cooperative apartment units in the adjacent 18 West 70th Street building, which abuts and is to the west of the development site. A conforming as-of-right building would not brick up any windows in 18 West 70th Street.

Although initial filings of the Congregation suggested that 18 West 70th Street windows would be impacted (see P-01443 and P-01444 as filed by the Congregation), the fact that a conforming building would not block up windows was concealed from the BSA.

The drawings filed by the Congregation did not show windows in the 18 West 70th Street building's eastern face. See P-01338.

After complaints from 18 West 70th Street condominium owners and other opponents, the BSA staff required the Congregation to show on its drawings the windows being blocked by the proposed building.

In the drawings filed by the Congregation on October 22, 2007 at P-4A, the Congregation finally showed the windows on the proposed scheme, but omitted the outline of an as-of-right building. Thus, the Congregation continued to obscure the fact that a conforming building would block no windows in 18 West 70th Street. Within days, the Land Use Committee of Community Board 7 voted to deny the upper floor condominium variances. See Minutes of Community Board Land Use Committee,

November 19, 2007 (P-0235). Report of Community Board Land Use Committee, November 19, 2007 (P-02376):

> Most importantly, the proposed height and setback variances will substantially impair the use of a portion of the adjacent property. These variances, if granted, would allow a building to abut 18 West 70th Street in such a way as to block entirely seven lot line windows in that building. Moreover, the increase in building height from a permitted 75 feet to 105 feet will exacerbate the reduction in light and air enjoyed by residents whose windows face a courtyard on the east side of West 70th Street. Community Board 7 believes that it would be an abuse of the variance process to permit one landowner to exceed zoning restrictions at the expense of its neighbors. The blockage of lot line windows and, to a somewhat lesser extent, the reduction of light and air in the courtyard do not constitute mere inconveniences, but, in a very real sense, a taking of property in a way which the zoning resolution was designed to prevent.

When plans for the proposed building were submitted by the Congregation to the LPC, the plans showed no windows and the LPC was never apprised of the fact that a conforming building would not block windows in 18 West 70th Street, but the proposed building would block windows. Thus, when the LPC approved the proposed building, it was not aware of that fact.

No laws are violated by the lot line windows in 18 West 70th Street. Thus the windows are not illegal. If a building were constructed by the Congregation without a variance and blocked the lot line windows in 18 West 70th Street, then such a building would be illegal. The Congregation in its variance request was effectively asking the BSA to make an otherwise illegal act legal, which legalized act would allow the lot line windows to be blocked.

The Board avoided making actual factual findings relating to the 18 West 70th Street windows, merely repeating assertions of the opposition and the Congregation. The missing finding would be that the windows did, or on the other hand, did not present a condition that prevented a §72-21(c) finding(.

> ¶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
> ¶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

Although the BSA seems to claim that §72-21 (c) issues were not raised, the BSA, as indicated in ¶192, required the Congregation to create courtyard that affected the windows in the rear of 18 West 70th Street that would be completely blocked by an as-of-right building

The Congregation submitted a drawing, Proposed Lot Line Window Diagram, on March 11, 2008 (see P-03044) and refiled May 13, 2008 (P-03523). This is a section drawing. The drawing fails to show the outline of a conforming building so as to disguise the impact of the proposed building when compared to a conforming building. The Congregation did not submit any three-dimensional drawings of the proposed building showing the windows and the so-called compliant courtyard. The BSA and the Congregation collaborated to create a record which obscured the fact that the similarly situated lot line windows in the front of the building would still be bricked up. The Decision is deceptive in not explaining why the blocking of the front lot line windows was not fact making a finding under 72-21(c) improper.

The BSA, by forcing the Congregation to reduce the size of the condominiums in the rear and to create a "courtyard" that would prevent the rear windows from being bricked up in effect acknowledged that the proposed building would substantially impair the appropriate use of adjacent property and would be in conflict with §72-21 (c).

The BSA term "compliant outer court" is not found in any zoning resolutions and is a misleading term, since there will remain non-complying setbacks on the easterly side of these floors. The so-called "compliant outer court" will not alter the fact that the extra condominium floors will also block the air and light into a courtyard abutting the lot line, and into the windows facing the courtyard.

The BSA required the Congregation to provide the courtyards in the rear because the variances extending the upper condominium floors to the rear were in conflict with Zoning Resolution §72-21(c), which bars granting variances that adversely affect adjoining property owners. It was an abuse of discretion and arbitrary and capricious 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.

Petitioner Lepow owns two of the three apartments that have windows in the front part of the eastern face of the building, and the apartments will lose light and air and views of Central Park and will be adversely affected by the variances.

The variances affecting the windows are unrelated to any programmatic need of the Congregation. The variances are a subsidy to the trustees and members of the Congregation since the effect and purpose is to provide a monetary benefit to the Congregation. The effect of the variances is to transfer value from Petitioner Lepow personally into the pockets of Congregation members, who will not have to contribute to a building fund like members of other religious congregations.

Accordingly, it was arbitrary, capricious, erroneous and irrational for the BSA to make the §72-21(c) finding as to the upper floor condominiums because it ignore the

direct impact upon the cooperative apartments in 18 West 70th Street, especially the lot line windows in the front of the building.

B. The Increase Of Height And Elimination Of Front Setbacks Alter The Essential Character Of The Neighborhood, Impair Adjacent Property, And Are Detrimental To Public Welfare

The Congregation acknowledges that shadows cast on buildings and streets will affect others in the neighborhood.

Contextual zoning is intended to protect light in the mid-blocks.

The fact that only a few buildings are affected by the proposed building does not diminish the impact on these buildings.

By accepting the argument that only a few buildings are affected, the BSA is effectively eliminating mid-block zoning and finding that, as a matter of BSA interpretation, any additions of floors on row houses in mid-block zones are not in conflict with §72-21(c).

C. In Basing The (c) Finding On The Assertion That Only A Few Buildings Suffer Adverse Consequences, The BSA Has Ignored The Finding Inherent In The City Council's Adoption Of 1984 Contextual Zoning

As described by Elliot D. Sclar, professor of urban planning, the 1984 "contextual zoning" (see Letter of Elliot D. Sclar, February 12, 2008 (P-02925)) is a land use plan was carefully crafted to protect the mid-block areas in low-rise midblocks and protect the light, air and human scale to remain vital. It was in no way an arbitrary determination of the City Council. Simply speaking, the BSA cannot interpose its own narrow view as to the impact on the surrounding area for the carefully crafted determination of the City Council.

Because of the relative small-scale nature of the mid-block, any individual impact of an oversized building would by its nature affect only a few buildings. The reason is that, on narrow streets, the narrow band of height between 75 feet and 105 feet is just enough to cast the street into darkness.

The opposition from the beginning of the proceeding argued that the proposed building's extra height would cast shadows on the narrow street, particularly in the winter months. The proposed building would affect the sunlight received in winter months on particular buildings and would cast shadows down the street. The opposition requested shadow studies shown at street level on West 70th Street and provided its own studies showing the impact, three dimensionally at street level, together with photographs not shown in the large-scale, indistinct overhead "studies" later presented by the Congregation..

In response, the Congregation and the BSA fell back on the CEQR, which the BSA claims:

> ¶195. WHEREAS, CEQR regulations provide that an adverse shadow impact is considered to occur when the shadow from a proposed project halls 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

Clearly there is a conflict between §72-21(c) and the mid-block zoning resolution on one hand and the CEQR on the other. While CEQR finds that "that shadows on streets and sidewalks or on other buildings are not considered significant," the mid-block zoning resolution was passed by the City Council primarily to protect theses interests.

Moreover, nothing in §72-21(c) states that the limit of the BSA review is that provided in separate environmental regulations which address other issues from traffic, garbage, pollution, parking, and other issues under CEQR.

The Congregation and the BSA responded with shadow studies of Central Park itself, an issue never raised by the opposition. (August 2007 Shadow Study, P-02015, R-000372; December 19, 2007 Shadow Study, P-02602; R-002009) The BSA and the Congregation obsessed with shadow studies of Central Park, ignoring specific requests to analyze the street shadows with street level three-dimensional studies and provided scant attention to the streets that the mid-block zoning was intended to protect.(P-01638, R-000221) Opponents, to demonstrate the reasonableness of providing meaningful street level three dimensional studies provided graphics created with a free program provided by Google. P-00457, R- 003597. In response, the Congregation's consultants, over a year after the application was filed, provide small scale studies of shadows of the side street from thousands of feet in the air. AKRF Study May 12, 2008 (P-03373; R-004693. These studies suffered from many deficiencies. Clearly, small narrow streets require appropriate street level studies. In addition, the studies failed to show the comparison of shadows between an as of right building and the proposed building, and was not validated with actual photographs of the streets showing actual shadows cast. The proposed building shadows would have the most impact in the winter months. The Applicant's AKRF consultant provided a shadow study for 10:00 AM on December 21 at 10:00 AM. (Fig- B-11 at P-03413, R-missing. In order to test the validity of the shadows shown, even though after the close of the hearing, this could only be tested on or around December 21, 2008. Opponents objected clearly to the BSA that the studies used a

flawed computer model and should be tested. Attached then as Exhibit L is a post-hearing photograph which shows that there is no scientific basis for the shadow study shown by AKRF and relied upon by the BSA. Even worse, the BSA Record conveniently fails to include the December 21, 2008 10:00 AM shadow study in its version of the AKRF Study at R-004597. Page R-004635 refers to the Winter shadow study diagrams, but the BSA did not include these Diagrams in the BSA Record. See Fig. B-10 and B-11 R-004635. P-03412-13. These should have been reproduced between R-004635 and R-004636.

As Norman Marcus, the dean of New York City's zoning law and regulation stated in testimony he gave just prior to his recent death, February 12, 2008 BSA Transcript at 40 (P-04104):

> 887 And, there have been times in the past when there was concern that this Board
> 888 might actually be taking unto itself powers to rezone when, in fact, the rezoning agencies
> 889 were not exercising them.
> 890 This application for a variance, in a sense, seeks to reverse the zoning
> 891 determinations in 1984 and to the extent that the reasoning here is applicable elsewhere,
> 892 particularly the vertical slice reasoning, represents a danger.

Moreover, the BSA's summary of the shadow study is not correct. The study found, as expected, that only a few buildings at any one time would be cast in shadow. Of course, in the small scale of the mid-blocks, that is what one would expect.

> ¶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

Professor Elliot Sclar described the evolution of mid-block contextual zoning in a letter submitted to the board. February 12, 2008 Elliot Sclar Letter to BSA (P-02924).

As a general matter, it is inherently improper for any developer, even a nonprofit institution, to seek special exemption from a zoning policy that was crafted with the meticulous care and communitywide support that the Upper West Side development plan received. I am fully familiar with the background of this zoning. In the Spring of 1982, I directed a graduate studio at Columbia University's Graduate School of Architecture, Planning and Preservation that was the starting point for this zoning change. The "client" for that studio was the Department of City Planning. The student produced work helped to launch the process that led to the adoption of the City's first "contextual zone" on the Upper West Side. The preliminary studio findings were support work for the 1982 West Side Zoning Study, which was in turn central to the 1984 creation of a "contextual zoning district" on the Upper West Side. In total, eight new districts were created that essentially downzoned the midblocks and upzoned the avenues, in keeping with the existing context of that neighborhood. The new zoning identified the midblocks, in which R8B zones were mapped to replace R7-2, as having a strong and identifiable low-rise scale and coherence. The residential avenues, including Central Park West, are defined by their high 130- to 150-foot streetwalls and were accordingly changed from R10 to R10A zones to promote tall construction with a consistent cornice line.

These building types create distinctive "environments," as stated in the City Planning Commission's report (April 9, 1984), and the boundaries between these environments are critical to maintain. The R10A district covering Central Park West gives way to the midblock R8B district at a point 125 feet in from the avenue. A 105-foot-tall building that is more than 125 feet into the midblock would destroy this crucial boundary. Indeed, it should be noted that the line between the old R10 avenue zoning and R7-2 midblock zoning used to be drawn at 150 feet. The City Planning Commission called this line "abnormally deep" and reduced it to 125 feet in order to contain tall construction closer to Central Park West. This was not an arbitrary change in policy but a careful and measured response to the Upper West Side's built environment.

The Upper West Side today is a delicate balance of intense and highly congested urban living. The low-rise midblocks give the area the necessary respite of light, air and human scale to remain vital. Once the scale of these midblocks is

> breached in one place, the case for enforcing the zoning in other places will be severely compromised. The precedent that the granting of these variances will create may effectively render the carefully crafted land use development plan for the Upper West Side moot.
>
> The contextual and landmark designations that guide this neighborhood's growth and change were thoughtfully designed and democratically adopted policies intended to fairly balance the maintenance of this area's character and livability with the real needs for added development. This project will destroy this careful balance.

The BSA, has decided to substitute its own law and ignore the plain fact that by its nature, violation of a zoning scheme such at the mid-block contextual zoning will almost always have a small incremental effect. But, these are the values that the City Council sought to protect.

VI. NO COMPELLING PROGRAMMATIC NEEDS OR HARDSHIPS JUSTIFY THE LOWER FLOOR VARIANCES FOR 1500 SQUARE FEET OF ADDITIONAL SPACE

The BSA Decision, without any specific discussion or findings, improperly granted variances to the Congregation for 500 square feet of additional USABLE space on EACH OF floors 2, 3, and 4, purportedly to accommodate school uses on those floors. Yet, at the same time, the BSA conspicuously failed to address the inconvenient fact that resolution is available to the Congregation for the supposed hardships on floors 5 and 6 of a conforming as-of-right building. The Congregation has, without any justification, decided that the school facilities may only occupy floors 2, 3 and half of floor 4.

The Zoning Resolution already allows a non-profit to use the entire footprint of the lot for community spaces as a statutory accommodation to non-profits. Accordingly, without the necessity of any showing of hardship, the Zoning Resolution authorizes the

Congregation to use, up to a height of 23 feet, the entire 6400 square foot lot, rather than the 70 x 64 or 4,480 square feet allowed to for-profits.

A. The Building First Was Designed And Thereafter The Congregation Crafted Programmatic Needs To Justify The Design

The record is clear: the programmatic need asserted by the Congregation to support the 500 square feet of space on each of floors 2,3 and 4 were created after and not before the design. The programmatic needs are contrived to support the maximum size building that the Congregation felt it could slip by the BSA. The record is undisputed that the envelope of floors 1-4 has remained essentially unchanged from the initial submission of plans to the Landmarks Commission in 2001. The opposition presented a composite exhibit comparing the different versions of plans for floors 1-4 and presented them to the BSA on January 28, 2008. See 0281 (First Floor), P-00289 (Second Floor), P-00294 (Third Floor), and P-00294 (Fourth Floor), which show the modifications made over time by the Congregation. and how programs were modified and changed over time, ultimately leading, for example, to the "toddler fabrication" for the second floor.

The Decision makes a complete mockery of the requisite showing of programmatic needs. The BSA acts as if deference means accepting any statements, conclusory or not, plausible or not, under oath or not, asserted by the party or merely by counsel for the party, and whether contradicted by other assertions by the party or not. The BSA has given complete carte blanche to the applicant, and has failed to perform its duties.

1. Fourth floor — No compelling reason for locating the 1200 square foot caretaker's apartment on the fourth floor.

The Congregation argues that programmatic needs compel that a 1200 square foot luxury caretaker's apartment be placed on the fourth floor, sharing the rest of the floor

with classrooms. The Congregation argues that it will suffer "unnecessary hardship" if the caretaker's apartment is not on that floor, and asks for a 500 square foot variance in the rear on the same floor (part of the total of 1500 square feet in all the lower floor variances.)

Opponents immediately pointed out that, not only was a caretaker's apartment not found in the initial plans, but that the Parsonage located a few feet way on the zoning lot was a residential building where the caretaker could live. The Parsonage is a six-bedroom, luxury townhouse (P-00252) being rented at a market rate of approximately $18,000 per month.[26] The Congregation responded that the Parsonage space was too valuable to use for the caretaker, and that the caretaker for security reasons had to be in the Community House (a specious and questionable requirement). Opponents then pointed out another obvious solution to the contrived hardship — in a conforming as-of-right building, the caretaker's apartment could be moved up one or two floors to the fifth or sixth floors, where the Congregation intended to locate luxury condominiums. The Congregation's rationalization was that:

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

July 8, 2008 Statement in Support at page 28 (P-03851).

Not only is that not a compelling unnecessary hardship under §72-21(a), but it runs afoul of the BSA decision that earning a financial return is not a programmatic basis for a variance under §72-21(b).

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[26] As part of its "hear no inconvenient fact" policy, the BSA refused to ask the Congregation to describe the actual rent being paid. At a CB7 hearing, the counsel for the Congregation acknowledged that the facility was being rented out at "market rate to a tenant who has a family there and can use the building in which it was built for the purpose it was built as a residential unit." CB7 Land Use Transcript October 17, 200? (P-00255).

Moving the caretaker's 1200 square foot apartment would free up 1200 square feet for classroom needs, making the 500 square foot variance on both the third and fourth floors unneeded.

2. The Toddler program is contrived as a hardship to justify the second floor rear setback.

The alleged programmatic need for a space for 60 toddlers that could be located only on the second floor did not make its appearance until the fourth version of plans submitted by the Congregation to the BSA.

The October 22, 2007 plans showed classrooms in the front of the building and offices in the rear. Drawing P-9, Community Facility/Residential Second Floor Proposed (P-02168 at P-02178; R-000573 at R-000582).

After opponents pressed the Congregation with the arguments that the offices planned for the second floor could be located elsewhere in a conforming building, the Congregation suddenly switched position to contrive a programmatic need that it would claim could only be located on the second floor — the 60-toddler day care center. So, this urgent programmatic need first surfaced in the Congregation's December 28, 2007 submission. Prior to that time, the Congregation had described a small toddler program meeting two or three times a week for two hours each day with a maximum of 20 children on each day, open to members and non-members at market rate charges. Suddenly, without explanation, this program mushroomed to 60 children meeting 10 hours per day, so as to justify the urgent need for a ten-foot expansion on the second floor. No rationalization or explanation of why there was a radical expansion of the toddler program was presented so late in the BSA proceeding. The Congregation did not attempt to explain why the program required 60 rather than the 47 children that could be

accommodated on an as-of-right second floor. The plans were never submitted to the DOB and there is a reasonable possibility that DOB would not approve 60 young children on the second floor of a security risk building where the access stairs are located in an adjoining building (the Sanctuary).

The toddler programmatic need is a transparent ploy. The "evidence" supporting this need emanates entirely from the conclusory assertions of counsel for the Congregation. There is no testimony at all by the Congregation officers, staff, or trustees, and this "need" was not mentioned in at all in the testimony of the rabbi and his director of religious education at the hearing of November 27, 2007. See Testimony of Rabbi Angel and Lynne Kay at pages 10 and 13 (P-02440 at P-02453 and P-02453; R-001726 at R-001736 and R-001739, rare in that testimony was from the Congregation and not the attorney for the Congregation who provided most testimony in the proceeding.

So as to justify an 80 by 64 square foot second floor, rather than a conforming 70 by 64 foot floor, the Congregation contrived a 60-toddler program that must be located on the second floor. Such a program was not mentioned in the April 2, 2007 Application by the Congregation or in any of the two (or three) revisions filed by the Congregation prior to the November 27, 2007 hearing.

Instead, the extensive Toddler program was contrived for the first time by the Congregation in the interval between the November 27, 2007 hearing and the Congregation's December 29, 2007 submission, after Community Board 7 had voted to reject all the variances.

B. Any Hardships Of Applicant Relating To The Lower Floor Variances That Do Result From The Strict Application Of The Zoning Resolution Are Self Imposed, Therefore Not Satisfying The Requirements Of (a) And (d)

Rather than fairly discuss the opposition's contention that the classroom expansions on the 2nd, 3rd, and 4th floors could be accommodated in a conforming as-of-right building, the BSA in its decision misrepresented the opposition's statement by stating inaccurately:

> ¶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
>
> ¶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

This is a distortion of the objections by the opposition, which were that the 1200 square foot caretaker's residential apartment could be accommodated either in the residential Parsonage floors or upon the 5th and 6th floors of a conforming as-of-right building. This objection was made repeatedly in hearing testimony and in numerous written submissions from the initial hearing through the final submissions.[27] Despite the

[27] 6. The Applicant intends to use part of the Fourth Floor for classrooms and the other part for a 1200 two bedroom, two bath, and apartment for the caretaker. The requested variance is to reduce the rear yard setback from 30 feet to 20 feet, so as to provide larger classrooms, adding 600 gross square feet of space.. This variance is unrelated to any of the access and accessibility needs. Applicant admits there is no programmatic need to locate the caretaker's apartment on the fourth floor rather than the fifth or sixth floors or in the parsonage building. The only reason proffered by the Applicant for placing the caretaker's apartment here is that the other locations are very valuable as residential condominium or rentals. See Lower Floor Variances at Opp.-Ex. GG-10
See July 29, 2008 Sugarman Post Hearing Statement in Opposition, p. 5 (P-03943).

many questions and objections, not once did any of the five commissioners wonder why the 5th and 6th floors of the conforming as-of-right building was not being used for programmatic needs.

As a cover for the BSA's "hear no inconvenient fact" policy, the Decision states:

> ¶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

Since this issue was raised over and over by the opposition, the statements of the BSA in ¶¶58, 59, and 216 are proof that the BSA acted arbitrarily and capriciously in its

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"One, then wonders how and why it became so compelling to locate the caretaker's apartment, not in the Parsonage, and not on the fifth or sixth floor of an as-of-right building, but ONLY on the fourth floor, sharing space with the classroom of children and 'creating' the programmatic need for the rear variances." January 28, 2008 Sugarman Letter in Opposition With Affirmation Re Exhibits, p. 7 (P-02697).

> 991 I just do not understand how anyone could accept an argument that the caretaker's
> 992 apartment on the fourth floor of this building cannot be moved to the fifth or sixth floor,
> 993 right upstairs, in an as-of-right building which would open up an enormous amount of
> 994 space. There's just no way. I would like to know what kind of finding or factual basis
> 995 the Board can find in this record to justify this position and, as well, the position of the
> 996 caretaker's apartment cannot be met in the ample space provided in the other living
> 997 quarters on this integrated zoning site, the parsonage
> February 12, 2008 Second BSA Hearing Transcript, p. 45 (P-02855).

The Opposition's Architectural expert opined that the asserted programmatic needs could be remedied in an as of right building - by moving the caretaker's apartment to the 5th or 6th floors and by eliminating the need for a separate elevator bank.

The Applicant's architect did not address this opinion, but rather attempted to divert the discussion, by, for example, referring only to "using the 5th and 6th floors for educational purposes." The Applicant's architect did not address the use of the 5th or 6th floors for the caretaker's apartment or the elimination of the residential elevator banks. February 8, 2008 Sugarman Response, p. 3 (P-02779).

See other objection raised by the opposition as to not using the 5th and 6th floors: November 23, 2007 Sugarman Letter to BSA, p. 4 (P-02384); March 25, 2008 Sugarman Opposition Statement/Brief, p. 5 (P-03104); Testimony of Craig Morrison, Transcript of April 15, 2008 BSA Hearing, p. 29, lines 633-638 (P-03274); Testimony of Jay Greer, Transcript of April 15, 2008 BSA Hearing, p. 30, lines 666-669 (P-03275); Statement of Landmark West, July 29, 2008, p. 10 (P-03894); Statement of Alan D. Sugarman to BSA November 7, 2007, p. 2 (P-02411).

conduct and in the proceeding. Zoning Resolution §72-21(a) is clear that a hardship must be unnecessary and must arise out of the strict application of the zoning resolution.

Under a conforming building that strictly complies with the zoning resolution, the Congregation would be able to address the issues of 1500 square feet requested for the lower floor variances by utilizing the fifth and sixth floors of a conforming building. Thus, the hardship does not qualify under (a). Further, under Zoning Resolution §72-21(d), the hardship may not be self-created. Clearly, choosing not to use any other part of the community house spaces to meet the needs of 1500 square feet is self-imposed. Finally, under finding (e), any variance must be the minimum variance to afford relief. Since space claimed for the programmatic needs can be accommodated in a conforming building or elsewhere on the zoning lot, the minimum variance is no variance.

VII. THE IMPROPER AND CAPRICIOUS CONDUCT OF THE VARIANCE PROCEEDING

The Verified Petition describes the improper and capricious nature of the BSA' conduct throughout this proceeding, including the improper ex parte meeting by the Respondent Commissioners Srinivasan and Collins. For the sake of brevity, the statements in the Verified Petition will not be repeated. Similarly, the letter of Alan D. Sugarman to said Respondents dated April 10, 2007, and attached to the Verified Petition clearly demonstrates the reasons why the meeting was highly improper.

Notwithstanding the voluminous record and the multiple hearings, it appears that, prior to the initial hearing, the Board had already determined to grant the variances. It would not even wait for CB7 to hold its meeting before holding the first BSA hearing. At the first BSA hearing, the Chair complained that the Congregation had put the Board in a "hard place" (November 27, 2007 BSA Transcript, p. 23, line 510 (P-02440 at P-02463,

R-001726 at R-001749), the hard place being that the BSA was "expected" to grant a variance on an application that was deficient in every respect. The BSA did not want to wait for the Congregation to respond completely to the staff's objection letters. But the Congregation's counsel boldly explained, "the application had the imprimatur of the Bloomberg administration" (Community Board 7 Land Use Committee Hearing, October 17, 2007, Page 7-8 (P-02080 at P-02081; R-002827 at R-002833-4).

Thereafter, the proceedings were an effort to mold a record that would pass muster with this Court — the facts were confused, gross misrepresentations were left unchallenged by the Board, simple financial concepts were clouded with complex artificialities, and obvious questions were left unasked by the BSA. The BSA ignored its own explicit written guidelines as to the content of BSA Applications and in a way that every variation from the guidelines served to act in favor of the applicant Congregation. The Congregation was allowed to file repeated do-over's of its application, filing in all over 1500 pages, but leaving out the most critical information and documents. The BSA Decision relied upon numerous undocumented assertions by the Congregation, principally from the counsel for the Congregation. The Decision offered nonfactual conclusory findings by the Board as to all key findings required by the Zoning Resolution. The Decision ignored numerous opposition experts, not deigning to attempt to respond in the Decision, and in the proceedings, adopting an "ignore inconvenient facts" attitude.

The BSA seemed to be confused as to whether the proceedings on this project were adjudicative in nature or, as the Congregation's counsel suggested, a colloquy between the BSA and the applicant (see Friedman & Gotbaum Letter, June 17, 2008, P-

03742), with the community as bystanders. Indeed, the BSA even states in its Guidelines for Hearing Attendees: "Please understand that the applicant has paid a fee and is prosecuting the application. So applicants and their witnesses are not entitled to speak longer than three minutes." (P-00154) At times, the BSA acted as the applicant's surrogate or co-applicant. In a Freudian slip, or a moment of candor, the BSA in its Decision forgets that its role is an impartial adjudicator when it states that it was the Board's obligation to establish the (b) finding, rather than the obligation of the applicant:

> ¶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, ...

For opponents, procedural due process meant only that the opponents were able to file any documents it wished, but the BSA would ignore their submissions without explanation Testimony was sometimes limited to three minutes, sometimes not. Opposition expert witnesses testified, but were ignored, rarely eliciting questions from the Board, while the BSA coached the Congregation experts. For the opposition, an important component of procedural due process was missing: the ability to question the Congregation and its consultants. The BSA did not swear witnesses, despite its ability to do so. (See New York City Charter, Chapter 27, §663 (P-00163); *Carroll v. Srinivasan,* No. 110199/07 (N.Y. Sup. Ct., Feb. 7, 2008) available at: ttp://decisions.courts.state.ny.us/fcas/FCAS_DOCS/ 2008FEB/3001101992007002SCIV.pdf) Further, despite repeated request, the BSA refused to arrange for an inspection the opposition architect, but the used "obsolescence" as a physical condition. ¶ ¶ 41, 69, 72, 75, 76 Similarly, the BSA refused to inquire and collect information about Beit Rabban, but then assumed conclusions as to Beit Rabban

in the Decision. ¶ ¶ 145, 146 Similarly, the BSA refused to inquire as to the rental income for the Parsonage - but, then used the development rights over the Parsonage in the key fact of site value.

The BSA would not subpoena witnesses from, for example, the unaffiliated Beit Rabban private school tenant of the Congregation, but rather, in its decision, relied upon conclusory claims by the Congregation's counsel.

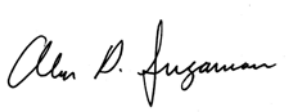
CONCLUSION

For the reason set forth above and in the Verified Petition, the Decision should be vacated and annulled and remanded to the BSA for the express purpose of denying the variance. The Congregation had plenty of opportunity to meets it burden of proof and failed. The conclusory and deceptive nature of the Decision is self-evident. The failure of the decision to abide by land use and zoning principles is clear.

Should the Court in its discretion determine that the Decision be remanded for further proceeding, the Respondent BSA should be ordered to allow Petitioners to intervene, to question representatives of the Respondent Congregation as to material issues, to propound written questions and request for documents, and to have the other rights of a party to the proceeding. Further, Respondents BSA Chair Meenakshi Srinivasan and BSA Vice-Chair Christopher Collins should not be allowed to further participate in any rehearing as a result of improper ex parte meetings with the Respondent Congregation and the lack of impartiality of said Chair and Vice-Chair as indicated in the Decision and record.

Dated: September 23, 2008 revised January 2, 2009
New York, New York

Alan D. Sugarman



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Attorney for Petitioners

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

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NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

- against -

Index No. 113227/08

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.

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MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION ON BEHALF OF RESPONDENTS BSA, SRINIVASAN AND COLLINS

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February 6, 2009

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CHRISTINA L. HOGGAN
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
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MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION ON BEHALF OF RESPONDENTS BSA, SRINIVASAN AND COLLINS

PRELIMINARY STATEMENT

Respondents, Board of Standards and Appeals of the City of New York, Meenakshi Srinivasan, Chair and Christopher Collins, Vice Chair (collectively "BSA" or "Board"), submit this memorandum of law in support of the BSA's August 26, 2008 determination to grant lot coverage, rear yard, height and setback variances to respondent Congregation Shearith Israel ("the Congregation" or "the Synagogue"), and in opposition to petitioners' application for a judgment pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR").

On or about April 1, 2007, the Congregation submitted an application to the BSA for waivers of zoning regulations for lot coverage and rear yard to develop a community facility that could accommodate its religious mission, and waivers of zoning regulations pertaining to base height, total height, front setback and rear setback to accommodate a market rate residential

development that could generate a reasonable financial return at the property known as both 6-10 West 70th Street and 99-100 Central Park West, New York, New York ("the subject property"). After reviewing voluminous submissions by both the Congregation and Opposition, and holding four public hearings, the BSA granted the Congregation's application, finding that the Congregation had met the requisite criteria set forth in New York City Zoning Resolution ("Z.R." or "Zoning Resolution") § 72-21.

Thereafter, petitioners commenced the instant Article 78 proceeding seeking a judgment annulling and reversing the BSA's determination, i.e., the Resolution on Calendar No. 74-07-BZ, which was adopted by the BSA on August 26, 2008 and filed on August 29, 2008 ("Resolution"). For the reasons set forth in this memorandum of law, and in the accompanying verified answer, the Resolution is rational and proper in all respects, and should be upheld by this Court.

STATEMENT OF MATERIAL FACTS

The Subject Property and Applicable Zoning Requirements

The subject property is located within the Upper West Side/Central Park West Historic District and consists of 2 tax lots (Block 1122, Lots 36 and 37), with a total lot area of 17,286 square feet. Pursuant to Zoning Resolution Section 12-10, the lots constitute a single Zoning Lot because the two tax lots have been in common ownership since 1984 (the date of the adoption of the existing zoning district boundaries – i.e. "an applicable amendment to the Zoning Resolution"). 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, and is situated partially in an R8B residence zoning district and partially in an R10A residence zoning district [R. 1-2 (¶¶ 12, 13, 15, 19, 20, 22)].

The use and development of property located in residence zoning districts is governed by various use and bulk regulations set forth in Article II of the Zoning Resolution.

A "use" is "any purpose for which a building or other structure or tract of land may be designed, arranged, intended, maintained or occupied" or "any activity, occupation, business, or operation carried on, or intended to be carried on, in a building or other structure or on a tract of land." See Z.R. §12-10. Bulk regulations are essentially addressed to building size and open lot space requirements. See Z.R. §12-10.

In order to develop a property with a non-conforming use or a non-complying bulk, an applicant is first required to apply to 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.. Absent the grant of a variance by the BSA, the use and development of property must conform to and comply with the use and bulk regulations for the zoning district in question.

Presently, tax lot 36 is improved with a landmarked Synagogue and a connected four-story parsonage house that is 75 feet tall and totals 27,760 square feet. Tax lot 37, which has a lot area of approximately 6,400 square feet, is improved, in part, with a four-story Synagogue community house totaling 11,079 square feet. The community house occupies approximately 40% of the tax lot area, and the remaining 60% is vacant [R. 2, 6 (¶¶ 16, 17, 82)].

This proceeding concerns an application by the Congregation, a not-for-profit religious institution, to demolish the community house that presently occupies tax lot 37 and replace it with a nine-story (including penthouse) and cellar mixed-use community facility/residential building that does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear setback applicable in the

residential zoning districts in which the zoning lot sits ("the proposed building") [R.1-2 (¶¶ 1-3, 24, 27)].[1]

The proposed building will have community facility uses on two cellar levels and the lower four stories and residential uses on the top five stories (although a minimal amount of the floor area on the first through fourth floors will also be dedicated to the residential use) [R. 2, 7 (¶¶ 24, 84)]. The community facility uses will include: mechanical space and a multi-function room on the sub-cellar level with a capacity of 360 persons for the hosting of life cycle events and weddings, dairy and meat kitchens, babysitting and storage space on the cellar level, a synagogue lobby, rabbi's office and archive space on the first floor, toddler classrooms on the second floor, classrooms for the Synagogue's Hebrew School and the Beit Rabban day school on the third floor, and a caretaker's apartment and classrooms for adult education on the fourth floor. [R. 3 (¶ 39)]. All uses are as-of-right in the residence zoning districts in question and no use waivers were requested by the Congregation. At the first hearing before the BSA, representatives for the Congregation discussed the reasons why a new facility is needed, including the need to: 1) accommodate the growth in membership from 300 families when the synagogue first opened to its present 550 families; and 2) update the 110-year old building to make it more easily handicapped accessible [R. 1728-46].

[1] To aid the Court concerning these requirements, lot coverage is that portion of a zoning lot which, when viewed from above, is covered by a building; the 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 open space; the base height of a building is the maximum permitted height of the front wall of a building before any required setback; the building height is the total height of the building measured from the curb level or base plane to the roof of the building; and 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. Z.R. §12-10.

The residential uses will include five market-rate residential condominium units, and are proposed to be configured as follows: mechanical space and accessory storage on the cellar level, elevators and a small lobby on the first floor, core building space on the second, third and fourth floors, and one condominium unit on each of the fifth through eighth and ninth (penthouse) floors [R. 6 (¶ 83)].

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 [R. 2 (¶ 26)]. 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 (20"-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) [R. 2 (¶ 27)].[2]

The Congregation submitted its development application to DOB and, on or about March 27, 2007, DOB's Manhattan Borough Commissioner denied the Congregation's development application, citing eight objections. After revisions to the application by the Congregation, the Manhattan Borough Commissioner issued a second determination on the

[2] The Congregation initially proposed a nine-story building without a court above the fifth floor and a total floor area approximately 550 square feet larger than what it ultimately applied for. The Congregation 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 eight floors of the building by approximately 556 square feet and reducing the floor plate of the ninth floor penthouse by approximately 58 square feet, for an overall reduction in the variance of the rear yard setback by 25 percent and a reduction of approximately 600 square feet in the residential floor area [R. 2 (¶ 29)].

Congregation's application which eliminated one of the prior objections. DOB's second determination, which was issued on August 27, 2007, became the basis for the Congregation's variance application before the BSA [R. 1 (¶ 1)].

The Zoning Resolution provides that the BSA may grant a variance to modify the applicable zoning regulations only where the BSA determines that (1) there are practical difficulties or unnecessary hardships involved in carrying out the strict letter of the provision, (2) the proposed use will not have a detrimental effect on the surrounding area, and (3) the proposed variance is the minimum necessary to afford relief. In making such a determination, the BSA, pursuant to Z.R. §72-21, is required to make "each and every one" of five specific findings of fact, as follows:

> [w]hen 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, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board of Standards and Appeals may, in accordance with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.
>
> Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this Resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:
>
> (a) that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the zoning lot is located;

> (b) 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 that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such zoning lot; this finding shall not be required for the granting of a variance to a non-profit organization;
>
> (c) 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.
>
> (d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however, where all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship; and
>
> (e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for.

In addition, Z.R. §72-21 requires the BSA to set forth in its decision or 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.
>
> Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection.

Congregation Shearith Israel's Application for a Variance

On or about April 1, 2007, the Congregation submitted an application to the BSA for waivers of zoning regulations for lot coverage and rear yard to develop a community facility

that could accommodate its religious mission, and waivers of zoning regulations pertaining to base height, total height, front setback and rear setback to accommodate a market rate residential development that could generate a reasonable financial return [R. 2 (¶ 30)]. The application was designated by the BSA as Calendar Number 74-07-BZ [R. 1].

In support of its application, the Congregation submitted various documents to the BSA, which included, *inter alia*, a zoning analysis, a statement in support, an economic analysis, drawings and photographs [R. 15-183]. In its statement in support, the Congregation set forth the ways in which it complied with the five requirements of Z.R. §72-21 [R. 19-48]. In compliance with environmental review requirements the Congregation also submitted an Environmental Assessment Statement ("EAS") [R. 112-132].

Environmental Review

As part of a variance application, certain projects require review under the State Environmental Quality Review Act ("SEQRA"), which is codified in Article 8 of the Environmental Conservation Law ("ECL"). The state regulations implementing SEQRA are found at 6 NYCRR Part 617. SEQRA was enacted to compel governmental agencies to consider any environmental consequences of their actions, so that they may take steps to mitigate any adverse environmental impacts prior to approving or initiating the action. ECL § 8-0103.

SEQRA authorizes local governments to develop and implement environmental review procedures consistent with its mandate. New York City's procedures for implementing SEQRA are set forth in the Mayor's Executive Order No. 91 of 1977, entitled City Environmental Quality Review ("CEQR"). CEQR is found in the Rules of the City of New York ("RCNY") Title 43, Chapter 6, as modified by regulations subsequently adopted by the City Planning Commission, codified as 62 RCNY Chapter 5.

CEQR establishes a multi-stage process for environmental review of proposed governmental actions, conducted by a lead agency. Where, as here, the proposed action is a variance of the zoning resolution, the lead agency is the Board of Standards and Appeals. See 62 RCNY § 5-03(b)(5).

Both SEQRA and its implementing regulations contemplate that environmental review will only be required of agency actions which cause, facilitate or permit some significant change in the physical environment. See 6 NYCRR § 617.11.

Initially, the lead agency must make a threshold determination as to whether the proposed action is subject to environmental review. See 62 RCNY § 5-05(a). If the project is determined to be subject to environmental review, the proposed action must be assessed for possible environmental consequences. In this regard, the lead agency is required to prepare an EAS containing a detailed environmental assessment of the action, and to then make a determination, based on the EAS, as to whether the proposed action may have significant effect on the environment. See 62 RCNY § 5-05(b).

The areas that can be analyzed in an EAS in "assessing the existing and future environmental settings," pursuant to the CEQR Technical Manual at 3A-1, include, *inter alia*: land use, zoning, socioeconomic conditions, open space and recreational facilities, shadows, neighborhood character, hazardous materials, waterfront revitalization programs, air quality, solid waste and sanitation services, traffic and parking, and noise.

If the lead agency determines that the proposed action may have a significant effect on the environment, then it issues a positive declaration and an Environmental Impact Statement ("EIS") must be prepared. See 43 RCNY § 6-07(b). The EIS must describe the adverse environmental impacts identified in the EAS, identify any mitigation measures that

could minimize those impacts, and discuss alternatives to the proposed action and their comparable impacts. See 43 RCNY § 6-09.

If, however, the lead agency determines that the proposed action will not have a significant effect on the environment, then it issues either a negative declaration or a conditional negative declaration.[3] Where a conditional negative declaration has been issued, an EIS is not required, because in such circumstances there are no adverse impacts to describe, nor is there a need to identify mitigation measures or to consider alternatives to the proposed action. See 43 RCNY § 6-07(b).

BSA's Review of Congregation Shearith Israel's Variance Application

On or about June 15, 2007, BSA provided the Congregation with a Notice of Objections to its variance application [R. 253-59]. By letter dated September 10, 2007, the Congregation provided responses to the BSA's June 15, 2007 objections, including, *inter alia*, an updated statement in support of its application, drawings, and a shadow study [R. 308-468]. A second set of objections was sent by the BSA to the Congregation on October 12, 2007 [R. 512-15]. The Congregation responded to the BSA's second set of objections in a submission dated October 27, 2007 [R. 536-641].

After due notice by publication and mailing, a public hearing on Calendar Number 74-07-BZ was held by the BSA on November 27, 2007 [R. 1 (¶ 4), 1648-63, 1726-1823]. The public hearing continued on February 12, 2008 [R. 1 (¶ 4), 3653-758], April 15,

[3] A conditional negative declaration is "a written statement prepared by the lead agencies after conducting an environmental analysis of an action and accepted by the applicant in writing, which announces that the lead agencies have determined that the action will not have a significant effect on the environment if the action is modified in accordance with conditions or alternative designed to avoid adverse environmental impacts." See 43 RCNY § 6-02.

2008 [R. 1 (¶ 4), 4462-515], June 14, 2008 [R. 1 (¶ 14), 4937-74], and on to decision on August 26, 2008 [R. 1 (¶ 4), 5784-95].

Opponents to the application, including petitioners and Alan Sugarman, petitioners' counsel in this proceeding, presented testimony at each of the public hearings, and made written submissions in opposition to the application [R. 217-232, 241-252, 260-274, 472-501, 1721-25, 1856-58, 3288-607, 3622-29, 3827-39, 3902-07, 3990-4005, 4811-58, 4925-32, 5310-750]. In their testimony and submissions, petitioners and other opponents attempted to discredit the applicant's arguments that the five findings had been met. Specifically, the Opposition touched on arguments including, *inter alia*, 1) the ability of the Congregation to satisfy its programmatic needs through an as-of-right development; 2) the ability of the Congregation to recognize a reasonable return on its investment from an as-of-right development; and 3) the detrimental effects the proposed development will have on the community, including the loss of windows in the adjoining buildings.

During the public hearings counsel for the Congregation presented the case for granting the variance, establishing each of the five criteria necessary for the granting of a variance pursuant to Z.R. §72-21. In addition, after each hearing the Congregation followed-up with additional written submissions to respond to questions and concerns raised by the BSA Commissioners and members of the Opposition during the hearing.

After conducting an environmental review in accordance with SEQRA and CEQR which found that the Congregation's proposed development would not have a significant adverse impact on the environment,[4] considering all the submissions and testimony before it, and after

[4] This finding obviated the need for the preparation of an Environmental Impact Statement. See 43 RCNY § 6-07(b).

visiting the site and surrounding area, the BSA met on August 26, 2008 and adopted a Resolution granting the variance by a vote of five to zero [R. 1-14].

Specifically, the BSA concluded as follows:

> **WHEREAS**, thus, the Board has determined that the evidence in the record supports the findings required to be made under Z.R. §72-21; and
>
> **WHEREAS**, the project is classified as a Type I action pursuant to 6 NYCRR, Part 617; and
>
> **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
>
> **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
>
> **WHEREAS**, the Board has determined that the proposed action will not have a significant adverse impact on the environment.
>
> ***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 Z.R. §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 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; and

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;

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

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;

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

THAT substantial construction be completed in accordance with Z.R. §72-23;

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 [R. 13-14 (¶¶ 218-230)].

The Article 78 Proceeding

Petitioners, Kettaneh, a resident of a townhouse at 15 W. 70th Street (across from the synagogue) and Lepow, the owner of several cooperative apartments in 18 W. 70th Street, commenced this proceeding by filing and serving a Notice of Petition and Petition, wherein they seek an order, pursuant to Article 78 of the CPLR, annulling, vacating and reversing as arbitrary and capricious, the BSA's decision to grant the Congregation's application for waivers of the lot

coverage, rear yard, height and setback requirements otherwise applicable to developing the property at 6-10 West 70th Street (99-100 Central Park West) in Manhattan.

For the reasons set forth herein, and in the accompanying memorandum of law, the BSA's determination was rational and proper in all respects, and its Resolution should be upheld by this Court.

ARGUMENT

POINT I

BSA'S DETERMINATION TO GRANT THE CONGREGATION'S VARIANCE APPLICATION SHOULD BE SUSTAINED AS A REASONABLE AND PROPER EXERCISE OF ITS DISCRETIONARY AUTHORITY.

The determination challenged in this Article 78 proceeding was made by the BSA following lengthy hearings and the receipt of voluminous evidence, pursuant to Charter §668 and Z.R. §§72-01(b) and 72-21. The BSA's determination to grant the variance was a reasonable and proper exercise of its authority, inasmuch as there is substantial evidence in the Record to establish "each and every one" of the five specified findings of fact required by Zoning Resolution § 72-21. Accordingly, the determination should be upheld this Court.

A. The Applicable Standard of Review.

The BSA is an expert body comprised of persons with unique professional qualifications, including a planner and a registered architect both with at least ten years of experience. City Charter § 659; Fordham M.R. Church v. Walsh, 244 N.Y. 280, 287 (1927). The BSA has been delegated the responsibility of interpreting the Zoning Resolution and enforcing its mandates. Among other things, the BSA is empowered to hear, decide and determine, in specific cases of practical difficulties or unnecessary hardship, whether to vary the

application of the provisions of the Zoning Resolution. See New York City Charter ("Charter") §§ 666(5) and 668; Z.R. §§ 72-01(b) and 72-20 et seq.

Where, as here, the BSA grants a variance application, its determination is reviewable in the Supreme Court of this State. See Charter § 668(d); CPLR §7803. The reviewing court cannot substitute its judgment for that of the local zoning body however. Rather, it is the function of the court to determine whether there is in the record a rational basis for the exercise of administrative discretion. See CPLR 7803; Cowan v. Kern, 41 N.Y.2d 591, 599 (1977); Fiore v. Zoning Board of Appeals, 21 N.Y.2d 393, 396 (1968); Matter of Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974); V.R. Equities v. New York City Conciliation and Appeals Board, 118 A.D.2d 459 (1st Dep't 1986); Shell Creek Sailing Club, Inc. v. Board of Zoning Appeals of the Town of Hempstead, 20 N.Y.2d 841 (1967); Purdy v. Kreisburg, 46 N.Y.2d 354, 358 (1979); 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 181 (1987); Mandell v. Purcell, 54 A.D.2d 935 (2d Dep't 1976); and Conley v. Town of Brookhaven Zoning Board of Appeals, 40 N.Y.2d 309, 314 (1976). If so, the challenged determination must be sustained. Guggenheim Neighbors v. Board of Estimate, 6/20/88 NYLJ at 23, col. 4 (Sup. Ct. N.Y. Co.), aff'd, 145 A.D.2d 998 (1st Dep't 1988), leave to appeal denied, 74 N.Y.2d 603 (1989); Conley, supra at 314.

As the Court of Appeals stated in Cowan,

> [w]here 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. supra at 599.

Accordingly, "[t]he Courts may set aside a Zoning Board determination only where the record reveals illegality, arbitrariness or abuse of discretion. Phrased another way, the determination of

the responsible officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence in the record." Conley, supra at 314 (citations omitted). See also Soho Alliance v. New York City Board of Standards and Appeals, 264 A.D.2d 59, 62-63 (1st Dep't), aff'd 95 N.Y.2d 437 (2000), citing Fuhst v. Foley, 45 N.Y.2d 441, 444 (1978).

B. The Five Findings.

As detailed above, the Congregation applied to BSA for "waivers of zoning regulations for lot coverage and rear yard to develop a community facility that can accommodate its religious mission," and "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" [R. 2 (¶30)].[5] After reviewing voluminous submissions by both the Congregation and Opposition, holding four hearings,[6] and considering the applicable law, the BSA rationally granted the Congregation's application because it had met each of the five specific findings of fact.

a. Religious and Educational Institution Deference

[5] That the Congregation's initial application initially requested waivers related to Z.R. §23-711 (minimum distance between buildings), but then later withdrew its request for that variance after obtaining revised objections from DOB which, based upon revised plans, did not object to the distance between buildings at the site, is, contrary to petitioners' contentions [Petition, ¶ 97, fn. 13], of no moment. Indeed, this issue was addressed by the Board during the February 12, 2008 hearing where Chair Srinivasan and Vice-Chair Collins explained first that it is typical for an applicant to submit revised plans to DOB and receive updated objections which become the subject of the BSA's review, and second, that all that is being reviewed and acted upon by the Board are the requested zoning waivers, not the differences between the first and second sets of plans submitted to DOB [R. 3724-28].

[6] The public hearing on Calendar Number 74-07-BZ was held by the BSA on November 27, 2007, and thereafter continued on February 12, 2008, April 15, 2008, and June 14, 2008 [R. 1 (¶ 14)].

As an initial matter, the BSA properly concluded that, to the extent the Congregation was seeking variances to develop a community facility, it was entitled to significant deference under the laws of the State of New York [R. 2-3 (¶ 31), citing, Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968)]. This determination was rational and reasonable as it was based on decisions of the Court of Appeals, i.e., Westchester Reform Temple, supra, Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986), and Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975), and Z.R. §72-21(b) which provide that 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. [R. 2-3 (¶ 31, ¶ 45), R. 11 (¶ 165)]

The BSA properly did not extend this deference to the revenue-generating residential portion of the site because it is not connected to the mission and program of the Synagogue. As found by the BSA, 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 afforded to such an organization when it seeks to develop a project that is in furtherance of its mission [R. 3 (¶ 34), citing, Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); Foster v. Saylor, 85 A.D.2d 876 (4th Dept. 1981) and Roman Cath. Dioc. of Rockville Ctr. v. Vill. of Old Westbury, 170 Misc.2d 314 (1996)].

Thus, the Board properly subjected the Congregation's application to the standard of review required under Z.R. §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 Z.R. §72-21, notwithstanding its sponsorship by a religious institution [R. 3 (¶¶ 33, 35, 36)].

(a) Unique Characteristics

Zoning Resolution § 72-21(a) [the "(a) finding"] requires a showing that the subject property 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 due to the general conditions of the neighborhood.

The Zoning Resolution effectuates this purpose by requiring that the physical condition be "peculiar to and inherent in" the zoning lot – "peculiar" to distinguish it from other zoning lots in the district and "inherent" to insure the condition's inseparability from the zoning lot. In this way the task of addressing district-wide conditions at odds with the Zoning Resolution is reserved for the legislature.

The requirement of Z.R. §72-21(a) that the unique physical condition causing the practical difficulty must be "peculiar to and inherent in the particular zoning lot" does not mean that the peculiarity be singular. For example, in Douglaston Civic Assn. v. Klein, 51 N.Y.2d 963 (1980), the applicant's alleged difficulty in developing his lot was caused by its swampy nature. The petitioners argued that, since other neighboring lots were swampy, the lot in question was not unique. The Court of Appeals disagreed:

> Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship. What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed. What is involved, therefore, is a comparison between the entire district and the similarly situated land.

Id. at 965 (Citations omitted). See also Galin v. Board of Estimate, 52 N.Y.2d 869 (1981) (upholding BSA's unique physical condition finding where there were other plots in the district

as narrow as petitioner's); and Albert v. Board of Estimate, 101 A.D.2d 836 (2d Dep't), appeal denied 63 N.Y.2d 607 (1984).

Moreover, unique physical conditions of the "zoning lot," include an evaluation of the existing building on that lot. Fuhst, supra at 445 (finding that a practical difficulty presented by a building, rather than the zoning lot on which it rests, satisfies the (a) finding for uniqueness). Indeed, while many cases examine the unique characteristics of the land itself, Courts have repeatedly found that zoning boards may consider and rely upon the uniqueness of a structure on the land, including its physical obsolescence, to satisfy the uniqueness requirement. Fiore, supra at 395 (finding of uniqueness examined the structure on the zoning lot); UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248 (1st Dep't 2002) (rejecting "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"); West Broadway Associates v. Board of Estimate, 72 AD2d 505 (1st Dep't 1979), leave to appeal denied, 49 N.Y.2d 702 (1980) (reinstating a variance and sustaining the BSA's uniqueness finding based on the unique qualities of the building, not the zoning lot); 97 Columbia Heights Housing Corp. v. Board of Estimate, 111 AD2d 1078 (1st Dep't 1985), aff'd, 67 NY2d 725 (1986) (reinstating a variance and finding that the uniqueness requirement was satisfied by the demolition of a building, resulting in increased costs); Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dep't 1985) (finding that "[t]he requirement that the hardship be due to unique circumstances may be met by showing that the difficulty complained of relates to existing improvements on the land which are obsolete or deteriorated"); Dwyer v. Polsinello, 160 A.D. 2d 1056, 1058 (3d Dep't 1990); and Dwyer v. Poisinello, Sr., 160 AD2d 1056, 1058 (3d Dep't 1990) (finding of unique circumstances based on the obsolete building on the zoning lot).

Community Facility Variances

The BSA properly determined that a combination of the programmatic needs of the Congregation, and the unique physical conditions at the Property, including the physical obsolescence and poorly configured floor plates[7] of the existing Community House, created an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations" [R. 5 (¶ 74)].

With regard to its programmatic needs, the Congregation represented that the requested variances were needed to permit it to: 1) expand its lobby ancillary space; 2) expand its toddler program which was expected to serve approximately 60 children; 3) develop 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; 4) provide a residence for an onsite caretaker to ensure that the Synagogue's extensive collection of antiques is protected against electrical, plumbing or heating malfunctions; and 5) develop shared classrooms that will also accommodate the Beit Rabban day school [R. 3 (¶ 42)]. The Congregation also represented that the proposed community facility portion of the building would permit the growth of new religious, pastoral and educational programs to accommodate a congregation which has grown from 300 families to 550 families [R. 3 (¶ 43)]. Moreover, the Congregation represented that the proposed building will provide new horizontal and vertical circulation

[7] A floor plate is the total area of a single floor of a building.

systems to provide barrier-free access to the Synagogue's sanctuaries and ancillary facilities [R. 5 (¶ 73)].[8] The BSA, citing to case law, rationally found that the Congregation's programmatic needs constituted an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations" [R. 5 (¶ 64), citing, Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)]; Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971)]. In doing so, BSA properly found that since the Congregation was seeking to advance its programmatic needs, the Congregation was "entitled to substantial deference under the law of the State of New York as to zoning" [R. 3 (¶45)].

In addition to its programmatic needs, the Congregation represented that site conditions created an unnecessary hardship in developing the site in compliance with applicable regulations as to lot coverage and yards. To this end, the Congregation submitted that if it were required to comply with the applicable 30'-0" rear yard and lot coverage, the floor area of the community facility would be reduced by approximately 1,500 square feet [R. 4 (¶ 46)]. As a practical matter, this reduction would not serve the Congregation's programmatic needs because it would necessitate a reduction in the size of three classrooms per floor, thereby affecting nine proposed classrooms which would consequently be too narrow to accommodate the proposed students. Specifically, reducing the classroom floor area would 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 [R. 4 (¶¶ 47-49)]. In addition, the floor

[8] The Congregation also initially cited its need to generate revenue as a programmatic need. However, because New York State law does not recognize revenue generation as a valid programmatic need for a not-for-profit organization (even if the revenue is to be used to support a school or a worship space), the BSA asked the Congregation to explain its programmatic needs without reliance on a need to generate revenue, and evaluated the Congregation's request without considering the need to generate revenue [R. 6 (¶¶ 79-80)].

plates of a compliant building would be small and inefficient with a significant portion of both space, and floor area allocated toward circulation space, egress and exits [R. 4 (¶ 48)].

After assessing the Congregation's assertions regarding its programmatic needs and the physical characteristics of the property, the BSA rationally concluded that the Congregation satisfied the (a) finding with regard to the community facility use. Specifically, the BSA stated:

> **WHEREAS,** . . . the Board finds that the aforementioned physical conditions, when considered in conjunction with the programmatic needs of [the] Synagogue, create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations [R. 5 (¶ 74)].

In coming to this conclusion, the BSA also rationally rejected arguments raised by the Opposition[9], including arguments asserted by petitioners herein [R. 4-6 (¶¶ 51-81)].

First, the BSA considered the Opposition's argument that the Congregation 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 [R. 4-5 (¶¶ 51-4, 75-6)].[10]

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[9] As detailed above, references to the Opposition are to the group of people who testified before the BSA in opposition to the Congregation's application, including counsel for the petitioners herein. Many of the arguments raised by the Opposition before the BSA are the same as those raised in the petition.

[10] Petitioners' complaints about BSA's discussion of the Congregation's use of the property and programmatic needs miss the mark. Petition, ¶¶ 103-106. As is clear from the Resolution itself, the BSA discusses these issues solely to respond to the Opposition's assertions that programmatic needs cannot constitute a hardship in support of the (a) finding for a bulk variance. The BSA does not in any way assert that the Congregation is seeking a use variance, nor does it mischaracterize the Opposition as saying that the Congregation's programs are not proper accessory uses. Rather, in discussing the Congregation's use of its community facility, the BSA simply responded to the Opposition's assertions regarding the ability of an applicant to cite to programmatic needs as the justification for the (a) finding.

In response to this objection, the BSA pointed out that not only did the Congregation assert that the site is burdened with a physical hardship that constrains an as-of-right development (e.g. limited development areas and obsolete existing Community House with poorly constructed floor plates), but that in accordance with cases such as Diocese of Rochester v. Planning Board, 1 N.Y.2d 508 (1956), Westchester Reform Temple, supra and Islamic Soc. of Westchester v. Foley, 96 A.D.2d 536 (2d Dept. 1983), zoning boards must accord religious institutions a presumption of moral, spiritual and educational benefit in evaluating applications for zoning variances and, therefore, religious institutions need not demonstrate that the site is also encumbered by a physical hardship [R. 4 (¶ 52)].

Moreover, the BSA pointed out that the cases relied upon by the Opposition in support of their argument that the Congregation must establish a physical hardship [e.g. Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710 (2d Dept. 1988) and Bright Horizon House, Inc. v. Zng. Bd. Of Appeals of Henrietta, 121 Misc.2d 703 (Sup. Ct. 1983)] are inapposite here because both of the cases concerned situations where the zoning boards determined that the variance requests were not related to religious uses and were not ancillary uses to a religious institution in which the principal use was a house of worship [R. 4 (¶ 53-4)].

In contrast, here the BSA concluded 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" [R. 4 (¶ 55)]. Indeed, it is well-settled that day care centers and preschools have been found to constitute uses reasonably associated with the overall purpose of a religious institution [R. 5 (¶ 64), citing, Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)]. The BSA also properly concluded that the operation of the Beit Rabban school

constitutes a religious activity [R. 5 (¶ 66), citing, Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971)]. Thus, the BSA rationally rejected the Opposition's argument because: 1) the Congregation established that there are physical hardships in developing the site with a conforming building; and 2) it was not necessary for the Congregation to establish such physical hardship in order for the Congregation to satisfy the (a) finding.

Second, the BSA rationally rejected the Opposition's argument that the Congregation's programmatic needs are too speculative to serve as the basis for an (a) finding, [R. 4 (¶ 56)]. The BSA's finding was reasonable because in evaluating the Congregation's programmatic needs for the variance, it required the Congregation to submit documentation regarding the proposed programmatic floor area. Indeed, the Congregation submitted a detailed analysis of the programmatic needs of the Synagogue on a space-by-space, and time allocated basis [R. 4 (¶ 57), 3884-6]. Based upon its review of the Congregation's submission, the BSA properly concluded that "the daily simultaneous use of the overwhelming majority of the spaces requires the proposed floor area and layout and associated waivers" [Id.].

Third, BSA rationally rejected the Opposition's argument that the Congregation's programmatic needs could be accommodated within an as-of-right building, or within the existing parsonage house already on the Congregation's campus [R. 4 (¶ 58-9)]. See also, Petition, ¶¶ 109-10. In this regard, the Board noted that the Congregation represented that an as-of right development would not meet its needs because the narrow width of the existing parsonage house (i.e. 24 feet) would make as-of-right development subject to the "sliver"

limitations of Z.R. §23-692 which would limit the height of the as-of-right development.[11] The combination of this limit in height and the need to deduct area for an elevator and stairs would result in an as-of-right development generating little additional floor area [R. 4 (¶ 60)]. Moreover, the Congregation further represented that an as-of-right development would not address the circulation deficiencies of the Synagogue, and would block several dozen windows on the north elevation of 91 Central Park West [R. 4 (¶ 61)].

As the BSA correctly recognized, where a 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 [R. 4-5 (¶ 62), citing, Guggenheim Neighbors, supra and Jewish Recons. Syn. of No. Shore, supra].

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 [R. 5 (¶ 63), citing, Islamic Soc. of Westchester, supra]. Thus, the Opposition's suggestion that the Congregation's programmatic needs, and access and circulation issues [Petition ¶¶ 247-261] could have been addressed by an as-of-right development, are of no moment.

Fourth, the BSA rationally rejected the Opposition's suggestion that the Beit Rabban School is not a programmatic need of the Congregation because it is not operated for or by the Synagogue [R. 5 (¶ 65)]. See also, Petition, ¶¶ 82-86. As the BSA correctly noted, the operation of an educational facility on the property of a religious institution is construed to be a

[11] The "sliver law" generally limits the height of new buildings and enlargements to existing narrow buildings in certain residence zoning districts, including R8 and R10 districts, in situations where the width of the street wall of a new building or the enlarged portion of an existing building is 45 feet or less. See Z.R. §23-692.

religious activity, and a valid extension of the religious institution for zoning purposes even if the school is operated by a separate corporate entity [R. 5 (¶ 66), citing, Slevin, supra]. Additionally, the Congregation noted that the siting of the Beit Rabban School on the premises helps the Synagogue to attract congregants and thereby enlarge its congregation. As the BSA correctly recognized, "enlarging, perpetuating and strengthening itself" is a valid religious activity [R. 5 (¶ 67), citing, Community Synagogue v. Bates, 1 N.Y.2d 445, 448 (1958)].

Regardless, the BSA determined that even without the Beit Rabban school, the Congregation provided sufficient evidence showing that the requested floor area, and the waivers as to lot coverage and rear yard would be necessary to accommodate the Synagogue's other programmatic needs [R. 5 (¶ 68)].

Fifth, the BSA properly rejected the Opposition's unsupported assertion that a finding of "unique physical conditions" is limited solely to the physical conditions of the Zoning Lot itself and that unique conditions of an existing building on the lot or other construction constraints cannot fulfill the requirements of the (a) finding [R. 5 (¶ 75)].

In rejecting this theory, the BSA pointed to a variety of cases in which New York State courts have found that unique physical conditions under Z.R. §72-21(a) can refer to buildings as well as land, and that obsolescence of a building is a proper basis for a finding of uniqueness [R. 5 (¶ 76), citing, Guggenheim, supra, UOB Realty (USA), supra, Matter of Commco, Inc., supra and Dwyer v. Polsinello, supra].

Finally, the Board rationally found that, contrary to the Opposition's assertions, it was not necessary for the Congregation to establish a financial need for the development project in order to establish its entitlement to the requested variances. Indeed, as the BSA properly noted, "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 York State law, nor Z.R. §72-21, require a showing of financial need as a precondition to the granting of a variance to such an organization" [R. 5-6 (¶ 78)].

Thus, petitioners' assertions that the Congregation should have sought to raise funds from its members instead of seeking the requested variances [Petition, ¶¶ 34, 36, 57 and 58, 60], is simply incorrect. As Vice-Chair Collins explained at the November 27, 2007 hearing, the hardship that is talked about in the context of a variance case is one that is created by the zoning in a given situation, it has nothing to do with the wealth of an individual property owner [R. 1767-68].

Thus, it is clear that the BSA properly assessed the requirements of Z.R. §72-21(a) by looking at the attributes of the property in the aggregate, including the unique characteristics of the existing building, the limited ability to construct a conforming building and the programmatic needs of the applicant. It is also clear that the BSA properly considered, and rejected, the Opposition's arguments with regard to the Congregation's programmatic needs. The BSA's conclusion that the Congregation satisfied the (a) finding with respect to the community facility variances is neither arbitrary, capricious, nor improper, and should be upheld by this Court.

Residential Variances

The BSA also properly determined that the base height, building height and front and rear setback variances requested by the Congregation to permit development of a building that would accommodate its proposed residential use satisfied the requirements of Z.R. §72-21(a).

In support of its assertion that there are unique physical conditions that create practical difficulties and unnecessary hardship proceeding with an as-of-right development (i.e. a development that complies with all zoning requirements), the Congregation pointed to: 1) the development site's location on a Zoning Lot that is divided by a zoning district boundary (i.e. that is partially in an R8B zoning district and partially in an R10A zoning district; 2) the existence and dominance of a landmarked synagogue on the Zoning Lot; and 3) the limitations on development imposed by the site's contextual zoning district regulations[12] [R. 6 (¶ 86)].

i. Lot Division

As to the development site's location on a zoning lot that is divided by a zoning district boundary, the Congregation explained that this division constrains an as-of-right development by imposing different height limitations on the two respective portions of the lot. In this regard, in the R10A portion of the Zoning Lot (approximately 73% of the lot), a building may have a total height of 185'-0" and a maximum base height of 125'-0",[13] while in the R8B portion of the lot (approximately 27% of the lot) a building is limited to a total height of 75'-0" and a maximum base height of 60'-0" with a required front setback of 15'-0" at the maximum 60'-0" base height and a required rear setback of 10'-0". A complying development would, therefore, be forced to set back from the street line at the mid-point between the fifth and sixth floors [R. 6 (¶¶ 88-92)].

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[12] Contextual zoning districts regulate the height and bulk of new buildings, their setback from the street line, and their width along the street frontage, to produce buildings that are consistent with existing neighborhood character. Medium- and higher-density residential and commercial districts with an A, B, D or X suffix are contextual districts.

[13] This height would permit construction of a 16-story residential tower on the development site [R. 6 (¶ 93)].

In addition, because the frontage of the portion of the development site within the R10A portion of the development site is less than 45 feet, the "sliver law" provisions of Z.R. §23-692 limit the maximum base height of an as-of-right building to 60'-0" [R. 6 (¶ 94)].

A diagram provided by the Congregation 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 [R. 7 (¶ 95)]. As detailed above, the proposed development contemplates a total residential floor area of approximately 22,352 square feet, while an as-of-right development would allow for a residential floor area of only approximately 9,638 square feet [R. 6 (¶¶ 84-5)].

In response to the Congregation's assertions of uniqueness, the Opposition argued that the presence of a zoning district boundary within a lot is not a "unique physical condition" under the language of Z.R. §72-21. In addition, the Opposition represented that there are four other properties owned by religious institutions and 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 [R. 7 (¶ 103)].

In response, the BSA stated that the location of a 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 [R. 7 (¶ 104), citing 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)].

Moreover, the BSA concluded that the four sites pointed to by the Opposition, which are within a 51-block area of the subject site, would not, in and of themselves, be sufficient to defeat a finding of uniqueness because New York State law does not require that a given parcel be the only property so burdened by the condition(s) giving rise to the hardship in order to conclude that a site has "unique physical conditions" [R. 7 (¶¶ 105) and R. 7 (¶ 106), citing, Douglaston Civ. Assn., supra]. Rather, all that is required is 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 [R. 7 (¶¶ 104-06)].

ii. Synagogue

The Board properly concluded that "the site is significantly underdeveloped and . . . the location of the landmark Synagogue limits the developable portion of the [Zoning Lot] to the development site" [R. 7-8 (¶ 112)].

As established by the Congregation, because the landmarked synagogue occupies nearly 63% of the Zoning Lot, only the area currently occupied by the parsonage house, and the proposed development site are available for development [R. 7 (¶¶ 107-09)]. As noted above, the narrow width of the parsonage house makes its development for the required purpose infeasible [R. 7 (¶ 110)].

Further, as explained by the Congregation, the site is unique because it is presently 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 [R. 7 (¶¶ 100-01)]. Moreover, the Congregation explained that all the properties within the 22-block neighboring area and bisected

by the district boundary line are developed to a Floor Area Ratio ("FAR")[14] exceeding 10.0, while the subject zoning lot is currently developed to a FAR of 2.25 [R. 7 (¶ 102)].

iii. Limitations on Development Imposed by the Zoning Lot's Location

As to the limitations on development imposed by the Zoning Lot's location within the R8B contextual zoning district, the Congregation stated that the district's height limits and setback requirements, and the limitations imposed by the sliver law result in an inability to use the Synagogue's substantial surplus development rights [R. 8 (¶ 113)].

In this regard, because the creation of the Zoning Lot predates the adoption of the R8B/R10A zoning district boundary, the provisions of Z.R. §77-22 permit the Congregation to utilize an average FAR across the entire Zoning Lot. The maximum permissible FAR in an R10A district (73% of the zoning lot) is 10.0 and the maximum permissible FAR in an R8B district (27% of the zoning lot) is 4.0 [R. 2 (¶ 21-2)]. Using the averaging methodology set forth in Z.R. §77-22, the Congregation calculated that due to the percentage of the lot in an R10A district and the percentage of the lot in an R8B district, the averaged permissible FAR is 8.36. This FAR results in 144,511 square feet of zoning floor area [R. 10 (¶ 115), 5131].

However, the Congregation represented that because of the existing Synagogue and parsonage house, height limits, setback requirements and sliver limitations, the Congregation would be permitted to use only 28,274 square feet to construct an as-of-right development [R. 8 (¶ 114)]. In addition, the Congregation represented that the averaged permissible FAR should

[14] FAR is the principal bulk regulation controlling the size of buildings. FAR is the ratio of total building floor area to the area of its zoning lot. Each zoning district has an FAR control which, when multiplied by the lot area of the zoning lot, produces the maximum amount of floor area allowable in a building on the zoning lot. For example, on a 10,000 square-foot zoning lot in a district with a maximum FAR of 1.0, the floor area of a building cannot exceed 10,000 square feet.

result in 144,511 square feet of zoning floor area; after development of the proposed building the Zoning Lot would only be built to a floor area of 70,166 square feet and a FAR of 4.36, and that approximately 74,345 square feet of floor area will remain unused [R. 8 (¶ 115)].[15]

In response, the Opposition asserted that the Congregation's inability to use its development rights is not a hardship under Z.R. §72-21 because: 1) as recognized in Matter of Soc. for Ethical Cult. v. Spatt, 51 N.Y.2d 449 (1980), unlike a private owner, a religious institution does not have a protected property interest in earning a return on its air rights; and 2) there is no fixed entitlement to use air rights contrary to the bulk limitations of a zoning district [R. 8 (¶ 116-17)].

In response to the Opposition's arguments in this regard, the BSA correctly noted that Spatt concerns the question of 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 the present case in which a religious institution merely seeks the same entitlement to develop its property as any other private owner [R. 8 (¶ 118)]. Moreover, the BSA noted that Spatt does not stand for the proposition that a land use regulation may impose a greater burden on a religious institution than on a private owner [R. 8 (¶ 119)]. In fact, in Spatt the Court noted that the Ethical Culture Society, like any similarly situated private owner, retained the right to generate a reasonable return from its property by the transfer of its excess development rights [Id., citing Spatt, supra at 455, fn. 1].

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[15] Contrary to petitioners' allegations, the BSA's discussion and consideration of the Congregation's inability to use all of its development rights is neither wholly irrelevant nor improper. Petition, ¶¶ 102, 107, 108. Indeed, the fact that the Congregation does not need to transfer development rights in order to meet its needs and realize a reasonable return illustrates the reasonable scope and scale of the proposed project.

Thus, the BSA properly concluded that while a "nonprofit organization is not entitled to 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" [R. 8 (¶ 121)]. Moreover, the BSA properly concluded that "the unique physical conditions of the site, when considered in the aggregate and in light of the Synagogue's programmatic needs, creates practical difficulties and unnecessary hardships in developing the site in strict compliance with the applicable zoning regulations, thereby meeting the required finding under Z.R. §72-21(a)" [R. 8 (¶ 122)].

To the extent petitioners, citing various cases regarding unconstitutional takings, argue that the BSA improperly granted the Congregation variances based on a finding that the landmarking of the Synagogue and division of the subject property constituted unconstitutional takings, petitioners misrepresent the BSA's finding. Petition at pp. 43-47, 74-76. Nowhere in the Resolution does the BSA hold that either the landmarking of the Synagogue, or the division of the subject property constituted an unconstitutional taking. Rather, as provided above, the BSA, in considering Spatt, found that the concept was not applicable [R. 8 (¶ 118). Thus, to the extent petitioners raise such an argument, it is of no moment.

(b) **Financial Hardship**

Zoning Resolution § 72-21(b) requires an applicant to establish that, "because of such [unique] physical conditions, there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of [the Zoning] Resolution will bring a reasonable return . . . ." BSA's finding pursuant to Z.R. §72-21(b) is reasonable and supported by the record.

The applicant submitted to the BSA specific "dollars and cents" proof that they could not realize a reasonable return with a conforming use. See generally, Village Board of

Fayetteville v. Jarrold, 53 N.Y.2d 254 (1981); Sheeley v. Levine, 147 A.D.2d 871 (3rd Dep't 1989).

Residential Variances

As to the residential development, which was not proposed to meet the Congregation's programmatic needs, the BSA properly determined that it was appropriate to grant the requested variances because the site's unique physical conditions resulted in no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return [R. 8-10 (¶¶ 125-148)]. As a preliminary matter, it is important to note that a reasonable return is not simply any sort of profit whatsoever. Rather, the profit margin must be substantial enough to actually spur development.

Because the residential development was not proposed to meet the Congregation's programmatic needs, the BSA directed the Congregation to perform a financial feasibility study evaluating the ability of the Congregation to realize a reasonable financial return from an as-of-right residential development on the site, just as it would have required of any for-profit applicant [R. 8 (¶¶ 125-26)].

The Congregation initially submitted a feasibility study from Freeman Frazier [R. 133-61] 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 residential building with a 4.0 FAR; 3) the original proposed building; and 4) a lesser variance community facility/residential building [R. 8 (¶ 127)].

At the November 27, 2007 hearing, the Board questioned why the analysis included the community facility floor area, and asked the Congregation 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 [R. 9 (¶ 128), 1753-56]. In response, the Congregation revised its financial analysis to also include an as-of-right community facility/residential tower building using the modified site value [R. 9 (¶ 129), 1968-2008]. 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 [R. 9 (¶ 130), 1968-2008].

After this analysis, it was determined that a tower configuration in the R10A portion on the Zoning Lot was contrary to the sliver law and, as a result, the as-of-right community facility/residential tower building used in the feasibility study did not actually represent an as-of-right development [R. 9 (¶ 131)]. In addition, at the February 12, 2008 and April 15, 2008 hearings, the Board questioned the basis for the Congregation's valuation of its development rights and requested that the Congregation recalculate the value of the site using only sales in R8 and R8B districts [R. 9 (¶ 131), 3653-758, 4462-515]. Finally, the Board requested that the Congregation evaluate the feasibility of providing a complying court to the rear above the fifth floor of the original proposed building [R. 9 (¶ 132), 3653-758, 4462-515].

In response to these requests, the Congregation revised its feasibility analysis to assess the financial feasibility of: 1) original proposed building, but with a complying court; 2) an eight-story building with a complying court; 3) a seven story building with a penthouse, and a complying court, using the revised site value arrived at based upon R8 and R8B zoning district sales. This revised analysis concluded that of the three scenarios, only the proposed building was feasible [R. 9 (¶ 133), 3847-77].

The Board raised questions as to how the space attributable to the building's rear terraces had been treated in the financial feasibility analysis [R. 9 (¶ 134)]. In response, the Congregation submitted a letter from Freeman Frazier, dated July 8, 2008, stating 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. However, Freeman Frazier also provided an alternative analysis considering the rear terraces as sellable outdoor terrace area and revised the sales prices of the two units accordingly [R. 9 (¶ 135), 5171-81].

The Board also asked the Congregation 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 [R. 9 (¶ 136)].

In its July 8, 2008 submission, Freeman Frazier 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 [R. 9 (¶ 137), 5171-81]. Freeman Frazier also submitted a revised analysis of the as-of-right building using the revised estimated value of the property which showed that the revised as-of-right alternative would result in a substantial loss of return [R. 9 (¶ 138), 5171-81].

In response to the Congregation's feasibility analysis, the Opposition questioned: 1) 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; 2) the adjustments

made by the applicant to those sales prices; 3) the choice of methodology used by the Congregation, 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 4) the omission of the income from the Beit Rabban school from the feasibility study [R. 9-10 (¶¶ 139, 141, 145)].

The Congregation responded to each of the Opposition's challenges. With respect to the choice of comparable sale prices and the adjustments made thereto, the Congregation explained: 1) that in order 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; and 2) the 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 [R. 9 (¶ 140)].

With respect to the method used to calculate the reasonable financial return, the Congregation stated 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 [R. 9 (¶ 142)]. In support of its chosen method, the Congregation explained 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 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 [R. 9-10 (¶ 143)]. Indeed, the BSA noted in its Resolution 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 [R. 10 (¶ 144)].

Petitioners, in an attempt to challenge the BSA's findings regarding the proper method to calculate the reasonable financial return cite to: 1) Red Hook v. New York City Board of Standards and Appeals, 820 N.Y.S.2d 845 (N.Y. Sup. Ct. June 2, 2006) rev'd in part, appeal dismissed in part 49 A.D.3d 749 (2d Dep't 2008); 2) Kingley v. Bennett, 185 A.D.2d 814 (2d Dep't 1992); 3) Morrone v. Bennett, 164 A.D.2d 887 (2d Dep't 1990), and 4) Lo Guidice v. Wallace, 118 A.D.2d 913 (3d Dep't 1986). Petitioners' reliance is misplaced. Indeed, the cases cited by petitioners comport with the Resolution.

In Red Hook, the owner, seeking to convert its warehouse to luxury apartments, submitted an application to the BSA for a use variance. supra. In support of its application, the owner calculated its financial return utilizing a return on equity. This comports with the Resolution which provided that "a return on equity methodology is characteristically used for income producing residential or commercial rental projects" [R. 10 (¶ 143)]. Here, the Congregation was not required to utilize a return on equity methodology because it was not seeking to develop a rental project. Rather, as held by the BSA, since the Congregation was seeking to develop five market-rate residential condominium units, "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" [R. 10 (¶ 144)].

Similarly, petitioners' reliance on Kingley, Morrone , and Lo Guidice is misplaced. In all three matters, the owners sought use variances for commercial purposes. In Kingsley, the owner sought a use variance to convert a two-story residence into a commercial office building. supra. In Morrone, the owner sought a use variance to structurally alter its

restaurant/bar in order to expand its eating facilities. supra. In Lo Guidice, the owner sought a use variance to convert a two-family residence into a restaurant. supra. That owners seeking use variances for commercial purposes utilized a return on equity method to calculate their financial return has no bearing on the instant matter, since the Congregation did not seek a use variance for commercial purposes. Further, nothing in the cited cases contradict the BSA's finding 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." [R. 10 (¶ 144)]. Accordingly, petitioners' argument fails.

With respect to the income from the Beit Rabban school, the Congregation explained that it had in fact provided the BSA with the projected market rent for a community facility use, and that the cost of development far exceeded the potential rental income from the community facility portion of the development [R. 10 (¶ 146)]. Moreover, the Board specifically requested that costs, value and revenue attributable to the community facility be eliminated from the financial feasibility analysis to allow a clearer description of the feasibility of the proposed residential development, and of lesser variance and as-of-right alternatives.

There is no question that the BSA adequately assessed the feasibility studies provided by the Congregation as well as the responses provided to the Opposition's questions, and petitioners' suggestion that the BSA did not fully consider the Freeman Frazier submissions, and any flaws in the submissions in rendering its decision is incorrect. For example, at the November 27, 2007 hearing, BSA Chair Srinivasan specifically explained that the Board read through the Freeman Frazier financials, and may disagree with some of the assumptions. In response to those concerns, Chair Srinivasan asked the Congregation to provide an analysis of the property without the 20,000 square feet that's being used for the synagogue. Specifically,

the BSA wanted to see a valuation analysis that did not include a proposed developer having to pay for that portion of the site that is not going to be used by the developer because it is already being used by the synagogue [R. 1753-54]. This type of in-depth discussion of the Freeman Frazier assumptions and conclusions continued throughout the February, April and June public hearings [R. 3653-758, 4462-515, 4937-74].

Moreover, the fact that the BSA did not specifically mention these issues in its Resolution is of no moment, because the BSA clearly stated: "[t]he 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" [R. 13 (¶ 216)]. Therefore, there is no question that after considering the feasibility analysis presented by the Congregation and the questions raised by the Opposition, the BSA properly determined that there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return [R. 10 (¶¶ 147-8)].

Finally, in the instant proceeding, in addition to reasserting the arguments asserted by the Opposition during the BSA's review, petitioners argue that the BSA's improperly concluded that the Congregation satisfied the (b) finding with respect to the residential variance for several reasons.

First, petitioners argue that the BSA acted arbitrarily and capriciously because it did not require the Congregation to submit a complete copy of its construction cost estimate for Scheme A. To this end, petitioners claim that the Congregation's failure to submit a complete copy of its construction cost estimate is evident because the second page of the two page document submitted was numbered "Page 2 of 15." Petition ¶ 190. Based on the

Congregation's alleged failure to submit the additional 13 pages, petitioners conclude that "[c]learly, Freeman Frazier provided false, altered, incomplete documents with the intention to mislead the BSA and opponents." Petition ¶ 190. Petitioners' argument is without merit.

BSA properly did not require the Congregation to submit the alleged additional pages because they were not necessary for its review. BSA, in examining whether construction prices are reasonable, reviews the base unit price, i.e., the construction cost divided by the square footage. Here, since the Congregation submitted the construction cost and the square footage, BSA had the necessary elements to calculate and review the base unit price [R. 1997, 5178-79]. Accordingly, the additional pages were irrelevant because they were not needed for BSA's review. Moreover, as admitted by petitioners, strict rules of evidence do not apply to an administrative hearing. Petition ¶ 193. Thus, there was no requirement for the alleged additional pages to be submitted.

Second, petitioners argue that, prior to adopting the Resolution, BSA should have required the Congregation to revise its December 21, 2007 Scheme C study (all residential scheme). Specifically, petitioners claim that the Congregation should have been required 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 July 2008 report because doing so would have shown a profit of approximately $5 million. Petitioners' argument is flawed. As set forth above, under Z.R. §72-21(b), BSA examines whether an applicant can realize a reasonable return, not merely a profit. While utilizing the revised acquisition value, i.e., $12,347,000, would have resulted in a profit of approximately $5 million, the rate of return would have only been increased to 6.7%. As established by the Congregation's experts, a reasonable rate of return for the subject premises was approximately 11% [R. 4652-3, 4656, 4868-69, 5172, 5178].

Accordingly, since petitioners' proposed calculation would not have resulted in a reasonable return, petitioners' argument fails.[16]

Third, petitioners argue that Freeman Frazier and BSA improperly interchanged the phrases "acquisition cost" "'market value' of the land," and "site value." Petition ¶ 132. Petitioners further argue that "[t]he inconsistent use of terms is intended to create complexity and make it difficult for courts to review the assertion of the Congregation or the findings of the BSA." Petition ¶ 133. Petitioners' argument does not merit serious consideration. As is common with the English language, various words and phrases are used interchangeably. Terms utilized by the BSA are no different. The terms "acquisition cost," "market value," and "site value" are used interchangeably for no other reason than that they each designate the as-is fair market value of a property and are all in common usage.

Fourth, petitioners argue that the Congregation violated BSA's written guidelines, i.e., BSA's Detailed Instructions For Completing BZ Application Item M(5), because it "failed to provide both the market value of the property or the acquisition cost and date of acquisition as required by Item M." Petition ¶ 232. Petitioners are incorrect in several respects. First, contrary to petitioners' argument, the Congregation submitted both the market value of the property, and acquisition costs and date of acquisition. The dates of acquisition were provided in the deeds [R. 168-181, 1918-1926]. The market value of the property which, as stated above, is synonymous with the acquisition cost, was also provided as part of the Congregation's Economic Analysis

[16] Notably, the rate of return for the proposed development as approved by BSA is 10.93%.

Summary [R. 5178].[17] Accordingly, petitioners' argument fails. Second, contrary to petitioners' suggestion, BSA's Detailed Instructions For Completing BZ Application Item M(5) does not set forth absolute requirements. Rather, it sets forth general guidelines for financial submissions. It provides,

> [g]enerally, for cooperative or condominium development proposals, the following information is required: market value of the property, acquisition costs and date of acquisition; hard and soft costs (if applicable); total development costs; construction/rehabilitation financing (if applicable); equity; breakdown of projected sellout by square footage, floor and unit mix; sales/marketing expenses; net sellout value; net profit (net sellout value less total development costs); and percentage return on equity (net profit divided by equity).

Thus, there was no requirement to submit the information and petitioners' argument fails.

Moreover, to the extent, petitioners, citing case law, assert that the Congregation was required to provide the subject property's original acquisition cost, petitioners misapply the cases upon which they rely. Contrary to petitioners' assertion, none of the cited cases require an owner seeking lot coverage, rear yard, height and setback variances to submit its original acquisition costs.

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[17] Notably, the market value/acquisition cost, which the BSA rationally found to be proper, was calculated by the Congregation based upon an analysis of comparable vacant land sales, taking into consideration adjustments required by the BSA [R. 9 (¶¶ 128-129, 131, 133, 139-140), R. 4651]. This type of calculation, i.e., using comparable property sale prices, is standard BSA practice because it provides an accurate property valuation based upon the market. Indeed, strict application of actual acquisition costs, as petitioners argue should be applied, would be useless. Not only could applicants artificially inflate acquisition costs, but for properties such as the subject premises, which were acquired in different stages between 1895 and 1965, the actual acquisition costs would be irrelevant since due to the passage of time and change in the real estate marketplace, they do not reflect a property's current market value [R. 168-181, 1918-1926, 4654, 4866, 4867-68].

In Douglaston Civic Assoc. v. Galvin, 36 N.Y.2d 1 (1874), and Varley v. Zoning Bd. of Appeals, 131 A.D.2d 905 (3d Dep't 1987), the Courts found that the original acquisition cost was relevant where an applicant sought a use variance. Specifically, the Court in Douglaston Civic Assoc. found that "[w]e 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." supra at 9. Since, the Congregation neither sought, nor was granted, a use variance, Douglaston Civic Assoc. and Varley are not applicable.

Further, Curtiss-Wright Corp. v. East Hampton 82 A.D.2d 551 (2d 1981), Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267 (2d Dep't 1983), and Sakrel, Ltd. v. Roth 176 A.D.2d 732 (2d Dep't 1991) are inapplicable to the case at hand. In those matters, the Court, in relevant part, considered the constitutionality of zoning restrictions, not whether the BSA properly granted or denied variances. Specifically, in Curtiss-Wright Corp, the Court considered whether a zoning restriction, as applied, resulted in an unconstitutional taking. supra. In Northern Westchester Professional Park Associates, the Court considered whether a zoning ordinance, as applied to the owner's property, was constitutional. supra. In Sakrel, Ltd., the Court, having considered whether the Zoning Board of Appeals properly denied petitioner's variance application, found,

> turning to the claim that the denial of the petitioner's variance application constitutes a confiscatory taking of its property, the failure of the petitioner to divulge its purchase price is fatal. Although it cannot erect a house on its land, the petitioner's adamant and persisting refusal to divulge the amount of its original investment precludes us from determining whether or not all but a bare residue of the economic value of the land has been destroyed. Indeed, a party challenging a zoning ordinance as confiscatory must adduce "dollars and cents" proof to establish, beyond a reasonable doubt, that the property as presently zoned is

> incapable of yielding a reasonable return. Absent such proof a landowner may not overcome the presumption of constitutionality, especially when seeking relief from a self-inflicted hardship. supra at 737.

These issues are not before this Court. Despite petitioners' repeated efforts to incorporate the issue of unconstitutional takings into the Resolution, the BSA simply did not make any findings regarding takings. Consequently, petitioners' argument fails.

Fifth, petitioners argue that the Congregation improperly included the "allowable floor area" over the Parsonage in Lot 36 in calculating the land valuation set forth in the May 13, 2008 Freeman Frazier Report. Petition ¶¶182-185. Petitioners are incorrect. The parsonage area was properly counted as part of the "allowable floor area" in calculating the land valuation because it exists on the zoning lot and could be developed for residential use. As set forth in the Resolution, 144,511 square feet of available floor area existed for development, of that only 42,406 square feet was utilized for the proposed construction at issue in this case. Thus 102,105 square feet of undeveloped floor area remains on the zoning lot [R. 2 (¶22, 26)]. That the Congregation retains the rights to develop the remaining available floor area, including for future school space, is hardly improper, as the Z.R. permits such development. Accordingly, petitioners' argument fails.

Sixth, petitioners argue that Freeman Frazier purposefully altered the value/square foot, lot size, and lot value in calculating the Congregation's Scheme A in order to manipulate the return. Petitioner ¶¶ 144-174. Petitioners' argument is without merit. As outlined above, the Congregation implemented the changes in response to questions and issues specifically raised by the BSA. In implementing these changes, the value/square foot, lot size, and lot value changed because the scope of the site to be developed and/or evaluated changed. For example, as provided above, at the November 27, 2007 hearing the BSA "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" [R. 9 (¶ 128)]. Further, contrary to petitioners' allegation, it was rational for BSA to find that the Congregation satisfied the Z.R. §72.21(b) finding because the final value/square foot, lot size, and lot value were based on comparable property sales and limited to the area which could be developed for residential purposes. [R. 9 (¶¶ 128-129, 131, 133, 139-140), R. 4651-52, 5173-74].

Seventh, petitioners argue that BSA improperly rejected the need for a return on equity analysis. Petition ¶¶ 201-203. Petitioners are incorrect. As set forth above, the "return on equity methodology is characteristically used for income producing residential or commercial rental projects, whereas the calculation of a rate of return based 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" [R. 9-10 (¶ 143)]. "[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" [R. 10 (¶ 144)]. Regardless, there is no requirement for an applicant to submit a return on equity analysis. Supra ¶ 279.

Eighth, petitioners argue that BSA improperly used the term "financial return based on profits" in the Resolution because "[t]here is no such concept." Petition ¶ 205. Petitioners' argument runs contrary to basic economics and is of no moment. It is understood that a financial return on an investment is based on profit. Regardless, even assuming arguendo that the BSA did use an incorrect term, such an error does not result in the nullification of an entire Resolution, especially whereas here, the alleged error has no bearing on the BSA's rationale. The

issue before the BSA was whether the methodology utilized by the Congregation in calculating its estimated return was proper. As provided above, the BSA rationally found that the methodology used was proper. Supra ¶ 282. Thus, petitioners' argument fails.

Finally, petitioners argue that if the Congregation acted as its own developer, it would earn a greater profit because it would pay itself the acquisition cost of $12,347,000. While it is unclear, it appears that petitioners are arguing that the BSA should have required the Congregation to eliminate the acquisition cost in calculating its rate of return. Petitioners' argument fails because it disregards BSA's standard practices. The standard procedure in developing a rate of return analysis is to include the acquisition cost. By arguing for its elimination, petitioner seeks to have the Congregation held to a different standard than all other BSA variance applicants. Such is impermissible under an Article 78 review standard.

(c) Essential Character of the Neighborhood

Z.R. § 72-21(c) requires the applicant to establish that if a variance is granted, it will not alter the essential character of the neighborhood, will not impair the use of adjacent property, and will not be detrimental to the public welfare. The Record before the BSA establishes that the applicant set forth substantial evidence to prove that the requirements of Z.R. § 72-21(c) have been met.

Community Facility Variances

With regard to the community facility variances (i.e. the lot coverage and rear yard variances), the BSA properly concluded that the proposed rear yard, and lot coverage variances will not negatively affect the character of the neighborhood or adjacent uses [R. 10-11 (¶ 151- 169)]. As set forth in its Resolution, to reach this conclusion, the BSA conducted an

environmental review of the proposed development, and found that it would not have significant adverse impacts on the surrounding neighborhood [R. 10 (¶ 155)].[18]

In reaching its conclusion, the BSA properly considered, and rejected, arguments raised by the Opposition with respect to the anticipated impact from the proposed variances [R. 10-11 (¶¶ 156-69)]. Specifically, during the course of the proceedings before the BSA, the Opposition contended that the expanded toddler program and additional 22 to 30 life cycle events and weddings anticipated to be held in the multi-purpose room of the lower cellar of the proposed community facility would produce significant adverse traffic, solid waste and noise impacts [R. 10 (¶ 156)]. However, the Opposition presented no evidence to the Board supporting these alleged negative impacts [R. 11 (¶ 168)]. Notwithstanding the lack of evidence presented by the Opposition, the BSA considered the arguments raised by the Opposition, and correctly determined they lacked merit.

With respect to the expanded toddler program, the BSA noted in its Resolution that any additional traffic and noise created by expanding the toddler program from 20 children to 60 children daily, falls below the threshold for potential environmental impacts set forth in the CEQR statue because the expansion is not expected to result in an additional 200 transit trips during peak hours [R. 10 (¶ 157)]. See also, March 11, 2008 Letter from AKRF Environmental Planning Consultants [R. 3878-83] discussing CEQR requirements as well as Sections O, P and R of the CEQR Technical Manual available online at http://www.nyc.gov/html/oec/html/ceqr/ceqrpub.shtml.

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[18] It should be noted that the proposed waivers would allow the community facility to encroach into the rear yard by only 10 feet (there will still be a 20 foot rear yard). Moreover, the effect of the encroachment into the rear yard will be partially offset by the depths of the yards of the adjacent buildings to its rear [R. 13].

With respect to the use of the multi-purpose room in the lower cellar for life cycle events and weddings, the BSA noted that the sub-cellar multi-purpose room represents an as-of-right use, and that the requested rear yard and lot coverage variances are requested to meet the Congregation's need for additional classroom space [R. 10 (¶ 158)]. Thus, any complaints about the use of the multi-purpose room do not factor into the BSA's consideration of the Congregation's variance application.

In any event, in response to the substance of the Opposition's concerns regarding traffic impacts, the Congregation explained: 1) the life cycle events will have no impact on traffic 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; 2) 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; and 3) significant traffic impacts are not expected from the expanded toddler program because it is not expected to result in a substantial number of new vehicle trips during peak hours [R. 10 (¶¶ 159-161)].

Similarly, the Congregation explained the proposed community facility use would not have an adverse impact on solid waste collection because: 1) the EAS analyzed the impact of increased solid waste and concluded that the amount of projected additional solid 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 affect the City's ability to provide trash collection services; and 2) trash from the 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 [R. 10-11 (¶ 162-65)].

With respect to noise, as the multi-purpose room is proposed for the sub-cellar of the proposed building, even at maximum capacity (360 persons), it is not anticipated to cause significant noise impacts [R. 11 (¶ 166).

As correctly stated by the BSA in its Resolution, a religious institution's application is entitled to deference unless significant adverse effects upon the health, safety or welfare of the community are documented [R. 11 (¶ 167), citing, Westchester Reform Temple, supra and Jewish Recons. Syn. of No. Shore, supra]. Here, the Opposition did not document any potential adverse effects that would result from granting the requested variances [R. 11 (¶ 168)], nor were any ascertained by the BSA. Consequently, the BSA properly concluded that the requested community facility variances will not have negative impacts on the neighborhood or adjacent uses.

Residential Variances

The BSA also properly concluded that proposed variances to height and setback permitting the residential use will not negatively affect the character of the neighborhood, nor affect adjacent uses.

As detailed above, the height and setback variances requested by the Congregation would result in a building that rises to a height of approximately 94'-10" along West 70th Street before setting back by 12'-0" and continuing to a total height of 105"-10'. A compliant building in an R9B zone would have a maximum height of 60'-0" before being required to set back 15'-0" and could rise to a total height of 75'-0". In addition, the requested variances would result in a rear setback of 6'-8" instead of the required 10'-0" [R. 11 (¶¶ 171-74)].

Because the building is located in a landmarked district, the Congregation was required to obtain approval for its proposed project from the Landmarks Preservation Commission. See Administrative Code § 25-307. The result of that process was the Landmarks Preservation Commission's issuance of a Certificate of Appropriateness dated March 14, 2006 approving the design for the proposed building [R. 11 (¶ 177), 350-2].

Contrary to arguments advanced by the Opposition during the course of the proceedings before the BSA, the BSA correctly determined that the proposed height and setback of the building is compatible with neighborhood character. In this regard, the bulk of the proposed building is consistent with the bulk of neighboring buildings. Specifically, the subject site is flanked by a nine-story building at 18 West 70th Street which has approximately the same base height as the proposed building and no setback. That building also has a FAR of 7.23 while the proposed building will have a FAR of 4.36 [R. 8 (¶ 115)].

Moreover, the bulk of the proposed building is less than that of the buildings immediately to its north and south. The building located at 101 Central Park West, directly to the north of the proposed building has a height of 15 stories, and a FAR of 12.92, while the building located directly to the south of the proposed building (i.e. at 91 Central Park West) has a height of 13 stories and a FAR of 13.03 [R. 11 (¶¶ 176, 180-81)].

Similarly, the BSA properly concluded that the Opposition's assertion that the proposed building disrupts the mid-block character of West 70th Street, and thereby diminishes the visual distraction between the low-rise mid-block area, and the higher scale along Central Park West missed the mark [R. 11 (¶ 182)]. Indeed, the Congregation submitted a streetscape of West 70th Street indicating that the street wall of the proposed building matches that of the

adjacent building at 18 West 70th Street, and that, as a result, the proposed building would not disrupt midblock character [R. 11 (¶ 183), 2022].

The BSA also properly rejected the Opposition's argument that approval of the requested height waiver would create a precedent for the construction of more mid-block high-rise buildings because an analysis submitted by the Congregation in response to this assertion found that none of the potential development sites identified by the Opposition share the same potential for mid-block development as the subject site [R. 11 (¶¶ 184-86), 1910-13].

Next, with respect to light and air, the BSA properly addressed the Opposition's argument that the proposed building will significantly diminish the ability of adjacent buildings to access light and air. Indeed, the BSA was quite concerned with the issue of the lot line windows at the November 27, 2007 hearing, and specifically asked the Congregation to attempt to figure out whether there are any apartments that have their only source of air though the lot line windows [R. 1807-08]. That discussion was continued at the February 12, 2008 hearing [R. 3655-63].

Specifically, the Opposition asserted that: 1) unlike an as-of-right building, because the proposed building abuts the easterly wall and court of the building located at 18 West 70th Street it will eliminate natural light and views from seven eastern facing apartments; and 2) the proposed building will cut off natural light 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 which will result in reducing the market values for the affected apartments [R. 11-12 (¶¶ 187-89)].

In response, the BSA noted that the Congregation correctly explained that as to the lot-line windows at 18 West 70th Street, the Opposition's arguments are of no moment

because lot line windows cannot be used to satisfy light and air requirements.[19] As a result, 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 [R. 12 (¶ 190)]. Likewise, the Congregation correctly explained that a property owner has no protected right in a view [R. 12 (¶ 191)].

However, notwithstanding these arguments, the BSA nonetheless directed the Congregation 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 [R. 12 (¶¶192-93)]. The BSA directed the Congregation to do so, not because the Congregation had a legal obligation to avoid blocking adjoining lot line windows but, rather, as a compromise to lessen the impact of the project. Thus, contrary to petitioners' argument [Petition, ¶ 280-82], there was absolutely nothing improper about the BSA not requiring the Congregation to salvage the four lot line windows in the front of the adjoining lot.

Finally, the BSA properly considered and rejected the Opposition's assertion that the proposed building will cast shadows on the midblock of West 70th Street [R. 12 (¶ 194)].

As explained in the BSA's Resolution, CEQR regulations provide that shadows on streets and sidewalks or on other buildings are not considered significant under CEQR. Rather, an adverse shadow impact is only considered to occur when the shadow from a proposed project falls upon a publicly accessible open space, a historic landscape, or other historic

[19] Lot line windows are not protected and, therefore, a occupant takes a risk in occupying an apartment with one because developers do not have a duty to ensure that lot line windows of adjoining buildings will not be blocked. Lot line windows are not "illegal," per se, but they are not a legal source of light and air and the DOB will not approve floor plans that show that the only source of light and air to a room is a lot line window. In most instances, if the only source of light and air to a room were a lot line window, that room would have been created illegally.

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. Here, however, a submission by the Congregation states that no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street. As a result, any incremental shadows in this area would not constitute a significant impact on the surrounding community [R. 12 (¶¶ 195-196)].

Moreover, the Congregation conducted a shadow study over the course of a full year and determined that the proposed building casts few incremental shadows, and that those cast are insignificant in size [R. 12 (¶ 197), 372-81, 4624-4643]. As required by CEQR guidelines, the Congregation considered the effects of incremental shadows for four representative days, December 21, March 21, May 6, and June 21. Id. In addition, the Congregation's EAS analyzed the potential shadow impacts on publicly accessible open space and historic resources and found that no significant impacts would occur [R. 12 (¶ 198)]. 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 [R. 12 (¶ 199)].

As a result the Board correctly stated as follows in its Resolution:

> **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 [R. 12 (¶ 200)].

(d) Non-self created hardship

Zoning Resolution § 72-21(d) requires that the evidence support a finding that the hardship claimed was not created by the owner of the premises or a predecessor in title. In this

case, the BSA properly found that the hardship the applicant faced in developing the property was not a self-created hardship within the meaning of the Zoning Resolution.

The Record before the BSA demonstrated that the hardship in developing the Zoning Lot with a complying building was not created by the Congregation, but originated from the landmarking of the Synagogue and the 1984 rezoning of the site. Specifically, the conditions that create an unnecessary hardship in complying with zoning requirements are: 1) the existence and dominance of a landmarked Synagogue on the Zoning Lot; 2) the site's location on a Zoning Lot that is divided by a district boundary; and 3) the limitations on development imposed by the site's contextual zoning district [R. 12 (¶¶ 203-04)].

As a result, the BSA properly concluded that the Congregation satisfied the (d) finding because the hardship was not created by the owner or a predecessor in title [R. 12 (¶ 205)].

(e) Minimum Variance Necessary to Afford Relief

To support the grant of a variance, Z.R. §72-21(e) [the "(e) finding"] requires that the evidence establish that the variance granted was the minimum necessary to afford relief from the hardship claimed by the applicant. The Record before the BSA demonstrates that the variance, as granted, is the minimum variance necessary to afford the Congregation relief from the development hardships detailed above.

As a preliminary matter, it should be noted that in response to concerns about access to light and air raised by residents of buildings adjacent to the proposed development, the BSA directed the Congregation to amend its initial proposal to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining access to light and air for three additional lot line windows [R. 12-13 (¶¶ 207-09)]. The inclusion of the compliant outer court reduced the floor plates of the sixth, seventh and eighth floors of the building by

approximately 556 square feet and reduced the floor plate of the ninth floor penthouse by approximately 58 square feet, for an overall reduction in the variance of the rear yard setback of 25 percent [R. 13 (¶ 209)].

Moreover, the Record before the BSA establishes that lesser variance scenarios are not economically feasible for the Congregation. In this regard, during the course of its review, the BSA directed the Congregation to assess the financial feasibility of several lesser variance scenarios. The results of this analysis established that none of the alternative lesser variance scenarios yielded a reasonable financial return [R. 13 (¶ 210-11)].

However, as petitioners argue herein [Petition, ¶¶ 12-15], during the BSA's review of the Congregation's application, those opposed to the BSA's issuance of the variance argued that the minimum variance necessary to afford relief to the Synagogue was in fact no variance at all because the existing community house could be developed into a smaller as-of-right mixed-use community facility/residential building that would achieve its programmatic mission, improve the circulation of its worship space and produce some residential units [R. 13 (¶ 212)].

In response to this assertion, the BSA concluded that "the Synagogue has fully established its programmatic need for the proposed building and the nexus of the proposed uses within its religious mission" [R. 13 (¶ 213)]. Moreover, in accordance with the decisions in Westchester Ref. Temple, supra, Islamic Soc. of Westchester, supra, and Jewish Recons. Synagogue of No. Shore, supra, zoning boards must accommodate proposals 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. Here,

the BSA properly concluded that "the Opposition has not established such impacts" [R. 13 (¶¶ 214-15)].

After considering the Congregation's submissions and the Opposition's arguments against the variance, the BSA concluded that the requested variance was in fact the minimum necessary. In this regard, the BSA stated in its Resolution:

> **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 [R. 13 (¶ 217)].

In conclusion, the Record amply supports the BSA's granting of a variance. All of the criteria set forth in Z.R. §72-21 have been met and the BSA's findings are supported by substantial evidence in the Record as to each of the five necessary findings.[20] Indeed, contrary to petitioners' allegations [Petition, ¶¶ 325-37] the BSA made specific findings with regard to each of the Z.R. §72-21 criteria.

Contrary to petitioners' allegations [Petition, ¶ 321], the BSA did not run afoul of City Charter Section 663 in voting on the Congregation's variance application on August 26, 2008. Indeed, that section simply requires that the BSA keep minutes of its proceedings and record the vote of each member upon the questions presented. Here the BSA recorded the minutes of its proceedings in the transcripts provided herewith [R. 1726-1823, 3653-758, 4462-

[20] Petitioners' suggestion that the BSA acted as it did because the Congregation's project "had the imprimatur of the Bloomberg Administration" [Petition, ¶ 59], is baseless. Indeed, petitioners' suggestion in this regard is based upon a mischaracterization of speculative statements made by representatives of the Congregation to the to the Landmarks Preservation Commission and Community Board 7 [R. 2594-96, 2831-978]. Not only were these statements not made by BSA staff or Commissioners – they were not even made by Congregation representatives to the BSA staff or Commissioners.

515, 4937-74] and recorded the vote of each member of the Board on the question presented to it which was whether to grant the Congregation's application for the requested variances [R 5784-95]. That the vote did not break out each specific variance request is simply of no moment because the Resolution adopted by the Board set out the Board's specific findings on each variance request [R. 1-14]. That the Resolution was not presented to the public at the August 26, 2008 hearing is also of no moment because, as required by 2 RCNY § 1-02(d), following the August 26, 2008 vote, the Board's determination was "incorporated in a resolution formally adopted and filed at the office of the Board," and was "made available to the public" within several days thereafter.

POINT II

THE CONGREGATION WAS NOT REQUIRED TO APPLY TO THE LANDMARKS PRESERVATION COMMISSION FOR A Z.R. §74-711 SPECIAL PERMIT PRIOR TO APPLYING TO THE BSA FOR A VARIANCE.

Petitioners argue that the BSA improperly considered the Congregation's variance application because CSI did not exhaust its administrative remedies prior to applying to BSA for a variance. Specifically, petitioners argue that the Congregation was required to apply to the Landmarks Preservation Commission for a Z.R. §74-711 special permit before it could apply to the BSA for a variance. Petitioners are incorrect.

First, petitioners misapply the law surrounding exhaustion of administrative remedies. Under the theory of exhaustion, a party is required to exhaust their available administrative remedies before seeking relief from the Courts. See Young Men's Christian Assn, supra at 375 (citations omitted) (holding "[t]he doctrine of exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals, rather

than to the courts, and . . . to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts"; Abreu v. New York City Police Dep't, 182 A.D.2d 414 (1st Dep't 1992) (finding "[i]t is well settled that a person aggrieved by an administrative determination must exhaust all available administrative remedies before maintaining a judicial challenge")(citations omitted). Since BSA is not a Court, but rather an administrative agency itself, the law is inapplicable. Second, there is no legal requirement that a party seek a Z.R. §74-711 special permit before seeking a variance from BSA. Rather, a BSA variance and Landmarks Preservation Commission special permit are two separate forms of administrative remedies available to parties. A party may, at its choice, seek a Z.R. §74-711 special permit from Landmarks Preservation Commission, or seek a variance from BSA pursuant to Z.R. §72-21(a). The only pre-requisite the Congregation had to satisfy in order to seek a variance was to apply for, and obtain a Certificate of Appropriateness from the Landmarks Preservation Commission. As admitted by petitioners, the Congregation obtained the requisite Certificate of Appropriateness. Thus, petitioners' argument fails.

POINT III

THE BSA'S PRE-APPLICATION MEETING WITH THE CONGREGATION WAS PROPER.

We turn next to petitioners' suggestion that it was improper for the BSA to meet with representatives of the Congregation in November 2006, six months in advance of their filing their application before the BSA.[21] In this regard, in their petition, petitioners complaint that "[o]n November 8, 2006 Respondents Srinivasan and Collins held an ex parte meeting with the Congregation's lawyers and consultants at BSA headquarters, did not notify opponents of the project, and has since refused to provide information to opponents as to what occurred at said meeting." Petition, ¶¶ 27, 289-303. Contrary to petitioners' allegations, there was absolutely nothing improper about this meeting.

Pre-application meetings are a routine part of practice before the BSA, and the procedures for the conduct of such meetings are clearly outlined in a publication entitled "Procedures for Pre-Application Meetings and Draft Applications" which is available on the Board's website (and provided herewith as Exhibit E). As explained in that document, pre-application meetings,

> are designed to facilitate discussion between potential applicants and the BSA of development proposals that may require discretionary relief.
>
> Such meetings are conducted on an informal basis, and have no bearing on the ultimate outcome of the case if subsequently filed.

[21] To the extent petitioners allege that BSA attempted to improperly exclude the documents regarding the meeting from the administrative record, petitioners are incorrect. The BSA properly did not produce the documents regarding the meeting as part of the administrative record because the documents were not considered by the Board in rendering its final agency determination, and thus was not part of the administrative record. Further, it was always BSA's intent to annex the documents to its Answer, as it has.

....

> Draft applications, which are adjunct to the Pre-application Meeting process, are submitted for staff-level review prior to formal filings. This review is designed to reduce the number of comments on the Notice of Objections, and to ensure that filed applications, which are later sent to community boards, elected officials and neighbors, have fewer deficiencies.

The point of these meetings is not to pre-judge or improperly influence potential applications, but, rather to streamline the BSA's review process. In this regard, the Procedures document further explains as follows:

> [t]he BSA historically has offered some form of pre-application meeting process to potential applicants. However, many major cases have been filed without any pre-application review. Some of these cases have been poorly presented, and were deficient in both substance and form. This causes unnecessarily protracted technical review and undue delay in calendaring.
>
> When such cases come to public hearing, the Board often is compelled to remedy problems that could have been easily avoided prior to filing. Additionally, the Board must guide the applicant through the process of meeting the findings required for the grant, which usually necessitates numerous continued hearings.
>
> Through the Pre-application meeting process, the BSA seeks to:
>
> - Facilitate a more efficient and expeditious technical and public review process;
> - Provide technical and procedural advice to both inexperienced and experienced applicants on the formulation and execution of potential applications;
> - Provide substantive feedback on the merits of the proposal;
> - Ensure better quality of submissions, and reduce or eliminate the review of unnecessary or poor quality submissions;
> - Establish case-to-case consistency in materials submitted for review;

- Identify early in the process the need for additional analyses, technical data, modifications, substantive discussion, and corrections; and

- Suggest alternative routes to achieve the desired outcome.

At the start of the November 27, 2007 public hearing, Chair Srinivasan explained the routine nature and propriety of the pre-application meeting. Specifically, the Chair stated:

> [b]efore we discuss the application, I'd like to address the request made by a community resident that the Vice-Chair and myself recluse ourselves based on a meeting we had with the synagogue prior to the application being filed.
>
> Just for the record, the Board routinely holds meetings with potential applicants and the rationale and procedures of these meetings are described on our web site.
>
> Since the meeting occurred outside a hearing context and any proceedings, indeed, it was six months before the application was filed. That meeting is not considered an ex parte communication under Section [1046] of the City's Administrative Procedure Act and, therefore, is not the basis for a recusal by the Board members who attended it.
>
> Furthermore, we did offer a similar meeting to the community resident by he declined to take advantage of that offer [R. 1727].

Indeed, contrary to petitioners' allegations, the Citywide Administrative Procedures Act ("CAPA") simply does not apply to proceedings before the BSA. Unlike an adjudicatory hearing, the purpose of these public hearings is not to make an "evidentiary finding," as that terms is understood in the context of an adjudication, but rather to permit comment and the submission of documents upon which the BSA commissioners base their exercise of discretion within the regulatory framework. See 2 RCNY §§ 1-01 (6); 1-01.1 (b), (k). See also Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm's of NY, 62 A.D. 2d 188, (1st Dep't 1978) (hearing before Tax Commission concerned information gathering and was non-adversarial in that the commissioners asked questions and witnesses were not

interrogated or cross-examined and not pursuant to direction of law), appeal denied, 45 N.Y.2d 706 (1978), appeal after remand, 81 A.D. 2d 64, (1st Dep't 1981), motion to dismiss appeal denied, 55 N.Y.2d 823, (1981), rev'd on other grounds, 55 N.Y.2d 512 (1982); Matter of John F. Poster v. Scott A. Strough, 299 A.D.2d 127 (2d Dep't 2002) (hearing where the only papers before the Town Board of Trustees were those submitted in support of the permit application, and thus were not evidentiary in form, was informational and not an adjudicatory hearing).

A BSA hearing also differs from an adjudicatory hearing in that there is neither a judge nor a standard of proof. Rather, a determination is made by means of a vote by members of the Board. See NYCRR § 1-10(a) ("Any appeal...must receive the three affirmative votes to be granted. If an application fails to receive the three affirmative votes, the action will be denied"); City Charter §663 ("a concurring vote of at least three members shall be necessary to grant...an appeal"). Compare New York Public Interest Research Group, Inc. v. Williams, 127 A.D.2d 512 (1st Dep't 1987) (ALJ in adjudicatory hearing removed in face of possible financial interest in outcome); Matter of Samuel W v. Family Court, 24 N.Y.2d 196(1969) (under the Family Court Act, determination at the conclusion of an adjudicatory hearing must be based on the preponderance of the evidence).

Even if CAPA did apply, at the time of the pre-application meeting there is simply no "adjudication" before the BSA such that it is in any way improper for the Board to meet with an applicant outside the presence of anyone who may be opposed to such an application.[22] Indeed, potential applicants who attend pre-application hearings may elect to

[22] As defined in Section 1041 of the Citywide Administrative Procedures Act, an "adjudication" is a "proceeding in which the legal rights, duties or privileges of named parties are required by law to be determined by an agency on a record and after an opportunity for a hearing."

either not file applications with the Board, or substantially modify that which they initially contemplate filing. Thus, in many instances that which the Board looks at during the pre-application meeting never even becomes the subject of an actual application.

Further, here, petitioners' were in no way prejudiced by the BSA's pre-meeting with the Congregation. First, petitioners' counsel did not object to the pre-meeting in advance of it taking place. In this regard, on September 1, 2006 (before the BSA's meeting with the Congregation) petitioners' counsel sent Chair Srinivasan a letter regarding the Congregation's anticipated application and pre-filing meeting. In this letter, petitioners' counsel simply requested copies of documents submitted by the Congregation, but did not request the opportunity to be present at any meetings. A copy of this letter is provided as Exhibit A.

Second, following the BSA's November 2006 meeting with the Congregation petitioners' counsel sent BSA FOIL requests seeking information about this meeting, to which the BSA responded and provided petitioners' counsel with copies of documents that had been submitted by the Congregation. Copies of this correspondence are provided herewith as Exhibit C-I.[23] Third, upon learning that petitioners' counsel was upset about this pre-meeting, the BSA offered petitioners' counsel the opportunity for his own pre-meeting, he refused. Fourth, all those opposed to the Congregation's application were given ample time to submit documents and testimony during the course of the Board's lengthy review of the Congregation's application.

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[23] To the extent petitioners attempt to challenge BSA's November 27, 2006 or April 17, 2007 letters, which denied petitioners' requests for certain records regarding BSA's meeting with the Congregation, including BSA's handwritten notes and internal e-mails, because the records were subject to attorney client or attorney work product privilege, or because they are exempt under FOIL §87(2), petitioners are time-barred from challenging BSA's determination. If petitioners wanted to challenge BSA's determination, they were required to bring an Article 78 proceeding within four months of the determination. See CPLR §217. Since petitioners clearly failed to do so, they are now barred from challenging BSA's determinations regarding the FOIL response.

POINT IV

THE BSA FOLLOWED THE PROPER PROCEDURES IN CONDUCTING ITS REVIEW OF THE CONGREGATION'S VARIANCE APPLICATION.

Finally, the procedures used by the BSA in conducting its review of the Congregation's variance application were proper in all respects. In an effort to discredit the BSA's determination, petitioners assert a myriad of baseless complaints about the procedural aspects of the BSA's review process. As detailed below, each of petitioners' arguments in this regard should be easily dismissed by this Court.

First, contrary to petitioners' allegations, there was nothing improper about BSA going ahead with the November 27, 2007 hearing [Petition, ¶¶ 94-96]. In support of its argument in this regard, petitioners assert that the BSA should not have held a hearing on November 27, 2007 because it provided the Congregation with only 29 days (rather than 30 days) notice of this hearing, and because the application was not substantially complete because the Community Board had not yet opined on the application.[24] As a preliminary matter, petitioners do not have standing to assert an objection to the notice given by the BSA to the Congregation as they are not suggesting that they were not provided with the required 20 days notice of the BSA's first hearing. Moreover, the application was substantially complete at the time the hearing was

[24] 2 RCNY 1-06(g) provides as follows: "after examiner(s) have determined the application to be substantially complete, the applicant shall be notified by the Executive Director, on the appropriate form, of the date set for the public hearing, which shall be at least thirty (30) days after the mailing of said notice. With this notice, the applicant shall be supplied with an official copy of the appropriate forms, which he or she is required to send not less than twenty (20) days prior to the date of such hearing to: (1) The affected Community Board(s) (or Borough Board); (2) The affected City Councilmember; (3) The affected Borough President; (4) The City Planning Commission; and (5) Affected property owners.

scheduled, and the fact that the Community Board had not yet voted on the application is simply irrelevant as there is no dispute that they provided their recommendation to the BSA in December 2007, well in advance of the August 2008 decision [R. 1886-92].[25]

Second, contrary to petitioners' allegations, there is nothing improper about the fact that applicants and witnesses on behalf of applicants are given greater amount of time to speak at a public hearing than those who are opposed to an application [Petition, ¶ 306]. Indeed, as it is the applicant's burden to make out the case for the each of the five findings required by Z.R. §72-21, there is nothing improper about giving them the opportunity to make out their case. Moreover, here, it simply cannot be said that those opposed to the application were strictly kept to the 3-minute time limit, or that those opposed to the opposition were not given ample time in which to speak at each of the Board's four public hearings on the Congregation's application. For the same reason, petitioners' assertion that it was in any way improper for the BSA to permit the Congregation to make supplemental submissions to address issues raised by the Board and the Opposition during the course of the public hearings [Petition, ¶ 311], is unfounded. The Opposition was given the opportunity to (and did in fact) submit voluminous documents in opposition to the application.

Third, it was not improper for the BSA to take testimony without swearing in witnesses [Petition, ¶ 309], or allowing the Opposition to ask direct questions of the Congregation at the hearing [Petition, ¶¶ 308, 312]. As discussed above, the proceedings before the BSA are simply not adversarial proceedings, and those opposed to the application have no

[25] It is also of no moment that CB 7 had a meeting with the Congregation outside presence of the Opposition [Petition, ¶ 94] as CB 7 sided with the Opposition and recommended against the variances [R. 1886-92].

due process right to examine the applicant. In any event, here, the Opposition did effectively "examine" the Congregation in its written submissions to which the Congregation responded.

Finally, petitioners' suggestion that the BSA acted improperly by not subpoenaing witnesses to testify regarding this application [Petition, ¶ 308] is simply irrelevant as there is no indication that subpoenas were requested, or denied, during the course of this proceeding.

CONCLUSION

For all the above reasons, as well as those set forth in the verified answer, the determination of the BSA should be upheld and the petition dismissed.

Dated: Brooklyn, New York
February 6, 2009

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

NIZAM PETER KETTANEH and HOWARD LEPOW *Petitioners*, against BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL *Respondents.*	:	Index No. 113227-08

RESPONDENT TRUSTEES OF CONGREGATION SHEARITH ISRAEL'S
MEMORANDUM IN OPPOSITION TO PETITIONERS' ARTICLE 78 PETITION

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INTRODUCTION

Respondent Congregation Shearith Israel (the "Congregation") respectfully submits this memorandum of law in opposition to the verified petition under Article 78 of the CPLR (the "Petition") of petitioners Nizam Peter Kettaneh and Howard Lepow (the "Petitioners"). The unanimous administrative decision of respondent Board of Standards and Appeals of the City of New York (the "BSA") is neither arbitrary nor capricious. Accordingly, the Petition should be denied.

Petitioners are asking this Court to conduct a *de novo* review of a zoning law variance that will enable the Congregation to construct a mixed-use community facility and residential building at 8 West 70th Street in Manhattan. The crux of Petitioners' over-sized Petition and memorandum of law is that Petitioners are unhappy with each of the key factual findings that the BSA made in its August 26, 2008 resolution granting the Congregation a zoning variance (the "Resolution").[1]

Yet, Petitioner's efforts to secure *de novo* review are impermissible. A court may not overturn an administrative agency's determination simply because it would have come to a different conclusion.

Indeed, this case is controlled by the New York Court of Appeals' decision in *Matter of SoHo Alliance v. New York 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). In *SoHo Alliance*, the Court explained that the BSA may grant a zoning variance by making the five factual findings referenced in Section 72-21 of the

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[1] Exclusive of their table of contents and table of authorities, Petitioners' Memorandum of Law in Support of Petition spans 102 pages, and is therefore 72 pages in excess of the motion paper length limit prescribed by the New York County Supreme Court, Civil Branch Rules of the Justices ('Rules"). Rule IV(b) of the Rules explain that "unless advance permission otherwise is granted by the court for good cause, memoranda of law shall not exceed 30 pages each (exclusive of table of contents and table of authorities)."

New York City Zoning Resolution. *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citing N.Y. City Zoning Resolution § 72-21). Holding that a lower court erred in vacating the variance and granting the Article 78 petition, *SoHo Alliance* concluded that a BSA's variance must "'be sustained if it has a rational basis and is supported by substantial evidence.'" *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citation omitted).

Here, the BSA's detailed Resolution is supported by an extensive administrative record – almost 6,000 pages in eleven volumes. Accordingly, Petitioners' efforts to re-litigate this administrative matter in this forum are to no avail. Indeed, it is evident from the BSA's eighteen-page Resolution that the BSA carefully weighed the competing interests and facts presented at each of the many public hearings. The BSA indisputably made each of the five factual findings referenced in Section 72-21 of the Zoning Resolution. The BSA also acknowledged and considered arguments presented by Petitioners, and ultimately found them unpersuasive. Since the BSA's determination is neither arbitrary nor capricious, the Petition should be denied.

BACKGROUND

In April 2007, the Congregation submitted a variance application to the BSA seeking waivers of zoning regulations to construct a community facility and residential development at 8 West 70th Street in Manhattan. In support of its application, the Congregation also submitted, among other things, a statement in support of its application, a zoning analysis, an economic analysis, and an Environmental Assessment Statement. The Congregation's submission followed a unanimous decision by the Landmarks Preservation Commission ("LPC") that the Congregation's proposed construction would be appropriate in regard to its relationship to both

the Congregation's landmarked Synagogue and the Upper West Side/Central Park West Historic District.

To facilitate its review of the Congregation's request, the BSA conducted four public hearings over the course of eight months. BSA Res. ¶ 4.[2] To maximize public involvement, the Congregation's application to the BSA was announced in the *City Record* and in letters sent by certified mail to all owners of record within 400 feet of the proposed development site. *Id.* Moreover, Community Board 7's Land Use Committee also held public hearings regarding the Congregation's proposed construction.

Both supporters and opponents of the Congregation's requested variance testified at the BSA hearings, including members of the Congregation, area residents, legislators, and a community group. BSA Res. ¶¶ 7-11. Proponents and opponents of the Congregation's application also submitted written materials to the BSA, including financial feasibility studies. (*See* BSA Res.) As a result, a massive, eleven-volume administrative record, consisting of 5,795 pages, was compiled by the BSA.

On August 26, 2008, the BSA issued a Resolution granting the variance and expressly making the five findings referred to in Section 72-21 of the New York City Zoning Resolution. The BSA found that: (a) there are unique physical conditions that create practical difficulties in strictly complying with the zoning requirements; (b) the physical conditions of the development site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return; (c) the variance will not alter the essential character of the neighborhood or district in which the Congregation is located; (d) neither the

[2] "BSA Res." refers to the copy of the BSA Resolution that Petitioners have annotated with paragraph numbering. *See* Petitioner Appendix A, Volume 1.

Congregation nor its predecessor in title created the practical difficulties that the Congregation claims as a ground for the variances; and (e) the variance is the minimum necessary to afford the Congregation relief. BSA Res. ¶¶ 122, 148, 201, 205, 210-11. Having made the five statutory findings, the BSA granted the variance.

On September 29, 2008, Petitioners filed this Article 78 Petition. In their Petition and accompanying memorandum of law, Petitioners attempt to persuade that the BSA reached the wrong conclusion with respect to each of the five statutory findings.

ARGUMENT

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." *Matter of SoHo Alliance v. New York City Bd. of Standards & Appeals*, 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. "The BSA, comprised of five experts in land

use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution." *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). As a result, the Court of Appeals has held that a BSA decision granting a variance "'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.'" *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citation omitted).

Under this Court of Appeals test, "a reviewing court may not substitute its judgment for that of the BSA – even if the court might have decided the matter differently" provided that substantial evidence exists. *Toys "R" Us*, 89 N.Y.2d at 423, 654 N.Y.S.2d at 107, 676 N.E.2d at 869. The supporting evidence will be considered "substantial" provided that key findings are substantiated by more than a "scintilla of evidence," *i.e.*, that "a reasonable mind ***might*** accept [the proof] as adequate to support the [agency's] conclusion." *Bethlehem Steel Corp. v. New York State Division of Human Rights*, 36 A.D.2d 898, 899, 320 N.Y.S.2d 999, 1001 (4th Dep't 1971) (emphasis added). "That conflicting inferences may have been drawn from this evidence is of no moment." *Toys "R" Us*, 89 N.Y.2d at 424, 654 N.Y.S.2d at 107, 676 N.E.2d at 869. Since "'weighing the evidence and making the choice'" is the exclusive province of the BSA, the courts "'may not weigh the evidence or reject the choice'" that the BSA has made. *Id.* (citation omitted); *see also Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599, 363 N.E.2d 305, 310, 394 N.Y.S.2d 579, 584 (1977) ("[T]he responsibility 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.").

Since the agency is charged with weighing the evidence, it follows that it is the agency's province to decide what types of proof the agency will deem reliable. Thus, in *SoHo Alliance*, the Court of Appeals held that the BSA can "reasonably rely upon expert testimony submitted by the owners" to support the agency's findings of fact. *SoHo Alliance*, 95 N.Y.2d at 441, 718 N.Y.S.2d at 263, 741 N.E.2d at 108. In other words, here, the Congregations submissions, where relied on by the BSA, can be "substantial evidence."

Not surprisingly, the First Department has repeatedly applied this liberal, *SoHo Alliance* standard to uphold BSA decisions to grant zoning variances. *See, e.g., Torri Associates v. Chin*, 282 A.D.2d 294, 295, 723 N.Y.S.2d 359 (1st Dept' 2001) ("Despite petitioner's numerous challenges, '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 . . . variances here' . . . . Accordingly, the challenged determination must be confirmed.") (citations omitted); *UOB Realty (USA) Ltd. v. Chin*, 291 A.D.2d 248, 249, 736 N.Y.S.2d 874, 875 (1st Dep't 2002); *see also Mainstreet Makeover 2, Inc. v. Srinivasan*, 55 A.D.3d 910, 914, 866 N.Y.S.2d 706, 710 (2d Dep't 2008) ("decision of the BSA may not be set aside in the absence of illegality, arbitrariness, or abuse of discretion"); *Vomero v. City of New York*, 54 A.D.3d 1045, 1046, 864 N.Y.S.2d 159, 161 (2d Dep't 2008) ("Local zoning boards have broad discretion, and judicial review is thus limited to determining whether a zoning board's determination was illegal, arbitrary and capricious, or an abuse of discretion.").

While Petitioners repeatedly assert that some of their specific contentions were not explicitly "mentioned" by the BSA in its Resolution, this argument is legally irrelevant (and

false). An agency's decision "need not be exhaustive." *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768, 777, 809 N.Y.S.2d 98, 109 (2d Dep't 2005) (upholding variance); *cf. Gulf States Utilities Co. v. Federal Power Commission*, 518 F.2d 450, 458-59 (D.C. Cir. 1975) ("cursory" agency decision may be adequate; "a detailed semantic exigesis" is not required where agency's "'path may reasonably be discerned'" to establish that it "'genuinely engaged in reasoned decision-making'") (citation omitted). The evidence submitted by a party opposing a variance will only be relevant in an Article 78 proceeding challenging the grant of a variance where the opponent's evidence is "conclusive." *Vomero*, 54 A.D.3d at 1046, 864 N.Y.S.2d at 161 (variance upheld "despite the presence of countervailing evidence" since that evidence "was not conclusive"). Petitioners do not contend that they submitted "conclusive" evidence. Thus, it is enough that the BSA made the five, statutory factual findings – each one indisputably and explicitly set forth in the Resolution.

B. The Board of Standard and Appeals' Decision is Not Arbitrary or Capricious

The BSA's Resolution is a model of rational decision-making. It thoroughly considered the five factual areas referenced by the statute, made the required findings, and, accordingly, granted the variance. The BSA's findings are plainly supported by more than a "scintilla" of evidence. *See Bethlehem Steel*, 36 A.D.2d at 899, 320 N.Y.S.2d at 1001.

The BSA made each of the factual findings referenced in Section 72-21 of the New York City Zoning Resolution, referenced in *SoHo Alliance*. Indeed, the BSA made detailed factual findings regarding: (a) unique physical conditions; (b) financial return; (c) neighborhood character; (d) self-created hardship; and (e) minimum variance. *See* BSA Res. ¶¶ 37-215:

- ***"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.

- ***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." *Id.* ¶ 148; *see id.* ¶¶ 123-48.
- ***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." *Id.* ¶ 201; *see id.* ¶¶ 149-201.
- ***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." *Id.* ¶ 205; *see id.* ¶¶ 202-05.
- ***"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. *Id.* ¶¶ 210-211; *see id.* ¶¶ 206-215.

In each of the five sections of its Resolution, the BSA addressed each of Petitioners' objections to the Congregation's request for a variance. While the BSA dealt explicitly with the

issues that Petitioners raise here, the BSA also noted that the contentions it failed to address in detail were nonetheless considered, evaluated, and rejected as unpersuasive. *See* BSA Res. ¶ 216 (determining that "all cognizable issues" including any objections raised but "not specifically addressed herein . . . are addressed by the record").

Given the BSA's thorough analysis, "'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 . . . variances here.'" *Torri Associates*, 282 A.D.2d at 295, 723 N.Y.S.2d 359 (citation omitted). "Accordingly, the challenged determination must be confirmed." *Id.*

C. Petitioners' Contentions Are Without Merit

In their 102-page memorandum in support of their Petition, Petitioners attempt to entice this Court to re-do the work of the BSA. This Court should resist that invitation. The BSA applied its expertise to this matter by visiting the site, listening to hours of testimony, suggesting and then considering alternative approaches, and reviewing a massive record of written submissions. This Court should defer to the BSA in accordance with *SoHo Alliance*

The case for deference here is particularly strong given that aspects of the Congregation's proposal bear on its religious programmatic mission. In this Court's already narrow Article 78 review, even greater care must be taken not to second-guess the Congregation's assessment of what it needs to further that religious purpose. *See Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Town of Moreau*, 5 N.Y.3d 407, 413, 804 N.Y.S.2d 708, 713, 838 N.E.2d 624, 630 (2005); *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509 (1986) (holding that the law will presume that educational and religious uses benefit the public health, safety and welfare); *Albany Preparatory Charter Sch. v. Albany*, 31 A.D.3d 870, 818 N.Y.S.2d 651, 653 (3d Dep't 2006), ("because of their inherently beneficial nature, educational

institutions enjoy special treatment and are allowed to expand into neighborhoods where nonconforming uses would otherwise not be allowed . . . educational use is consistent with the public good"); *see also Trustees of Union College v. Schenectady City Council*, 91 N.Y.2d 161, 164, 667 N.Y.S.2d 978, 981 (1997) (holding that a city law denying educational institutions from a residential historic district was unauthorized and unconstitutional).

Petitioners' attack on each of the BSA's five findings are discussed below. Petitioners are unable to show, with respect to any of them, any irrationality or failure of proof.

1. The BSA's Finding of "Unique Physical Conditions" Was Rational

Petitioners argue that the BSA should not have found that there were unique physical conditions at the site that create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations, BSA Res. ¶ 122. *See* Petitioners' Mem. at 35-50. Specifically, Petitioners contend that (1) the "access, accessibility, and circulation" needs of the Congregation could have been addressed by constructing an as-of-right structure, without a variance (Petitioners' Mem. at 35), (2) the existing structure's accessibility limitations did not amount to "physical obsolescence" under the case law (*id.* at 41), (3) the landmarked status of the Congregation's synagogue could not properly be considered in evaluating whether the site next to that landmark suffered from a unique physical condition (*id.* at 43), (4) the fact that the site straddles a zoning district boundary could not be a unique physical condition (*id.*), and (5) the BSA purportedly failed to identify the religious programmatic needs of the Congregation that warranted a finding a unique physical condition leading to a difficulty or hardship (*id.* at 47).

Petitioners' contentions turn on a narrow construction of the Zoning Resolution, which Petitioners seek to support by citing a lower court decision, *Vomero v. City of New York*, 13

Misc. 3d 1214(A), 824 N.Y.S.2d 759 (Richmond Cty. Sup. Ct. 2006) (cited in Petitioners' Mem. at 31-32, 33). That decision did, indeed, suggest that it would be difficult for the BSA to find the presence of "unique physical conditions" in many circumstances. Petitioner fails to note, however, that the cited opinion in *Vomero* was ***reversed*** by the Second Department in *Vomero v. City of New York*, 54 A.D.3d 1045, 1046, 864 N.Y.S.2d 159, 161 (2d Dep't 2008).

The narrow view of the law espoused by Petitioners has not carried the day in New York. Indeed, the First Department warned against such second-guessing the BSA's expert view of the Zoning Resolution's "unique physical conditions" provision. For example, in *UOB Realty*, the First Department, citing the deference required in *SoHo Alliance*, "reject[ed the] 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." *UOB Realty*, 291 A.D.2d at 249, 736 N.Y.S.2d at 875.

In fact, the "unique physical conditions" standard has not been construed strictly. It has been employed as a flexible standard that focuses on the statutory purposes of the variance provision. Thus, "[u]niqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship." *Douglaston Civic Association v. Klein*, 51 N.Y.2d 963, 965, 435 N.Y.S.2d 705, 707, 416 N.E.2d 1040, 1042 (1980), 416 N.E.2d 1040 (citations omitted). "What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed." *Id.* As a result, a property's location can lead to "unique physical conditions." *See Matter of Elliott v Galvin*, 33 N.Y.2d 594, 596, 347 N.Y.S.2d 457, 459, 301 N.E.2d 439, 441 (1973), 301 N.E.2d 439 (location

of zoning lot within two different zoning districts constituted "unique physical condition" within the meaning of zoning resolution).

Under the deferential standard of Article 78 review, each of Petitioners' objections quickly crumbles:

First, while Petitioners assert that the Congregation's accessibility needs could have been addressed by building an alternate structure as-of-right (Petitioners' Mem. at 35), the BSA considered such alternatives but found that they would not be viable. *See* BSA Res. ¶¶ 60-61. The BSA's reliance on materials indicating that such alternatives would not be workable clearly satisfies the more-than-a-scintilla "substantial evidence" test. *See Bethlehem Steel*, 36 A.D.2d at 899, 320 N.Y.S.2d at 1001.

Second, Petitioners' "physical obsolescence" argument (Petitioners' Mem. at 41) similarly ignores that it was within the BSA's province to find the existing structure obsolete and the as-of-right alternatives unworkable. *See* BSA Res. ¶¶ 60-61, 72; *see also Commco, Inc. v. Amelkin*, 109 A.D.2d 794, 796, 486 N.Y.S.2d 305, 307 (2d Dep't 1985) ("the requirement that the hardship be due to unique circumstances may be met by showing that the difficulty complained of relates to existing improvements on the land which are obsolete and deteriorated").

Third, Petitioner's contention concerning the landmarked status of the Congregation's synagogue is similarly unavailing. The "takings" cases cited by Petitioners (Petitioners' Mem. at 43-44) nowhere suggest that, in evaluating whether a site suffers from a unique physical condition under Section 72-21 of the New York City Zoning Resolution, the BSA cannot consider the limitations in developing a site that abuts a landmark. In any event, the Resolution

does not suggest that the BSA, here, treated the landmarked status of the synagogue as a hardship.

Fourth, contrary to Petitioners' unsupported assertions (Petitioners' Mem. at 43), the courts have specifically held that the fact that a site straddles a zoning district boundary can contribute to unique physical conditions at the site. *See Matter of Elliott*, 33 N.Y.2d at 596, 347 N.Y.S.2d at 458, 301 N.E.2d at 440. Moreover, the BSA's prior similar holdings, in connection with other variance applications (BSA Res. ¶ 104) further undermines Petitioners' assertion that a lot's split-zone condition cannot be considered by the BSA. *See Vomero*, 54 A.D.3d at 1046, 864 N.Y.S.2d at 161 (relying on prior BSA rulings).

Fifth, while the BSA Resolution does not identify the religious programmatic needs of the Congregation in the particular, summarizing paragraph that Petitioners' cite (BSA Res. ¶ 122; *see* Petitioners' Mem. at 47), those programmatic needs are described and analyzed by the BSA in detail elsewhere. *See, e.g.*, BSA Res. ¶¶ 42, 57. The summary paragraph clearly refers back to those early, more descriptive discussions of the Congregation's needs.

In sum, the BSA considered Petitioners' arguments with respect to "unique physical conditions," but rejected them as unpersuasive. Given that the BSA's finding regarding "unique physical conditions" is rational and supported by substantial evidence, this Court should not disturb it.

2. The BSA's Finding of "No Reasonable Return" Was Rational

Petitioners also argue that the BSA should not have found that, because of the 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* Petitioners' Mem. at 71. Petitioners' convoluted attacks on the expert financial

analyses cited by the BSA do not undermine the conclusion that the evidence before the BSA was "substantial."

a. No Finding Was Required

As a threshold matter, the BSA did not even have to consider "financial return" under Section 72-21(b) of the New York City Zoning Resolution. While that provision ***generally*** requires a finding that "there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of [the zoning requirements] will bring a reasonable return," the provision concludes: "***this finding shall not be required for*** the granting of a variance to ***a non-profit organization***." N.Y. City Zoning Resolution § 72-21(b) (emphasis added). The record clearly shows, and it is undisputed, that the Congregation is a "non-profit organization" within the meaning of the Zoning Resolution.

The BSA, however, nevertheless proceeded to take testimony regarding whether the residential portion of the Congregation's proposal satisfied the "reasonable return" standard usually applied to for-profit enterprises. In proceeding with such caution, the BSA cited three decisions. *See* BSA Res. ¶ 125. Those cases did not deal with the New York City Zoning Resolution or hold that municipalities may not legislatively exempt not-for-profits from a "reasonable return" requirement statutorily-imposed on other zoning variance applicants. *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 395 N.Y.S.2d 428, 363 N.E.2d 1163 (1977), only held that, when a town operates a for-profit enterprise, it has an "obligation to comply with the zoning regulations." *Foster v. Saylor*, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981), merely held that a school's lease of school property to a corporation was "subject to local zoning regulations" and that the school's showing regarding its inability to sell the property satisfied those particular regulations. Finally, *McGann v. Incorporated Village of Old Westbury*,

170 Misc. 2d 314, 647 N.Y.S.2d 934 (Nassau Cty. Sup. Ct. 1996), concerned a church's First Amendment challenge to a local zoning ordinance and held that "because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of legality," which must be overcome "beyond a reasonable doubt." The Congregation did not argue that it was exempt from zoning regulations or that the zoning regulations were unlawful. To the contrary, the BSA was not required to consider "reasonable return," because the lawful zoning regulations, promulgated by the legislature, state: "this finding shall not be required for the granting of a variance to a non-profit organization." N.Y. City Zoning Resolution § 72-21(b).

Significantly, the Zoning Resolution's statement that "reasonable return" findings are not required "for the granting of a variance to a non-profit organization" applies without regard to whether the non-profit is seeking a variance that may facilitate the construction of residential homes. The statute and cases focus on the nature of the applicant, not the project. For example, recently, in *Fisher v. New York City Bd. of Standards and Appeals*, 21 Misc. 3d 1134(A), 2008 WL 4966546 (N..Y. Cty. Sup. Ct. Nov. 21, 2008), the court considered a project "to permit the construction of a twenty story hotel." 2008 WL 4966546 at *2. The court stated, without regard to the nature of the hotel: "As a non-profit organization, Xavier was not required to demonstrate the second criteria, that the subject premises could not yield a reasonable return without the variance (Zoning Resolution § 72-21[b])." *Id.*; *see also Homes for Homeless, Inc. v. Bd. of Standards and Appeals*, 24 A.D.3d 340, 345 n.1, 807 N.Y.S.2d 36, 40 n.1 (1st Dep't 2005) (McGuire, J., dissenting) ("A fifth showing, that due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property, is inapplicable where, as here, the applicant is a not-for-profit entity (NY Zoning Resolution § 72-21[b])."), *rev'd*, 7 N.Y.3d 822, 855 N.E.2d 1166, 822 N.Y.S.2d 752 (2006).

b. The Finding Was Supported By "Substantial Evidence"

In any event, despite Petitioners' diatribe, the BSA was clearly entitled to rely on the expert financial analysis submitted by the Congregation at the BSA's request. The record before the BSA on this point was exhaustive. *See, e.g.*, City's Filed Administrative Record at 133-161, 283-307, 3608-10, 3847-77, 4223-30, 5773-91. The BSA was provided with proof that only the proposed building was feasible, and that an as-of-right building would not result in a reasonable financial return. BSA Res. ¶ 133. The Congregation also provided the BSA with an alternative analysis that considered the rear terraces of the residential facility as sellable and revised the sales prices of the units accordingly. *Id.* ¶ 135. The Congregation then, at the BSA's request, analyzed data for the following scenarios: the proposed building; an eight story building; a seven story building, and the as-of-right building. *Id.* ¶ 136, 137. The Congregation then submitted a revised analysis of the as-of-right building using a revised estimated value of the property, which still showed that the as-of-right alternative would lead to a substantial loss. *Id.* ¶ 138. Based on this extensive record, the BSA found that, as a result of the property's unique physical condition, there was no reasonable possibility that development in strict compliance with applicable zoning requirements would result in a reasonable return. *Id.* ¶ 148.

While Petitioners now want to quibble with some of the expert analysis relied on by the BSA here, that assessment was for the BSA to make. In *SoHo Alliance*, the New York Court of Appeals expressly stated that the BSA can "reasonably rely upon expert testimony submitted by the owners" to support a "reasonable return" finding. *SoHo Alliance*, 95 N.Y.2d at 441, 718 N.Y.S.2d at 263, 741 N.E.2d at 108; *see also William Israel's Farm Co-op. v. Board of Standards and Appeals*, 22 Misc. 3d 1105(A), 2004 WL 5659503, *4 (N.Y. Co. Sup. Ct. Nov. 15, 2004) (approving BSA's reliance on submissions from developer's "financial expert").

Moreover, the courts have repeatedly declined to micromanage such agency analyses. *See, e.g., West Village Tenants Association v. New York City Bd. of Standards and Appeals*, 302 A.D.2d 230, 231, 755 N.Y.S.2d 377, 378 (1st Dep't 2003) (BSA is not required to consider the return for every permissible use). The Court should not disturb the BSA's "reasonable return" finding here.

3. The BSA's "Neighborhood Character" Finding Was Rational

Petitioners assert that the BSA should not have found that the variance would 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," BSA Res. ¶ 201. *See* Petitioners' Mem. at 82. Petitioners argue that the variance will result in the closure of seven lot line windows (those located on a wall abutting a property line) and will consequently reduce air and light. *Id.* Petitioners also contend that development in accordance with the variance will reduce air and light in the neighborhood. Petitioners' Mem. at 87. Petitioners argue that, as a result, the Board could not make the required finding. Petitioners' Mem. at 82. Petitioners' contentions are without merit.

Petitioners' contention ignores the fact that Section 72-21(c) of the Zoning Resolution merely requires a finding that the variance "will not ***substantially*** impair the appropriate use or development of adjacent property." N.Y. City Zoning Resolution § 72-21(c) (emphasis added). The assessment of whether a project's effect on an adjacent property will "impair" its use or development, as that term is used in the Zoning Resolution, lies exclusively within the province of the BSA.

Here, the BSA could reasonably conclude that the impact on lot line windows, light, and air – and any other effect on neighbors – would not be "substantial" such that the use or

development of the adjoining property would be "impaired," especially considering that the LPC had already unanimously determined that the proposed construction would be an appropriate addition to the historic district. These are precisely the kind of "sensitive planning decisions" that the New York Court of Appeals has held should be left to the "quasi-legislative, quasi-administrative boards composed of representatives from the local community," here the BSA, because those officials "possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community." *Cowan*, 41 N.Y.2d at 599, 394 N.Y.S.2d at 584, 363 N.E.2d at 310. Thus, it matters not whether this Court would have "decided the matter differently" after considering any impacts on neighbors. *See id.* The only question is whether the BSA's conclusion was rational.

With respect to the lot line windows, Petitioners cite no authority suggesting that such windows enjoy any special legal protection, nor can they since such windows may not even be used to provide legally required light and air to the rooms they service. (In fact, Petitioners do not cite any legal authority in the section of their memorandum in which they contest the BSA's "neighborhood character" finding). Moreover, any impacts were minimized. In a neighborly effort to block as few lot line windows as possible, the Congregation modified its original development plans by pulling back its rear wall to create terraces and thereby free up four or five lot line windows on 18 West 70th Street. Indeed, Petitioner Lepow cannot complain at all since his building at 18 West 70th Street has an outer court along its shared property line with the Congregation that contains columns of windows that are not on the lot line. The new building will not affect those windows.

Petitioners' contentions that the development will reduce air and light are similarly misplaced. Petitioners' Mem. at 87. The BSA acted well within its discretion in relying on the

shadow study, commissioned by the Congregation, comparing the shadows cast by the existing building with those cast by the proposed building. The BSA could reasonably conclude, based on the study of shadows cast over the course of the year, that the variance would lead to few additional shadows and that those few shadows would be insignificant in size. *See* BSA Res. ¶ 199.

4. The BSA's Finding of "No Self-Imposed Hardship" Was Rational

Petitioners contend that the BSA should have deemed the Congregation's inability to use portions of the community house to meet school needs a "self-imposed hardship." Petitioners' Mem. at 91-98. Petitioners suggest that the toddler program is a sham, and was included only to justify the variance request. *Id.* at 92. Petitioners also argue that, if the Congregation moved the caretaker's apartment, certain variances would be unnecessary. *Id.* at 94. Petitioners' arguments fail to establish that the BSA's finding of "no self-imposed hardship" was irrational.

The BSA acted rationally in accepting statements from the Congregation that it needed a toddler program and a live-in caretaker. Petitioners' assertions of "sham" notwithstanding, there was evidence before the BSA that the Congregation had a toddler program and always intended to expand it to accommodate 60 toddlers. The record confirms that the Congregation described the toddler program to the BSA during the first BSA hearing. Similarly, the BSA acted rationally in accepting proof from the Congregation that it needed a caretaker to live in the community house. *See* Petitioners' Mem. at 93. The BSA did not act irrationally in rejecting Petitioners' attempts to design the Congregation's building for the Congregation or to determine for the Congregation which needs are actually important. *See* Petitioners' Mem. at 91-98.

The BSA's conclusion that the Congregation did not create any of the limitations that warranted the variance is unassailable. *See* BSA Res. ¶ 205. Petitioners have certainly not established that the conclusion was arbitrary or capricious.

5. The BSA's "Minimum Variance" Finding Was Rational

Finally, Petitioners' brief contains this throw-away comment pertaining to the BSA's "minimum variance" finding: "Since space claimed for the programmatic needs can be accommodated in a conforming building or elsewhere on the zoning lot, the minimum variance is no variance." Petitioners' Mem. at 98. This comment certainly does not establish that the BSA's finding was arbitrary or capricious.

Indeed, the BSA considered this precise argument and found it unpersuasive. The BSA noted that Petitioners had argued "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." BSA Res. ¶ 212. Yet, 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.

Petitioners cannot show that this finding was irrational. To the contrary, 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. Based on this record, the BSA 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 reasons stated above, the Court should deny the Petition.

Dated: New York, New York
February 9, 2009

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

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
	:	Index No. 113227/08
	:	(Justice Lobis)
Petitioners,	:	
	:	
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, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,		
Respondents.		

Petitioners' Reply Memorandum of Law
In Support of Verified Petition.

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March 23, 2009

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PETITIONERS' REPLY MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PETITION

Petitioners Kettaneh and Lepow reply to both Answering Memoranda of Law submitted by the BSA Respondents and the Respondent Congregation.[1] This Article 78 proceeding appeals from a 2008 Resolution of Respondent BSA, granting variances to the Congregation for a mixed use building on West 70th Street in Manhattan.

Respondents have now conceded that a development of the Congregation's site would earn a reasonable return to the Congregation. In their Answers, the BSA acknowledged that the return to the Congregation for its version of a residential as-of-right scheme was greater than the Congregation's view of a reasonable and adequate return for such a development.[2] Accordingly, and without regard to the other reasons described herein, the BSA's finding under Z.R. §72-21(b) must be annulled.[3] Without a (b) finding by the BSA, the condominium variances must be annulled.[4]

1

Rather than provide two reply memoranda, Petitioners submit one reply memorandum to the BSA Memorandum of 67 pages, and the Congregation Memorandum of 21 pages (Cong. Mem.) The Verified Answer of the City Respondents, served February 9, 2009, (City Answer) consisted of 86 pages, of which 57 pages consisted of a Statement of Material Facts. The Congregation Verified Answer contained no Statement of Facts. Attached to the BSA Verified Answer were certain documents relating to the *ex parte* meeting held by the BSA Chair and Vice-Chair. Respondents Srinivasan and Collins did not submit separate Verified Answers.

On December 5, 2008, the BSA served the BSA Record consisting of 5795 pages.
Citations to R-00000 are to the BSA Record.

Pet. shall mean Petitioners' Verified Petition as revised January 2, 2009.

With the Petition dated September 29, 2008, Petitioners served Appendix A, which consisting of 4199 pages. Certain BSA documents are in Appendix A, but not included by the BSA in its Record. Attached as Exhibit B to the Petition is a Table of Contents for the 13 volumes.

Citations to P-00000 are to Petitioners' Appendix A.

Petitioner served a revised version of its Memorandum of Law and the Petition dated January 2, 2009,.
Citations to BSA Res."¶ " are to the paragraph numbered version of the BSA Resolution (aka Decision) at Exhibit A to the Petition and at P-00001 and P-00019. The parties by stipulation have agreed to cite to these paragraph numbers.

2 *See* BSA Answer, ¶292.

3 *See* BSA Res ¶149.

4 *See* R-140 and R-287. *See* Pet. Ex. N-1, N-1-A to C.

Moreover, the failure of the BSA to consider use of the fifth and sixth floors of the as-of-right building to support programmatic needs is a sufficient reason to annul the lower floor community house variances. A six floor structure conforming as-of-right structure will allow the Congregation to meet all of it programmatic needs - the full lot coverage on the first floor resolves all the access and circulation needs of the Congregation.

The Congregation's view is that it is not prevented from moving ahead with obtaining demolition and construction permits from the DOB and commencing construction. The Petitioners are not aware of the intentions of the Congregation. Accordingly, Petitioners request that this proceeding move along without delay.[5]

Variances Granted Improperly Below

The variances for the proposed building allow approximately 14,204 additional square feet of area over that allowed by an as-of-right building — approximately 10% of the area relates to the Congregation's community space, and the other 90% to luxury condominiums. Because the Answers deny this basic fact, Petitioners have prepared a compilation exhibit at Pet. Ex. M-1 showing all eleven levels of the proposed building with the location of the variances highlighted.

The BSA Has No Authority to Grant Variances Based upon Landmarking Hardships.

Because the site is in a landmarked district and the Synagogue is an individual landmark, the Congregation first sought (in 2001) and obtained a certificate of appropriateness (in 2006) from the Landmarks Preservation Commission (LPC) for a building with reduced height, but only as to the appropriateness of the building for design reasons.

[5] New York City Administrative Code, Title 25, §25-207 provides: "f. Preferences. All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.". *See* P-159. DOB refuses to release to the public any information as to the Congregation's applications and permits without the permission of the Congregation, and the Congregation will not provide such permission (R-235, R-1626, P-1283, P-1286, P-1293).

The LPC did not pass upon (and had no authority to pass upon) zoning matters, issues of height and scale, and impact on the area such as shadows on the mid-block streets.[6]

The LPC in conjunction with the City Planning Commission may consider relief from hardships caused by landmarking under Z.R. 74-711 . Initially, in 2001, the Congregation had sought relief from the LPC under Z.R. 74-711 , but did not pursue such relief, withdrawing its request. Despite the improper inference drawn from the positions expressed by the BSA in its Answer, the BSA has no role at all in providing relief from landmark hardships; the BSA provides variances on appeal from denials of permits by the Department of Buildings for violations of the Zoning Regulations; if Respondents argue to the contrary that the BSA can grant relief from landmark hardships not provided by the LPC, then it would seem that the Congregation did not avail itself of its remedies from the LPC.

SUMMARY OF SIGNIFICANT ISSUES

First, Respondents in their Answer have now established that the Congregation can obtain a reasonable and adequate return from an as-of-right building. Accordingly, there is no basis whatsoever for the so-called Z.R. 72-21(b) finding for the condominium variances which must be annulled.

Second, Respondents have been unable to show any rationality at all in assigning a site area of 19,775 square feet (oddly derived from unused air rights over the adjoining Parsonage) as the site area for computing reasonable return for the two condominiums in the mixed use Scheme A conforming as-of-right building. The Congregation claims that having satisfied its programmatic needs in floors 1-4 of the mixed use building, it is entitled to earn a reasonable return from two condominiums on the remaining floors five and six. But, these two floors do not contain 19,775 square feet, but only 5,316 square feet. By using this bizarre approach, the Congregation inflated cost and thereby eliminated the return.

[6] Title 25, New York City Administrative Code, §25-307, states the factors considered by the LPC in issuing a certificate of appropriateness: "architectural features" and "aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color."

Third, Respondents have been unable to cite to a scintilla of evidence that an as-of-right building does not fully satisfy the Congregation's asserted programmatic needs of access and circulation.

Fourth, Respondents have been unable to identify a single "physical" condition, such as swampy land or an L-shaped lot, to create a hardship arising out of the strict application of the zoning regulations and preventing the development of the 64x100 foot development site. Under the BSA approach in its Answer to "obsolete", any building that an applicant asserts, correctly or not, has outlived its usefulness satisfies the physical condition requirement of finding Z.R. §72-21(a).

I. PRELIMINARY STATEMENT

Review of the BSA Resolution is made complex because the BSA Resolution does not include findings of important material facts.[7] Important feasibility studies are not presented as single integral studies; but rather require reviewing reports scattered throughout the record. The lengthy BSA Resolution contains substantial discussions of little or no relevance.[8] The BSA Resolution relies largely on conclusory assertions, and the Answers largely cite to the Resolution of the Record as a whole. The BSA Resolution and Answers mischaracterize opposition positions. The Answers attribute to Petitioners claims by "opponents", claims not made in the Petition. The BSA Resolution in general ignore even assertions by opponents supported by detailed expert reports. In making its

[7] See Morrone v. Bennet, *infra* at n. 12 " This lack of clarity constitutes a failure to specify factual support for the determination and forecloses intelligent judicial review of the issues raised by the parties on appeal."

[8] As just one example, the Congregation must establish that an "as-of-right building" would not earn a reasonable financial return to the owner. But, the BSA paid scant attention to the financial return of an as-of-right building, but rather focused on financial analysis of multiple and repetitive submissions of various proposed schemes requiring variances. The LCP had already limited the height of the building, so the BSA exercise of analyzing the proposed building was a meaningless exercise, more for "show" than substance. So, the BSA reviewed the complete construction estimates (all 15 pages) for the approved building where the estimates had no significance (R-4872 to R-4916), but looked the other way and accepted only 2 of 15 pages for the important constitutionally mandated analysis of reasonable return for the as-of-right scenarios where the full report would show the allocations between the two components of the building. (R-1996-1997). At hearings, the BSA engaged in dialogue and questioning with Mr. Freeman of Freeman Frazier, but asked nary a question of the even more experienced and certified opposition expert, Martin Levine, who was questioning the as-of-right analysis by Mr. Freeman. See Transcript R-4485-4488. The Chair rushed and dismissed Mr. Levine after he spoke for 3 minutes. Mr. Freeman, though, was questioned by Commissioners in the same hearing. R-4463-4483, yet not one Commissioner asked Mr. Freeman why the proper site value for an as-of-right scheme A would not be the area of the two condominium floors times the value per square foot.

findings, the BSA erroneously relied on factors not permitted by law: asserting landmarking hardships, asserting religious programmatic needs to justify the condominiums, asserting hardships not physical in nature, and asserting hardships lacking causation — *i.e.*, not arising out of the strict application of the zoning laws. It is immaterial whether the BSA acted intentionally or not in articulating its findings in the manner that it did — in either case, the BSA approach cannot be allowed to frustrate judicial review.

A. The BSA Failed to Make Findings of Fact as to Substantial Material Facts

The BSA Resolution on the whole resorts to either conclusory findings or findings that merely parrot the words of the Zoning Regulation and fails to make findings of specific facts, and also resulting in an non-transparent decision. The following critical facts, as to which the BSA did not make factual findings in the BSA Resolution, are material to understanding Resolution, yet appear not to be in dispute.[9]

- 6.55%. The minimum acceptable rate of return for a finding under §72-21(b). Pet. Ex. N-!-B.
- 10.93%. The Annualized Rate of Return on Investment for the proposed development project as approved by the BSA. BSA Answer ¶292. Pet. Ex. N-1-A.
- 6.7%. The Annualized Rate of Return on Investment for the threshold as-of-right Scheme C. *Id.*.
- 5,316 square feet (sellable) 7,594 square feet (gross). The Site Area of the Two Floors of Condominiums in the Mixed Use As-of-Right Building Scheme A. Pet. Ex. N-4.
- 19,775 square feet. The Site Area Used by the BSA to Compute Site Value. Pet. Ex. N-6 and N-7.
- 12,704 square feet. The Additional Area Provided for the Variances for the Condominiums. Pet. Ex. M-2 and M-3.
- 10%. The Proportion of the Variances That Relate to the Resolution Discussion as to Religious Programmatic Need and Deference to Religious Institutions. Pet. Ex. M-2 and M-3.
- 4%. The Proportion of the Community House Variances Area to the Area Available for Programmatic Needs in an As-of-Right Community House. Pet. Ex. M-2 and M-3.
- No Evidence Cited. Evidence that access and circulation issues are not completely addressed by an as-of-right building.

[9] As to the (b) findings for the as-of-right residential condominiums. the BSA discussion is found at BSA. Res. ¶123 to ¶149 of the resolution. The BSA confuses the discussion by addressing in this section the feasibility analysis of the proposed building at ¶129-30, ¶132-36, ¶140, an issue that should have been addressed under the (e) finding, minimum variance.

- No Evidence Cited. Evidence that the Congregation Provided Revisions of Drawings to the DOB so that the Eighth Variance Would Be Removed.
- No Evidence Cited. Citation to the Record Showing the Actual Rent Paid by the Parsonage Tenant and the Beit Rabban Tenant.
- No Evidence Cited. Citation to the Record Showing Evidence of Obsolescence.

B. Non-Issues in This Proceeding

The BSA Resolution and Answers raise issues and engage in extensive discussion of issues of no relevance to this proceeding. But Respondents seem now to agree that:

- No floor area (FAR) is required to be transferred to the development site on Lot 37 from Lot 36 where the Synagogue and Parsonage are located. Thus, all discussion of this issue in the Resolution and in the Answers is irrelevant to issues before this proceeding.[10]
- No use variances are required; Petitioners do not challenge the uses proposed by the Congregation as proper programmatic accessory uses, and all discussion in the Resolution and Answers as to these issues are irrelevant to this proceeding.[11]
- All discussion in the Resolution as to religious deference applies only to the community house variances, which constitute 10% of the variance area in dispute.
- Because access and circulation may be resolved by an as-of-right building, no hardship or claims of obsolescence or programmatic needs are relevant to this proceeding.
- Compliance with SEQR and CEQR are non-issues in the Article 78 proceeding. The only related relevant issue is compliance with Z.R. §72-21(c).

II. OVERVIEW OF RESPONDENTS' ANSWERS TO THE PETITION

The BSA absolves itself from answering any averment in the Petition if it "can be construed as alleging that the BSA acted improperly or contrary to law."

Where the Petition alleges that some fact or document did not exist in the record, Respondents simply deny these averments, and then refer the Court to the entire Record and ask the Court to find the non-existent information in the record. *See* Reply, "Citations to the Entire Record Rather Than Specific Parts of the Record." *See* Reply "Respondents Refusal to Admit Facts Not in Controversy."

The BSA conducted its hearing and prepared its Resolution in a manner which, by intent or effect, frustrates and avoids review by a court, and preserves for the BSA the ability to act arbitrarily

[10] BSA Answer ¶ 248.

[11] BSA Answer ¶ 239.

and capriciously.[12] The Applicants was not asked questions that would elicit inconvenient facts in conflict with the BSA's predilection to grant variances, especially to religious applicants. Disproportionate attention was paid to certain issues. The BSA seemed to draft it Resolution herein as an advocate to prevent later review.

The result is that this BSA Resolution seem to attempt to frustrate, if not foreclose, the ability of a court to provide judicial review.[13] Notwithstanding, the Court is empowered to conduct hearings as described below.

III. NATURE OF THE PROCEEDING

A Petition in an Article 78 proceeding is more like a complaint combined with the post-trial statement of facts, where all evidence is appended. Appeals from the BSA have a 30-day statute of limitations, as compared to 4 months for other administrative appeals. In an Article 78 proceeding, if the agency or other party baldly denies facts, the court is not required to accept those bare denials. Otherwise, agencies could defeat all Article 78 proceedings, especially where the record is lengthy, by referring, as was done by Respondents, in answers broadly to the entire record or by generally "denying" matters. This places the burden on the Court and the Petitioners to identify parts of the record that show the agency denials are false. If this is permitted, the BSA could also create a complex record for the simple reason of thwarting court review — or permeate its decision and the record with irrelevant matters.[14] It is for exactly these reasons that the CPLR and the City Administrative Code are clear that a hearing is required if there is a question of substantial evidence.[15]

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[12] *See* Morrone v. Bennett, 164 A.D.2d 887, 889 (N.Y. App. Div. 2d Dep't 1990):

> "Thus, it is unclear whether the Board rejected the petitioners' financial analysis itself as failing to substantiate the hardship claim, or whether the Board determined that an 8% return on equity was not an unreasonable return. This lack of clarity constitutes a failure to specify factual support for the determination and forecloses intelligent judicial review of the issues raised by the parties on appeal." (emphasis supplied).

[13] Simple facts such as stating how many square feet of additional area are being granted by the variances are simply left out, and the BSA does not ask that they be supplied by the Congregation. The Congregation was not required to show floor plans that illustrate the portion of the floor for which variances are sought. (See R-514.) See Pet. Ex. M-1.

[14] Where, as here, a member of the public or third party adversely affected appeals an Article 78 proceeding,

Where a substantial evidence issue is raised, under CPLR §7403(g), a hearing is to be held, and to be transferred to the Appellate Division, but under CPLR §7403(h), the issue of fact is to be tried by a referee or by a justice of the Supreme Court. *See also* CPLR §7804(g).[16] In practice, should the Supreme Court initially hold a hearing that the Appellate Division later believes considered an issue of fact, the Appellate Division does not retry the issue.

However, Petitioners contend that the Respondents have had more than an adequate opportunity to create a record to support the variances. The facts are just not there to support the variances, and, for that reason, the BSA Resolution should be annulled.

IV. LEGAL ARGUMENT

A. Because the Congregation Can Earn a Reasonable Return from an All Residential As-of-Right Building, the BSA Improperly Found that §Z.R. 72-21(b) Was Satisfied, and the Condominium Variances Must Be Annulled

It is now clear that the Congregation is able to earn a reasonable return for an as-of-right residential Scheme C building on its development site of at least 6.7% (BSA Answer, ¶292), which is in excess of the 6.55% the Congregation deemed adequate in its initial application to the BSA. (R-140, R-287.) Thus, the condominium variances must be annulled, since the essential §72-21(b) finding cannot be made. *See* Pet. Ex. N-1.

The Scheme C analysis is required under applicable precedent requiring that the entire site be analyzed for reasonable return, not merely analyzing the slice of the property the owner wishes to develop.

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such party was not a party in the administrative proceeding. Accordingly, there is no implicit res judicata effect. Here, the petitioners were denied the basic ability to cause relevant material questions to be asked.

[15] The New York City Administrative Code, Title 25, §25-207, as to the BSA (see R-159) provides:

> d. Proceedings upon return. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his or her findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

[16] CPLR §7804(g): "Where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding."
."

In their Answering Memoranda Respondents ignore, and apparently concede, the assertion by Petitioners that, under §72-21(b) and case law, a religious organization proposing a mixed-use building may not bifurcate its property — meeting its programmatic needs in one slice of the property,[17] and then claiming that it cannot earn a reasonable return as to the remaining portion.[18] See Pet. Memorandum of Law at page 74. *See* Northern Westchester Professional Park Associates v. Bedford, 60 N.Y.2d 492, 503-504 (N.Y. 1983); Koff v. Flower Hill, 28 N.Y.2d 694 (N.Y. 1971). Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (U.S. 1978) ("Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); also Spears v. Berle, 48 N.Y.2d 254, 263 (N.Y. 1979)("A petitioner who challenges land regulations must sustain a heavy burden of proof, demonstrating that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use.")

1. The Nearly All Residential Building Earns a Rate of Return of At Least 6.7%

The BSA has not only failed to require the Congregation to analyze a truly all-residential scheme, but opponents claimed, and the Petition stated, that the "not-really" all-residential scheme of December 2007 had not been updated to utilize a reduced site value computed by the Congregation in April 2007, which reduced site value would have boosted the rate of return in the Scheme C analysis. The BSA ignored opponents' request, and would not ask the Congregation to update Scheme C, and the Congregation did not volunteer. *See* BSA Answer to ¶ 292 of Petition, reproduced at Pet. Ex. N-1-A.

Yet the BSA did not completely ignore this assertion in its Answer. After all, it was the BSA itself that initially requested that the Congregation provide an all-residential analysis. The professional staff of BSA, after it received the initial application, asked the Congregation for a “reasonable return

[17] The Congregation admits in its Statement in Support that the lots were purchased specifically for development of the Community House; the proposed Community House without the variances responds to the needs of the Congregation. Pet. at 88.

[18] In this discussion, we ignore the 10% of variances for the Community House and assume for argument’s sake that the 2nd, 3rd, and 4th floor variances are proper.

(aka "feasibility") study" for an all-residential project (Pet. at ¶ 210).[19] (The "all residential" analysis was not in fact all-residential. Petition ¶ 207 to ¶ 228, also reducing the financial return.[20])

The BSA, when pressed by the Petition, felt compelled to complete the analysis by using the new reduced site value, computing a rate of return of 6.7%. As stated in Paragraph 292 of the BSA Answer (reproduced as Pet. Ex. N-1)[21]:

> 292. Second, petitioners argue that, prior to adopting the Resolution, BSA should have required the Congregation to revise its December 21, 2007 Scheme C study (all residential scheme). Specifically, petitioners claim that the Congregation should have been required 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 July 2008 report because doing so would have shown a profit of approximately $5 million. Petitioners' argument is flawed. As set forth above, under Z.R. §72-21(b), BSA examines whether an applicant can realize a reasonable return, not merely a profit. While utilizing the revised acquisition value, i.e., $12,347,000, would have resulted in a profit of approximately $5 million, the rate of return would have only been increased to 6.7%. As established by the Congregation's experts, a reasonable rate of return for the subject premises was approximately 11% [R. 4652-3, 4656, 4868-69, 5172, 51781. Accordingly, since petitioners' proposed calculation would not have resulted in a reasonable return, petitioners' argument fails.[19]
>
> [19] Notably, the rate of return for the proposed development as approved by BSA is 10.93%. (emphasis supplied)

2. The Congregation Stated Repeatedly That a 6.55% Return Was Reasonable

The BSA has now confirmed the key assertion of the Petitioners: a reasonable return, of at least 6.7%, to the Congregation would be provided to the Congregation even by this "not-really" all residential building. How can we be so sure that 6.7% is a reasonable return? Simply because the Congregation and Freeman Frazier so said in the initial feasibility study accompanying the Congregation's application in April, 2007 (R-140)? Freeman Frazier, March 28, 2007 (Pet. Ex. N-1-B):

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[19] BSA Notice of Objections to Congregation June 15, 2007. R-253 at 257, 258:

> 31. Please provide a full plan set for a complying, 4.0 FAR residential building on Lot 36 (sic) that includes a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings).
>
> "37. Provided that the alleged hardship claim for the development site (Lot 36) (sic) is an inability to accommodate CSI's programmatic needs on Lot 37 (sic), please analyze a complying, fully residential development on Lot 36 (sic)as requested within Objection # 31. This analysis is requested for the purposes of gauging what the economic potential of the development site would be without the alleged hardship."

BSA Second Notice of Objections to Congregation, October 12, 2007. R-512 at 514.

[20] The Congregation supplied an analysis known as "Scheme C" or "F.A.R. 4" and labeled it an "all residential" analysis. In fact, the Scheme C proposal was not all-residential, and failed to consider the value of 11,000 square feet of valuable rentable space. Even without the 11,000 missing square feet, the Scheme C analysis showed a positive return. The opposition contended that a properly conducted analysis of Scheme C, which fully utilized all available space in an as-of-right building would yield a return on investment of 31%, an annualized return on investment of 16.4%, and a return on equity of 63%. R-3464. MVS-Martin Levine, February 8, 2008.

[21] The BSA Answer was verified by Respondent Srinivasan, the Chair of the BSA.

> 5.00 Conclusion 7.4 0.7.
>
> The Proposed Development provides a 6.55% Annualized Return on Total Investment. This return is at the low end of the range that typical Investors would consider as an investment opportunity, taking into account the potential risks inherent in this type of development project, and few, if any, investment options. The returns provided by the Proposed Development alternative, in this case would, therefore, be considered acceptable for this project. (emphasis added)

Because the Congregation can earn, without doubt, a reasonable return on the entire development site used for residential purposes, it is not necessary to analyzing whether a mixed use facility could earn a reasonable return from the two floors of condominiums on the fifth and sixth floors, The Congregation cannot have its cake and eat it too — satisfy its programmatic needs as a religious entity in the lower floors, and then claim it cannot earn a reasonable return for the upper two floors.

Should the Court be so persuaded, it may ignore the remainder of this brief as to the upper floor condominium variances, although there are other reasons requiring annulment of the condominium variances.

B. Because The BSA Finding Under Z.R. §72-21(b) that the Congregation Could Not Earn A Reasonable Return from the Two Condominiums in the As-of-Right Scheme A Building Is Erroneous, Lacks Substantial Evidence, and Uses an Arbitrary, Capricious, and Irrational Site Value, the Condominium Variances Must Be Annulled

A bifurcated analysis can work to exclude a variance to the Congregation for the revenue-generating component, if it is shown that the revenue-producing component can indeed earn a profit. A proper analysis of the Scheme A two-condominium project - correcting site area, site value, construction costs, and other elements, would yield a reasonable return.[22] Thus, finding (b) could not be properly made either for the all-residential scheme or the mixed use scheme,

In the Petition, Petitioners show that the BSA had no basis on which to make the finding under §72-21(b) that the Congregation could not earn a reasonable return from Scheme C. In answer, Respondents continue to inaccurately portray improperly Petitioners' objections to the Congregation's

[22] See reports critiquing Freeman Frazier studies by opposition certified real estate appraiser Martin Levine of Metropolitan Valuation Services November 2, 2007 (R-1631); January 25, 2008 (R-02506); February 8, 2008 (R-3630); March 20, 2008 (R-4093); April 15, 2008 (R-4254); June 10, 2008 (R-4800); June 23, 2008 (R-4932); July 29, 2008 (R-5210).

reasonable return/feasibility study as being based on a single flaw: that a return on equity analysis should have been used as specifically required in the Board's written guidelines.

1. The Market Value of the Site for the Two Floors of Condominium Development Rights Is $2.6 Million, Not $12.3 Million

The BSA continued to ignore the largest single flaw in its (b) finding for the as-of-right Scheme A building — the computation of site value — the largest cost component in the financial analysis. Correcting this single error (and there are others) would establish a satisfactory return to the owner, whether the return on equity or return on investment approach is used. See generally Pet. Ex. N-4 to N-7.

The proper computation of site value is simple — multiply site area times the site value per square foot. The two condominium floors in the as-of-right building contain 5316 sq. ft. (7594 gross), as stated in the Freeman Frazier analyses. R-4869. Freeman Frazier estimated a value of $450 per sq. ft. for condominium development space. R-520. Thus, the site value for the two condominiums would be the product of 5316 sq. ft. x $450 per sq. ft. or $2.6 million. *Id.*

Yet, for this site area, two floors of space with an area of 5,316 sq. ft., the Congregation used a site value of $12,347,000 (R-4869), based upon a site area of 19,975 square feet (R-4651-4652), and in the process boosted the site value per square foot from $450 to $675. To achieve this alchemy, the BSA allowed the Congregation to use the unused development rights over the adjoining Parsonage, and to value the space as if it overlooked Central Park. Pet. Ex. N-6. Although the BSA is required to make findings of fact, it did not include findings as to any of these facts in its lengthy Resolution.

Clearly, the Congregation was exaggerating the site value in a way to guarantee that any analysis of an as-of-right building would show a loss. An inflated site value is the cornerstone of the Congregation's strategy to satisfy the (b) finding, and, initially, the Congregation attempted to include the Community House space as part of site area.

The Chair observed at the November 27, 2007 hearing:

> CHAIR SRINIVASAN
> 591 Freeman needs to explain to us what he's done on his financials. We've seen it. I think
> 592 we have some concerns which we raised yesterday and either he can go back and look at
> 593 that or we can state them for the record, but I think some of the issues have to do with
> 594 how the site is valued and how a good portion of what is anticipated as the developer
> 595 paying for that site is not going to be used by the developer because it's being used by the
> 596 synagogue.
> 597 So, it's almost like you should take that out of the equation and then you have this
> 598 value on this property without that 20,000 square feet that's being used for the
> 599 synagogue.

Transcript of November 27, 2007 at R-1753.

At this juncture in the proceeding, Freeman Frazier was computing site value based upon a site area/building size of 37,889 sq. ft., a number apparently made up by Freeman Frazier.[23] Pet. Ex. N-3. The as-of-right building was not 37,889 sq. ft., but 27,771.61 sq. ft. *See* As of Right Floor Area Schedule, October 22, 2007, AOR-A-2 at R-594 (the amount 27,771.61 is in the lower right corner of the table).[24] Most of the 27,271.61 sq. ft. was occupied for community purposes. See Pet. Ex. M-1, M-2. The actual site area was closer to this figure minus 20,000 sq. ft., *i.e.*, 7,771.61 sq. ft.

Whether the Chair understood that the correct size of the building was 27,761 sq. ft., and not 37,889 sq. ft., was not clear. It is clear that if 20,000 square feet were subtracted from 27,761 sq. ft. to yield site area, then the condominium variances were doomed. The Congregation could only satisfy the (b) finding by exaggerating site value. (In reply to Respondents denial of Pet. ¶206 that Freeman Frazier provided a number of inconsistent reports, Petitioners compiled the varying methods of computing site value at Pet. Ex. N-3.)

The actual amount of space for the two floors of condominiums shown on all of the Scheme A studies is 5316 sq. ft. "sellable" (7594 sq. ft. "built"). R-4869. The Answers of Respondents

[23] When Freeman Frazier next submitted a Scheme A Analysis, the site area was reduced from 37,889 to 19,775, but the site value per square foot was raised from $450 per sq. ft. to $750 per sq. ft. This was a transparent manipulation of the numbers. Compare R-133 with R-516. See Pet. Ex. N-3.

[24] The BSA Res. at ¶ 114 states that the Congregation represented that a 28,274 sq. ft. would be permitted in an as-of-right building. The BSA Answer repeats this figure citation to the BSA Record. The source of this figure is not known.

completely ignore this issue.[25] It was this site area that a "developer would use and pay for," in the words of the Chair, which was to be used for the computation of site value in the Scheme A as-of-right building.[26] *See* Pet. Ex. N-1 *et seq*.

If the computation was clearly erroneous, this Court has the power to correct the computation. *See* 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.), *infra*. Because the computation by the BSA was clearly erroneous, the variances granted below must be annulled.

2. Market Value and Acquisition Cost Are Not One and the Same

The BSA Respondents contend in their answer that "market value" and "acquisition cost" are one and the same, and, that the use of the phrase "Acquisition Cost" in the various Freeman Frazier studies is supposed to mean market value.

> As is common with the English language, various words and phrases are used interchangeably. Terms utilized by the BSA are no different. The terms "acquisition cost," "market value," and "site value" are used interchangeably for no other reason than that they each designate the as-is fair market value of a property and are all in common usage. … The market value of the property which, as stated above, is synonymous with the acquisition cost.

BSA Mem. at 42. BSA Answer at ¶ 294. The BSA is attempting to distract the Court's attention from the fact that the reasonable return analysis failed to consider the amount paid by the owner for the property. Item M of the BSA Instructions clearly distinguishes between market value and the cost of acquisition of the site by the owner "market value of the property, acquisition costs and date of acquisition." R-4267 at R-4273. Pet. Ex. R.

Acquisition price is a factor not to be ignored under applicable case law (Pet. Mem. of Law Page 70 at page 69 and 80 *et seq.*) The price paid by an owner for his property is needed to show the return on investment upon the owners original investment in the property. Under the feasibility

[25] The failure to present the site value of the two floors of condominiums alone should give great pause to both this Court and to anyone considering the feasibility study of Freeman Frazier taken as whole. This should call into question the entirety of the Freeman presentations. And the refusal of the BSA to discuss the computation, since the issue was fully raised by opponents, raises questions as to the candor and impartiality of the BSA itself.

[26] Ultimately, when it was clear that the standard method would doom the (b) finding, the Congregation concocted the method of using unused development space over the adjoining Parsonage to define site area for the condominiums atop the Community House.

studies, the Congregation is to receive $12.4 million of cash as the market value of the site. However, during the time the Congregation owned the property, it received value in the form of use and rent. Thus, a return on investment for the Congregation would include factoring in the original acquisition cost, the value of the use and the rent received, and the amount received as the market value on the hypothetical sale to the hypothetical developer.

3. The BSA Irrationally. Arbitrarily, and Capriciously Uses the Value of the Development Rights over the Adjoining Parsonage as the Market Value of the Site for the Two Condominiums Constituting the Revenue Generation Part of the Development

The BSA then argues that market value of the space available to the developer is the measure of site acquisition cost. But it then departed from that measure when it chose to use the value of the development space over the adjoining parsonage as the site value of the two floors of condominiums. Pet. ¶¶ 182-185. Pet. Ex. N-5. BSA Answer at ¶295 and Pet. Reply thereto. Although the two floors of condominiums have a site area of 5,320 square feet (sellable) and 5,316 square feet (built), the BSA and Congregation approach was to use a site area of 19,775 sq. ft. See Pet. Ex. N-4 to N-7.

By so doing the BSA and the Congregation inflated the site value for the two condominiums from $2.4 million to $12.3 million.

The irrationality of this approach is addressed in the Pet. Mem. of Law at 53 *et seq*. Apart from the departure from the common sense approach, discussed above, the Petition notes:

- The Parsonage approach ignores the unused development space in the 64' x 100' construction site.
- Under the Parsonage approach, the Congregation essentially transfers air rights, but retains them at the same time - since, under the sleight of hand, the Congregation could still claim the air rights that were in effect transferred.
- The Parsonage approach ignores the unused development space over the Synagogue.
- Although using the development rights over the Parsonage, the feasibility study ignores the residential rental income from the Parsonage.

- The Parsonage approach measures the site value without regard to the actual development — the same value would be used whether the Congregation chose to use two floors for condominiums or four floors.

It also seems clear that further development over the Parsonage is limited by the landmark laws. As noted by the Congregation's architect while discussing the Parsonage in his letter to the BSA of (February 4, 2008, R-3611 at R-3613, Pet. Ex. Ex. G):

> Additional floors would block the historic leaded glass windows that provide southern light to the main sanctuary. In any case, its designation as a contributing building for landmarks would make these additional floors unlikely.

Not mentioned by the architect, but obvious from observation of the Parsonage is that large and architecturally integral cornices of the landmarked Synagogue actually extend over the Parsonage. See Pet. Ex. O-3. Development of the Parsonage would mean defacing the landmarked Synagogue. Thus, "assigning" the value of air rights over the Parsonage to the separate development , is nothing more than using the landmarking of the Synagogue as a basis for a variance.

The assignment of air rights value is effectively assigning FAR from Lot 36 Lot 37, not to increase the FAR on Lot 37, but to obtain waivers for height and setback requirements. But, it is already seen that moving air rights from one part of a zoning lot to another can transfer FAR, but cannot waive height and setback requirements.

The BSA attempts in vain to respond to this illogical approach — and was unable to even attempt to rationalize the last point — that the site value is the same whether the Congregation chose to develop as condominiums 1, 2, 3 or 4 floors of the as-of-right building. BSA Answer at ¶295 and Pet. Reply.

Tellingly, the BSA Resolution is silent as to all of these facts: it did not mention that use of the site area of the adjoining Parsonage or that the site area was being applied to the two condominiums. By so doing, the BSA disguised the shocking fact that it was engaged in an exercise that in effect involved the transfer of FAR from the Parsonage to Lot 37, where no FAR, as admitted by the BSA,

needs to be transferred, and without then restricting the available air rights for future development over the Parsonage.

4. It Was Arbitrary and Capricious for the BSA to Fail to Consider the Entire 15-Page Construction Cost Estimate in Evaluating the As-of-Right Schemes

The BSA was arbitrary and capricious in refusing to consider the demonstrated over-allocation of construction costs in the as-of-right schemes, thereby increasing the construction costs for the as-of-right condominiums. Even the analysis suggested by the BSA in its Answer at ¶ 291 (computing base unit costs) shows that overstatement occurred. *See* discussion of Pet. Ex. N-2, below. The overstatement had the effect of reducing the rate of return for the as-of-right scenario.[27] If not for this and other errors, the as-of-right condominium projects would earn a reasonable return. Accordingly, the condominium variances must be annulled, because there is no foundation for the (b) finding.

The BSA did not even collect or analyze the basic information or consider the reasoning behind the cost allocations between community house and as-of-right condominiums. Despite repeated requests by opponents, the BSA refused to require the Congregation to provide the complete construction cost reports for the threshold as-of-right buildings (Scheme A and C) (R-4863-5; R-1968 at R-1996[28]), while at the same time considering complete reports for the less relevant proposed schemes. Pet. at ¶ 25, ¶187. (See complete McQuilken reports at R-4865.[29])

In response, the BSA admits that the BSA did not seek these reports — and the Congregation did not provide the reports — because the BSA did not request the reports (R-4863 at 4865). The BSA

[27] Because the schemes analyze a mixed-use building, the methodology for allocating costs is highly important, it is possible to over-allocate costs to the condominiums and thereby reduce the return. Opposition expert Levine states did in fact occur. See Pet. ¶ 138, 139, 188. R-5210, Pet. Ex. F.

[28] The Scheme A construction reports were not included with the earlier May 13, 2008 report at R-4649, but were included in an even earlier report, establishing that no single Freeman Frazier report supplies the complete as-of-right analysis of Pet. ¶ 131.

[29] In a July 8, 2008 report, the Freeman excuse was that "the opposition did not specifically request the entire construction cost estimates for each previous scenario." R-5175.

asserts that it "did not seek the missing pages because they were immaterial" on the reasoning that the BSA could have analyzed the base unit construction costs:[30]

> The BSA, in examining whether construction prices are reasonable, reviews the base unit price (sic-cost), i.e., the construction cost divided by the square footage. Here, since the Congregation submitted the construction cost and the square footage, BSA had the necessary elements to calculate and review the base unit price [R. 1997, 5178-79]. Accordingly, the additional pages were irrelevant because they were not needed for BSA's review.

BSA Answer ¶291. Yet, the BSA provides no evidence at all that the BSA conducted such a computation. Nor is there any narrative in the Record to explain how the Congregation allocated construction costs.

In reply to the BSA Answer, Petitioners indeed have compared the base unit construction costs for Scheme A with that for the approved project. Using the last schedule provided by Freeman Frazier on July 8, 2008, the simple computation shows base unit construction costs of $700 a square foot for the as-of-right condominiums of Scheme A, but only $485 a square foot for the condominiums of the proposed/approved building. Pet. Ex. N-2. Clearly, the Congregation did exactly what the Petitioners always claimed — over-allocated construction costs to the as-of-right condominiums, so as to manipulate the rate of return.

It is proper to draw the inference that the "missing" evidence would have shown that the (b) finding could not be made for the as-of-right schemes. Thus, the Court should annul the condominium variances. There is no need for a remand. This was not an oversight by the Congregation — it deliberately withheld information. The Congregation had the opportunity to supply the information and chose not to do so.

5. The BSA Failed Ignored Its Own Written Guidelines As to the §72-21(b) Finding

An administrative body cannot ignore without justification its own written regulations, yet the BSA did ignore its instructions as to the §72-21(b) Finding: The BSA accepted an unleveraged return on investment approach where the Instructions require a leveraged return on equity approach. The BSA accepted an annualized return approach when the Instructions require a total return approach. The

[30] *See also* Answers to Pet. 134, 187-198, where Respondents simply deny what was admitted in the BSA Answer at ¶ 290.

BSA accepted unsigned incomplete construction cost estimates (which over-estimated AOR construction costs) where the Instructions require signed and sealed estimates. The BSA failed to require an analysis of a return on investment by the Congregation based upon the original acquisition price/cost for the Lot 37 properties, taking into account the value of use and income derived from the property, as a result of the $12,346,875 to be "received" by the Congregation for the market value of the property.

The Instructions at Item M of the BSA guidelines provide detailed and rational instructions for preparing the reasonable return (aka feasibility) studies. R-4273. Pet. Ex. R. These are BSA's only regulations or guidelines, and they are consistent with both real estate economics and precedent. Pet. ¶¶ 121 and 123.

The BSA was unable to provide any explanation for ignoring its own material and rational written instructions. The BSA could only claim that its only written instructions were merely guidelines and are not "absolute requirements," and could be ignored on the whim of the BSA. BSA Answer, ¶ 65. Had the Guidelines been followed, the BSA would have been unable to properly make the required (b) finding for the condominium variances.

6. The BSA Consideration of Z.R. 72-21(b) Lacks Support in the Record and the BSA Focused on Irrelevant Issues

The BSA Resolution provides the false impression that extended and deliberate attention was paid to the as-of-right feasibility studies, when in fact the BSA glossed over the as-of-right analysis. The (b) Finding concerns whether a reasonable return can be obtained from an as-of-right building; whether the proposed building yields a reasonable return is a matter for the (e) finding of minimum variance. The BSA Resolution at ¶¶125-148 mixes together the analysis of the two separate findings. BSA Res. ¶127, ¶132, ¶133, ¶134, ¶135, ¶136, and ¶137. The Court should not be misled by the confusing presentation of the BSA: careful reading shows that the BSA paid little attention to the as-of-right findings, and, importantly, failed to articulate the underlying factual assumptions, such as

using a site area of 19,975 square feet to value a site of 5,316 square feet. The BSA findings are just conclusory parroting of the language in the zoning regulation: the BSA omits the factual findings required, obscures the facts and prevents meaningful review.

7. Even If the Leveraged Return on Equity Approach to Reasonable Return Is Not Used, the As-Of-Right Schemes Still Earn a Reasonable Return to the Congregation.

The Respondents continue to misrepresent the objections to the report as being only an objection to whether they are a return on investment or a return on equity (required by the BSA Guidelines). Whether the return on investment method is used or the return on equity method specified in the BSA guidelines is used, if the site value correction is made and the construction cost allocations are adjusted and other padding of the analysis removed, both the Scheme A and Scheme C as-of-right schemes show an adequate return to the Congregation. In any event, a return on equity analysis was appropriate, because the BSA failed to provide a condition in the Resolution requiring that Congregation's residential units be marketed only as rental, rather than condominium, units. Thus, for that reason alone, not considering the return on equity was capricious.

C. Reasonable Return Analysis Is Grounded in the Constitutional Principles of Preventing Takings Without Due Process.

Petitioners had correctly observed in their Initial Memorandum that the necessity of analyzing whether a property owner could obtain a reasonable return is grounded in whether the zoning regulation amounts to a confiscatory taking. Similarly, the hardship issue is based on the concept that a land use regulation cannot create a taking. Although denying this assertion, the BSA Memorandum of Law is peppered with references to the Constitution and zoning regulation. The point is that the BSA is not free to come up with its own idiosyncratic definitions and applications of the concept of economic return. The Congregation makes this point by its citation and inclusion of this sentence from Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267 (2d Dep't 1983) at page 44-45 of the BSA Memorandum:

> Indeed, a party challenging a zoning ordinance as confiscatory must adduce "dollars and cents" proof to establish, beyond a reasonable doubt, that the property as presently zoned is incapable of yielding a reasonable return. Absent such proof a landowner may not overcome the presumption of constitutionality, especially when seeking relief from a self-inflicted hardship.

Indeed, by citing Northern Westchester Professional Park Associates, the BSA seems not to accept that, as to reasonable return, the applicable standard is not merely substantial evidence, but evidence "beyond a reasonable doubt."

The Court of Appeals is clear as to this relationship. Williams v. Town of Oyster Bay, 32 N.Y.2d 78 (1973):

> Property owners filed suit against town for the considerations for determining the constitutionality of a zoning ordinance as applied to a particular owner's property are much the same as those prescribed for the grant or denial of a variance. (citations omitted). Since these considerations are dealt with much more fully in the variance cases, we may look to them for guidance here.').

Zoning appeals boards exist to assure that zoning regulations are constitutional and that owners are able to use their property and/or to earn a reasonable return. Thus, as discussed elsewhere, the BSA is not free to suggest its own interpretation of constitutional requirements, for example, by allowing a religious property owner to fully meet its programmatic needs in half a building and then claim it cannot earn a reasonable return in the other half.

D. Under Z.R. §72-21 (b), Where a Religious Non-Profit Seeks to Build Revenue Producing Facilities, It Is Required to Show the Inability to Earn a Reasonable Return

If a religious non-profit seeks a variance to construct revenue-producing facilities such as luxury condominiums, then it must satisfy the reasonable return finding of Z.R. §72-21 (b). Petitioners concur with the position stated by the BSA on this issue. The Congregation's position is directly in opposition to the BSA position.

The Congregation disagrees and argues that the language of 72-21(b) provides that no reasonable return finding is required for any variances if the property owner is a religious non-profit

organization.[31] As noted below, the authorities cited by the Congregation in support of this proposition are inapposite.

Petitioners contend that in interpreting the application of Z.R. §72-21(b) where a non-profit organization seeks to develop a mixed-use project requiring variances, the constitutional underpinnings of this provision need to be considered, to avoid an unconstitutional taking by the land use regulation. Petitioners will not reiterate the discussion in its initial Memorandum of Law, except to note that the Respondents did not even attempt to respond to the discussion there.

1. The Congregation's Authorities Do Not Support Its Assertion Than No Finding (b) is Required

(a) The Congregation's Reliance on Fisher Is Incorrect

The Congregation completely misrepresents and mis-cites Fisher v. New York City Bd. of Standards and Appeals, 21 Misc. 3d 1134(A) (Sup. Ct. N.Y. Co.):

> For example, recently, in Fisher v. New York City Bd. of Standards and Appeals, 21 Misc. 3d 1134(A), 2008 WL 4966546 (N.Y. Cty. Sup. Ct. Nov. 21, 2008), the court considered a project "to permit the construction of a twenty story hotel." 2008 WL 4966546 at *2. The court stated, without regard to the nature of the hotel: "As a non-profit organization, Xavier was not required to demonstrate the second criteria, that the subject premises could not yield a reasonable return without the variance (Zoning Resolution § 72-21 [b])."

Congregation Memorandum, Page 15. A reading of the entire decision makes it clear that the Congregation's quotation from Fisher is taken completely out of context. The Fisher court was describing a 1963 variance granted by the BSA for "a six story school and monastery." The court was referring to the fact that in 1963, the church, as specified in the statute, was not required to demonstrate the inability to obtain a reasonable return for this pure religious use. As even a cursory reading demonstrates, the Congregation's Memorandum turns Fisher totally upside down.

(b) The Congregation's Reliance on Foster v. Saylor Is Similarly Incorrect

[31] The BSA and BSA practitioners frequently refer to the "(b) finding" or "finding (b)" when referring to the finding required under §72-21(b) of the Zoning Resolution (Z.R.), and in a similar manner to the other four findings required under §72-21 (a) through (e).

The Congregation reliance on Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) is also inappropriate. The zoning board there did find the school was able to obtain a reasonable return. The Congregation asserts at Page 14 of its Memorandum:

> Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981), merely held that a school's lease of school property to a corporation was "subject to local zoning regulations" and that the school's showing regarding its inability to sell the property satisfied those particular regulations.

Also, because the issue is one of statutory interpretation, another obvious distinction is that in Foster the zoning board was not within the City of New York and thus the court was interpreting another statute that does not contain specific language of 72-21(b), which the Congregation is attempting to misinterpret.

(c) The Congregation Also Incorrectly Cites to McGann, Which Does Not Involve the BSA at All

The Congregation most abuses McGann v. Incorporated Village of Old Westbury, 170 Misc. 2d 314 (Nassau Cty. Sup. Ct. 1996). It argues the following at page 14 and 15 of its Memorandum:

> Finally, McGann v. Incorporated Village of Old Westbury, 170 Misc. 2d 314, 647 N.Y.S.2d 934 (Nassau Cty. Sup. Ct. 1996), concerned a church's First Amendment challenge to a local zoning ordinance and held that "because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of legality," which must be overcome "beyond a reasonable doubt." The Congregation did not argue that it was exempt from zoning regulations or that the zoning regulations were unlawful. To the contrary, the BSA was not required to consider "reasonable return," because the lawful zoning regulations, promulgated by the legislature, state: "this finding shall not be required for the granting of a variance to a non-profit organization." N.Y. City Zoning Resolution § 72-21(b). (emphasis supplied)

Cong. Mem. at 14-15. The citation is completely and totally inaccurate and misleading. The cited and emphasized language does not appear in the case at all. In fact the church in McGann was in Old Westbury (in Nassau County), where the BSA has never had any jurisdiction and the exception language of New York City's Z.R.§72-21 (b) does not apply. Thus, the court could not have been interpreting the New York City Zoning Resolution. Also, the court there applied the applicable zoning regulations, even to a church, and did not engage in wholesale deference and abstention.

2. Finally, the Congregation's Citation to Homes for the Homeless Is Also Inapposite

The Congregation cites 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)[32] at P. 15 with a quotation that §72-21(b) did not apply to a not-for-profit entity, without noting that the use was a nonprofit use.

E. As Shown By Cases Cited by Respondents, Z.R. §72-21 (a) Requires that The Unique Condition Be Physical and the Congregation Failed to Show Any Physical Condition, Let Alone One That Satisfies the Arising From Requirement

The BSA seeks to divert the Court's attention by incorrectly describing Z.R. §72-21(a) on Page 18 of its Memorandum by heading its discussion of the issue with "(a) Unique Characteristic" when the statute clearly refers to "unique physical conditions." The primary issue presented by Petitioners is not whether the characteristic is "unique," but whether the condition is "physical." Because there is no evidence at all of any physical condition, then there is no substantial evidence for finding (a) and thus the variances must be annulled.

Z.R. §72-21(a) not only requires a "physical condition," it then describes examples of what it meant by a physical condition: "including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions." Accordingly, cases that describe other difficulties and hardships when addressing a Z.R. §72-21(a) finding still identify some type of a "physical condition."

The Congregation admits that "The building site is a rectangular 64 x 100 foot site just off Central Park West on West 70th Street and constitutes the entirety of Tax Lot 37." Cong. Answer to Pet. ¶ 41. In fact, the construction site consists of the combination of three rectangular brownstone lots, of which there are 117 nearby brownstone lots as shown just in the surrounding area diagram the

[32] The Congregation cited to the Appellate Division decision, without noting that it was later reversed by the Court of Appeals — over two years prior to their Memorandum.

Congregation filed with its application. R-53.[33] The Congregation intends to build deep into the bedrock with two subbasements, one a banquet hall of 6400 square feet. There simply are no physical conditions at all, unique or otherwise, and certainly none within the definition of Z.R. §72-21(a), which would constitute a hardship or practical difficulty.

The New York City cases cited in the Respondent Memoranda indeed are all careful to refer to specific physical conditions to justify the finding under Z.R. §72-21(a). Douglaston Civic Assoc. v. Galvin, 36 N.Y.2d 1 (1974) and Douglaston Civic Association v. Klein, 51 N.Y.2d 963 (1980) ("swampy nature of property")[34]; Galin v. Board of Estimate, 72 A.D.2d 114, 116 (N.Y. App. Div. 1st Dep't 1980), *aff'd*, 52 N.Y.2d 869, 870 (N.Y. 1981) ("narrowness and depth of the subject lot"); Albert v. Board of Estimate, 101 A.D.2d 836 (2d Dep't), *appeal denied*, 63 N.Y.2d 607 (1984) ("peculiar wedge shape of the subject lot"); and UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248 (1st Dep't 2002) ("construction of a large portion of the premises on pilings"); Vomero v. City of New York, 13 Misc. 3d 1214(A) (Richmond Cty. Sup. Ct. 2006), *rev'd*, 54 A.D.3d 1045, 864 N.Y.S.2d 159 (2d Dep't 2008) (irregular shape of the lot — no record as to what the Appellate Division found to be sufficient physical condition, though it did find that a physical condition existed); Matter of Elliott v Galvin, 33 N.Y.2d 594, 596 (1973) (irregular shape and small size — combined with split lot).

The Respondents cite to SoHo Alliance v. New York City Bd. of Stds. & Appeals, 95 N.Y.2d 437, 441 (N.Y. 2000) Congregation Memo, p. 1; BSA Memo at 16. The SoHo case involved physical conditions such as "idiosyncratic lot configuration," "L-shaped" and "irregular and unique shape of lots."

[33]Were the Respondents to argue that the rectangular lots are a physical condition, they are not unique. Judicial notice should be taken of several townhouses in Manhattan that became "lots" in the last year as a result of destruction by construction accidents or explosions.

[34] The BSA's citation at page 44, to "Douglaston" is unclear: see Douglaston Civic Assoc. v. Galvin, 36 N.Y.2d 1 (1974) and Douglaston Civic Association v. Klein, 51 N.Y.2d 963, 965 (1980).

The Respondents cite to a number of cases interpreting zoning statutes that do not include a requirement for a "physical" condition as the hardship.[35] *See* Commco, Inc. v. Amelkin, 109 A.D.2d 794 (2d Dep't 1985) (Town of Huntington — no interpretation of §72-21(a) or any other statute requiring a physical condition); Dwyer v. Polsinello, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (Rennsalaer County — no interpretation of §72-21(a) or any other statute requiring a physical condition); and Fuhst v. Foley, 45 N.Y.2d 441, 444 (1978) (Town of Greenburgh — no interpretation of §72-21(a) or any other statute requiring a physical condition).[36]

Additional cases cited by the Congregation are similarly inapposite as to interpretation of the statutes' use of "physical" as they relate to whether a condition must be unique. Douglaston, UOB, and Commco were also cited by the BSA and distinguished above. Since there are no physical conditions at all, whether the condition is unique is not relevant, but it is still clear that the perfectly rectangular shape of townhouse lots is hardly unique in the area. *See* Cong. Answer ¶ 31 ("The Congregation denies the allegations in paragraph 31 of the Petition, except admits that Lot 37 is a regularly shaped lot, 64 feet by 100 feet.")[37]

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[35] See New York State Town Law Section 267-b-2-(b) ("that the alleged hardship relating to the property in question is unique" and (c). See P-180-1. It is regrettable that many courts in BSA zoning cases involving statutory interpretation may not have been advised by the parties of the differences between City and State law. Perhaps the Corporation Counsel believes this is of "no matter"; we would disagree. Many New York City zoning practitioners are not aware of the differences existing outside their own jurisdiction.

[36] The BSA also cites West Broadway Associates v. Board of Estimate, 72 A.D. 2d 505 (1st Dep't 1979), leave to appeal denied, 49 N.Y.2d 702 (1980) (memorandum order without opinion — no precedential value). and 97 Columbia Heights Housing Corp. v. Board of Estimate, 111 AD2d 1078 (1st Dep't 1985), *aff'd*, 67 NY2d 725 (1986) (memorandum orders without opinion — no precedential value).

[37] Although not cited by Petitioners in their Memorandum of Law, the BSA at page 23 of its Memorandum also attempts to distinguish the holdings in Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710 (2d Dept. 1988) and Bright Horizon House, Inc. v. Zng. Bd. of Appeals of Henrietta, 121 Misc.2d 703 (Sup. Ct. 1983) claiming that they were cited as to "physical condition." But they were not cited for that reason even in a letter brief submitted by another opponent in the BSA proceeding, and do not address the issue of physical condition. These cases were cited by another attorney who was amongst the community opponents, at 3908 and 3922, for the proposition that no deference is to be accorded a religious organization for variances like the condominium variances. Even if the case were cited as to physical condition, that would be irrelevant since neither case is a New York City case concerning interpretation of the words "physical condition" in the New York City statute.

On the other hand, the BSA ignored Petitioners extensive discussion of 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). Pet. Mem. at p. 42.

1. The BSA Failed to Identify Any Evidence in the Record Identifying The Nature and Location of The Alleged Obsolescence And How It Meets the Arising From Requirement

The Respondents expend a great deal of energy in trying to explain that a physical condition can include a physical condition of a building, apparently conceding that a "physical" condition is required under §72-21(a). It seems perhaps that the physical building condition upon which the Respondents rely is "obsolescence." However, there is scant discussion of what is "obsolete" — is the Respondent claiming that the Synagogue is obsolete or the existing community house is obsolete? The Respondents can point to nothing evidentiary as to either, except possibly to a 54-year-old elevator that requires replacement. Nor is there any explanation as to the causation — how the so-called physical obsolescence (*i.e.*, physical condition) creates a hardship "arising out of" the strict enforcement of the zoning resolution.[38] If it is the community house that is "obsolete," then an as-of-right building resolves any obsolescence, but, again, it is not clear upon what particular facts in the Record the Respondents rely. If the Synagogue is "obsolete," again an as-of-right building resolves the issues of egress and circulation. So, the hardship does not "arise out of" the strict application of the zoning regulation.

2. Obsolescence Is Not an Appropriate Factor Here, Especially Where The Variances Are for a New Building

Similarly, the assertion that the existing building that occupies two-thirds of the frontage of the lot is somehow obsolete to a depth of 60 feet is not a basis for the Z.R. §72-21(a) finding because there

[38] BSA Staff, in its June 15, 2007, R-255, focused on the issue of "causation" and requested:

> 14. Page 20: Within the first paragraph, one of the elements of the suggested "(a) finding," is "...the dimensions of the zoning lot that preclude the development of floor plans for community facility space required to meet CSI's ...programmatic needs." Please specifically explain in what way the site's "dimensions" hamper CSI's programmatic needs.

No response was provided to this request. The Congregation claims at R-309 that it responded at R-338-39. The response consists of a barrage of conclusory verbiage from counsel for the Congregation, with no evidentiary support at all.

is no showing that the variances in any way relate to the conditions — there is no showing of "arising from." There is no showing of any difficulty or excess cost in demolishing the existing community house — to the contrary. There is no evidence that the existing building is obsolete — there are only assertions of ultimate fact. This relatively small 4-floor existing building is being rented partially to Beit Rabban for $500,000 year. The building is no more obsolete than any other brownstone on the block. Nothing is cited in the record. Further, with the cooperation of the BSA, the opposition expert architect was unable to visit the interior of the existing community house (requested over 5 months prior to the close of the hearing), and it was an abuse of discretion for the BSA to consider unspecified claims of obsolescence while not instructing the Congregation to provide access to the building to the opposition's expert. R-3825, R-3877, R-3906, P-166. Without specifying any facts as to the claimed obsolescence, it is not possible to ascertain the relationship between the hardship claimed and the variance - the arising from requirement. [On the return of the Petition — the BSA failed to fill in the record as to facts Commissioners' may have obtained from their inspection — thus, presumptively, there are no such facts as to the Commissioners' inspections that may be used to support the findings.]

Where a new building is to be constructed, and the obsolete building is to be demolished, and where an as-of-right building resolves all hardships associated with the alleged obsolescence, then there is a failure of the causation arising from requirement in §72-21(a).

The BSA cites to 97 Columbia Heights contending on page 19 "reinstating a variance and finding that the uniqueness requirement was satisfied by the demolition of a building, resulting in increased costs." There is no showing here of any special increased costs in dollars and cents. The demolition costs are minimal. Were the BSA's view to be accepted, then any building which an owners wishes to replace with a variance requiring structure can be described as obsolete and then a finding (a) obtained to build a larger building, even though an as-of-right building responds to the hardships which the applicant asserted were caused by the obsolescence.

Obsolescence is used appropriately, arguably, when a building is deemed obsolete for its current use, as in Homes for Homeless, Inc., *discussed infra.* Some argue that obsolescence could be an appropriate factor in a case where a building may be too expensive to modify or demolish - but no such evidence exists here, and the "arising from" condition would still be need to be satisfied. The existing community house can be demolished for a nominal amount based upon the construction cost estimates provided by the Congregation. The total hard construction cost of the as-of-right Scheme A building is estimated to be $19 million, of which only $100,000 is for demolition. R-4873. Under the BSA logic, almost any building that someone wishes to replace could satisfy finding (a), rendering the requirement of physical condition to be meaningless. See Carriage Works Enterprises, Ltd. v. Siegel, 118 A.D.2d 568, 571-570 (2d Dep't 1986) ("the building is still structurally sound and could, with the infusion of approximately $ 10,000 to $ 15,000, be renovated for the proposed use. We remain unconvinced, however, that the petitioner has met its burden as to the grant of a use variance.") The citations by the BSA on page 19 of its Memorandum to Commco, *supra* and Dwyer, *supra* are similarly not apposite, since these are not New York City cases interpreting whether obsolescence can be a physical condition under New York City Z.R. §72-21(a).

In 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), the variance there concerned a proposed homeless facility involving an existing building and a vacant lot (here, the Congregation seeks variances for an existing community house and a vacant lot). Petitioner cited this case in its initial memorandum, but the BSA chose not to respond, since, in that case, the BSA asserted a different position.

The BSA granted a use variance only for the existing building (claiming irregular lot and obsolescence), but not for the vacant lot. The BSA made a distinction that the "determination regarding the structure's obsolescence is not relevant to the requested variance for expansion into a newly constructed building." The Appellate Division remanded the case to the BSA for further consideration because the BSA provided no rationality in the distinction drawn. On appeal, the BSA

argued that "The finding that authorized the legalization of the two buildings already in use relied upon findings that the existing hotel structures were functionally obsolete and that the lot was irregular. Determinations regarding a structure's obsolescence, however, are not relevant to a requested variance for expansion into a newly constructed building." See Brief of BSA, April 29, 2005, Court of Appeals. (Brief Available on WestLaw)

> The record reflects substantial evidence supporting the BSA's finding that the site does not have unique physical conditions that create an unnecessary hardship, or practical difficulties that require an expansion of the existing use. The Court of Appeals has determined that for entitlement to a variance, a petitioner generally "must show that as a practical matter he cannot utilize his property or a structure located thereon 'without coming into conflict with certain restrictions of the [zoning] ordinance.'"

Thus, in Homes for the Homeless, the BSA cited to the physical irregular lot, validated the causation requirement, and relied upon obsolescence only for the extension of the use variance and not for the new building in the vacant lot

F. In Stating That It Is of "No-Moment" Whether a Programmatic Need Hardship Such As Access May Be Accommodated by an As-of-Right Development, the BSA Improperly Ignored the Causation Requirement of Z.R. §72-21(a)

The BSA has ignored the causation "arising out of" requirement in making its hardship findings under §72-21(a). Astonishingly, as to the access and circulation hardship, the BSA states that it is irrelevant that an as-of-right building resolves the hardship; it is of "no-moment."

One of the "hard spots" for the BSA (R-1749) was to find a "physical condition" to support the (a) finding or to find a hardship or difficulty or programmatic need, hopefully physical in nature, to shoehorn into the (a) finding. The Congregation settled on the programmatic need of physical access and circulation to and from and within the Synagogue Sanctuary building. See extensive detailed factual averments at Pet. 242 *et seq*., and the overbroad denials by Respondents. Access and circulation were so important that the Congregation drummed in the issue over and over again in its multiple submissions of its 50-page statement in support, sometimes mentioning the issue 30 times in a single document. The "hardship" had all the elements of drama, including a landmarked sacred site and handicapped and aged people too embarrassed to attend religious services. If the flag could have

been used, it would have been. Unfortunately, the facts do not support the claim. An as-of-right building resolves the problems. (The Congregation never even identified a single fact that it could not replace its 55-year-old elevator without erecting a new building.)

The Congregation responded in its brief by asserting a scintilla standard, without showing the scintilla. The BSA, realizing that the Petitioners were overwhelming correct on this issue, abruptly announced that this was of "no-moment," something the BSA did not have the gall to assert in its Resolution, so ridiculous is the proposition.

Ignoring Z.R. §72-21 and the very purpose of zoning variances, the BSA astonishingly and incorrectly asserts that a variance may be granted even if there are no supporting hardships arising from the strict application of the zoning regulation:

> 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 [R. 5 (¶ 63), citing, Islamic Soc. of Westchester, supra]. Thus, the Opposition's suggestion that the Congregation's programmatic needs, and access and circulation issues [Petition ¶¶ 247-261] could have been addressed by an as-of-right development, are of no moment.

BSA Answer at ¶ 247. BSA Memorandum of Law at page 25, with no further explanation. This is an extraordinary proposition: that the BSA would grant a variance to a religious institution asserting a hardship, when the religious institution does not need the variance to resolve the hardship.[39]

The BSA was responding to the Petitioners' still unrefuted assertions that the claimed access and circulation hardship of the Congregation would be resolved by an as-of-right building without the need for any variances. Pet. ¶ 247-261. Accordingly, the BSA was not authorized by the zoning resolution to grant a variance based on that hardship.

The BSA's position is a fundamental error of law. Any reading of §72-21 and variance law shows that the purpose of variances is to relieve property owners from unreasonable hardships created by the zoning law. See Marchese v. Koch, 120 A.D.2d 590, 591 (N.Y. App. Div. 2d Dep't 1986):

[39] The record has no substantive evidence as to any "excessive additional costs." One of the questions the BSA never would ask is the cost to the Congregation of replacing the 1954 elevator with a modern elevator. It is as if a $35 million building must be built to replace a $100,000 elevator.

> The petitioner argues that his lot is not suitable for residential use because of its large size, unusual depth, trapezoidal shape, and proximity to another lot which is being used for commercial purposes. However, the petitioner presented no evidence to show how these conditions prevent him from being able to construct residences or obtain a reasonable return from such a use.

Z.R. §72-21(a) is clear in stating that there must be a finding that "practical difficulties or unnecessary hardship arise in complying strictly with the use of bulk provisions of the Resolution." Fuhst v. Foley, 45 N.Y.2d 441, 444 (1978) ("it is incumbent upon an applicant to demonstrate that 'strict compliance with the zoning ordinance will result in practical difficulties.'"[40]

It is clear that if a hardship can be resolved in an as-of-right building with no variances, then it is not a hardship that "arise[s] in complying" with the Resolution.

Similarly, Z.R. §72-21(e) makes the purpose of variances more explicit: "(e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief." In other words, the purpose of the variance is to relieve the property owner from a hardship. If the owner can be relieved of the hardship without a variance, then the minimum variance under §72-21(e) is no variance.

The BSA incorrectly states that the "arise in complying strictly" and "minimum variance" requirements are not applicable to a variance application by a religious organization. Were the BSA to be correct, there would then be no need for the BSA and hearings when a religious organization applied for a variance.

In this proceeding, however, the BSA used the access and circulation hardship to justify the need for a variance for the revenue-generating condominiums, which is clearly outside the argument that the BSA must defer to assertions of fact by religious organizations that are inconsistent with rationality and the real world.

If the BSA now states that it is of "no moment" that an as-of-right building resolves the access and circulation hardships, then it needs to explain why the difficulty was mentioned in the decision, why it is included as a programmatic need, and why the BSA did not require the Congregation to

[40] In New York City, as opposed to almost all if not all other jurisdictions in New York State, the applicable zoning resolution statute requires additionally that the practical difficulty arise from a unique physical condition.

remove from its statement in support the repeated references to access and circulation hardships, as the BSA did when it had asked the Congregation to remove the assertion that revenue generation from the condominiums was a legally cognizable basis for the variances.

1. There Is No Scintilla of Evidence That Any Variances Are Needed to Resolve Access and Circulation Issues

The Congregation suggests the scintilla standard, to support its central argument, that only variances would remedy asserted hardships of access and circulation; for the access and circulation finding, the BSA and the Congregation cite not to facts in the record, but only to the BSA references to "representations" by the Congregation and to "indications." Cong. Memo at 12. BSA Res. §60, §72, §73. Indications and representations are not facts. The BSA has not cited to any facts to support the findings based upon "representations." Similarly, the BSA states in is Memorandum at 20:

> Moreover, the Congregation represented that the proposed building will provide new horizontal and vertical circulation systems to provide barrier-free access to the Synagogue's sanctuaries and ancillary facilities [R. 5 (¶ 73)].[8] The BSA, citing to case law, rationally found that the Congregation's programmatic needs constituted an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations" [R. 5 (¶ 64) …

(*See also* Congregation Memorandum at 12 "The BSA's reliance on materials indicating that such alternatives would not be workable clearly satisfies the more-than-a-scintilla 'substantial evidence' test" without identifying the scintilla).

Clearly the BSA was unable to find any evidentiary facts to support this proposition, since the BSA Resolution could point only to that which "the Congregation represented." Second, the BSA even there sailed right through the causation requirement in §72-21(a). Although the Congregation asserted that the proposed building will provide these systems to make the facilities barrier free, it did not assert that an as-of-right building would NOT do the same thing. Of course, since opponents raised this issue repeatedly,[41] when the BSA made its so-called findings, it was cleverly trying to distort its way around the requirement of causation (while, at the same time illustrating a lack of impartiality by the BSA).[42]

[41] For example, June 20, 2007 Community Objection #30, R-269 (Pet. Ex. E) and references cited in Pet. at ¶¶ 109 *et seq.*

The Respondents must identify facts in the record, not conclusory findings by the BSA and not assertions of counsel inconsistent with physical reality and the opinions of the Congregation's own experts, and certainly not to "indications."

After scrutinizing the record for months, the Respondents simply have been unable to identify any evidence (even a scintilla) to support the assertion that variances are required to resolve an asserted religious programmatic hardship for access and circulation to its Sanctuary. The existence of a hardship is not a sufficient basis to obtain a variance. What is necessary is that a variance must be granted in order to resolve the hardship.

The Congregation described this asserted hardship as central to its variance application and the Respondent relied upon this hardship to find programmatic needs to support the community house and condominium variances. *See* Congregation June 17, 2008 Letter, R-4859 at R-4860 ("significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application."). See Pet. Ex. P-1 reproducing R-4860.

The Respondents rely upon the asserted access and circulation hardship to underpin all of the variances. First, the Respondents claimed that these access hardships were "physical" in nature and supported the Z.R. §72-21(a) requirement for a "unique physical condition." Next the Respondents used this hardship to assert that the there was "obsolescence" that satisfied the physical condition requirement. Then the Respondents claimed that resolving these access hardships were programmatic needs. Finally, the BSA in its decision used "programmatic needs" as a hardship to support, not just the lower floor religious community house variances, but also the upper floor luxury condominium spaces, which account for 90% of the variances.[43]

Yet the Respondents have not been able to identify any evidence in the record to support the claim that variances are needed to resolve this alleged hardship. There is a simple fact that frustrates

[43] The BSA, notwithstanding, did use religious programmatic need as a basis for its (a) and (e) finding for the revenue-generating programmatic needs. BSA Res. ¶122, ¶214 and ¶215, and, even the Congregation cannot explain what the BSA had in mind. Cong. Mem. at 13..

the Congregation and the BSA in supporting their false assertion. The Zoning Resolution, as a generous accommodation to religious organizations, permits without any variances at all, an as-of-right community building to occupy not 70% but 100% of the entire lot up to 23 feet above street level. For the Congregation, all circulation and access issues are addressed on the first floor, except for a 100 square foot elevator shaft that is in the as-of-right part of the proposed building. It is for this reason that the distinguished architect for the Congregation was unwilling to misrepresent to the BSA that variances were needed to resolve access and circulation issues.

The Congregation's architect, in a specific statement in response to contentions by opponents on this specific issue, agreed that no variances were required to meet this programmatic need. The BSA and Congregation did not deign to discuss this probative and conclusive admission by its own expert.

In summary, analysis of the circumstances surrounding the false assertions by the BSA and the Congregation as to access and circulation are illustrative of the arbitrary and capricious and irrational conduct of the BSA in the BSA proceeding and its response to the Petition:

- A 6500-page record and 18 months of hearings do not establish that matters were considered by the BSA or found in the record.
- Representations and indications are not facts.
- The BSA accepting facts that conflict with reality is irrational.
- The BSA capriciously shaped the record by being careful not to ask the Congregation expert to explain the claimed relationship between the access and circulation and the variances.
- There must be a causal relationship between an alleged hardship such as access and circulation and the variances sought.

G. The Proper Remedy for a Property Owner Seeking Relief from Hardships Created by the Landmark Law Is Under Z.R.§74-711 And The BSA Has No Role in Providing Relief For Such Hardships

The BSA improperly used landmarking as a unique physical condition hardship to satisfy Z.R. §72-21(a). Not only is the alleged hardship resulting from landmarking not a physical condition under Z.R. §72-21(a), but Respondents were unable to show how this hardship, especially as to the revenue-

generating condominiums, arises out of the strict application of the zoning regulations as required in Z.R. §72-21(a). Thus, the variances as to the condominiums must be annulled for that reason, but another reason is that the BSA is not authorized to consider the hardship of landmarking.

The landmarking hardship alleged by the Respondents arises, not out of the strict application of the zoning regulations, but out of the regulation of the New York BSA landmark laws, which apply generally to the West Side blocks surrounding the Synagogue. The Zoning Regulation clearly removes the BSA from any role in deciding when a hardship from landmarking requires relief. The LPC has a role and the City Planning Commission has a role, but the BSA has absolutely no role.

BSA knew that what it was being asked to do, taking into account that the landmark status was improper — this was the "hard place" the Respondent Chair referred to at the first hearing:

> 510 So, we're put in this hard place.
> 511 Typically, when you have a situation that goes through Landmarks where you're
> 512 asking for height and setback waivers and they're not driven by hardship, there's another
> 513 venue and I know that you just mentioned 74-711. It - - maybe it was foreclosed to you.
> 514 That's unfortunate, but we're here looking at this case and it's just - - it's been very hard
> 515 for us to get our hands around this.

R-1749. The Congregation acknowledges that the LPC would not provide 74-711 relief to the Congregation, in its letter of June 17, 2008, R-4859 at R-4861: "Its request for Landmarks cooperation on a ZRCNY Sec. 74-711 special permit was denied, thus properly bringing this Application to the Board for relief." Of course, there is nothing at all proper about asking the BSA to do what the LPC would not do under §74-711, when the BSA has no authority under such provision.

The Congregation describes it decision to withdraw it §74-711 request at page 15 of its July 9, 2008, its last version of its Statement in Support (R-5129-5128) and outrageously claimed that having been turned down by the LPC for a §74-711 special permit, that the LPC "signaled" that its issuance of a Certificate of Appropriateness (COA) for a smaller building would meet the preservation purposes required. But, if this were so, first of all the LPC would indeed have approved a special permit under §74-711 - and it did not do so. All the LPC said in effect was - "here is your COA - go to the BSA and see if you meet their other standards, because we are not giving you a special permit." The

Congregation claimed that "that CSI took every available step to seek the administrative relief provided in the Zoning Resolution for seeking a special permit to modify the bulk regulations for which this variance Application now seeks waivers, thereby exhausting its administrative remedies prior to the filing of this Application." Of course, that is false - the Congregation did not take the "available step" of applying for the special permit.

The BSA Memorandum at 55 acknowledges that the BSA took the landmark status of the Synagogue into account in both the 90% upper floor condominium variances and the 10% lower floor community house variances.

> The Record before the BSA demonstrated that the hardship in developing the Zoning Lot with a complying building was not created by the Congregation, but originated from the landmarking of the Synagogue and the 1984 rezoning of the site.

Z.R. §74-711 is the exclusive remedy for a party to seek relief from a hardship created by the landmarking of the property. There is nothing in Z.R. §72-21 to suggest that landmarking is a "unique physical condition" under §72-21(a) or a hardship recognized thereunder. Z.R. §74-711 provides in part:

> **Landmark preservation in all districts**
>
> 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, except floor area ratio regulations.

Allowing a property owner to use landmarking as a hardship constituting a unique physical condition under §72-21 (a) not only flies in the face of the language of Z.R. §72-21 (a) but also renders Z.R. §74-711 meaningless.

The Congregation played the same double game with the landmark "hardship" as it did with the "access and accessibility" issue and the "money is needed for programmatic needs" issue. It peppered its submissions with references to these issues, hoping to influence the BSA incorrectly, but then claims that the issue was just provided for context and in passing.

The Congregation, knowing that Z.R. §74-711 is the exclusive remedy for landmark hardships, states at page 12-12 of its Congregation Memorandum at 12-13: "In any event, the Resolution does not suggest that the BSA, here, treated the landmarked status of the synagogue as a hardship."

But the Congregation is incorrect. The BSA did improperly take the landmark hardship into account in making the (a) finding. The problem with the BSA position is that whenever the LPC landmarks a district or building, then the BSA arrogates to itself the right to grant variances and otherwise ignore the requirements of §72-21(a).

Finally, the BSA fails completely to identify any facts that illustrated why the landmark status of the Synagogue or even the landmark status of the entire West Side district prevents the Congregation from developing the construction site. The BSA's logic merely is "the Synagogue was landmarked so it creates a hardship in developing the development site." Or is the Congregation claiming that it is the application of the landmarks laws on the development site that creates the hardship? The record is silent. Where is the explanation for this logic? How do the variances relate to this hardship? Where is the causation? How do the variances provide relief from the hardship?

H. Landmarks Law Prevents the Congregation From Building a 17-Foot Wide Tower and the BSA May Not Grant Relief From This Limitation In This Matter

The split lot is a physical condition, according to Respondents, because the sliver law limitations of Z.R. §23-692 allegedly prevent the construction of a narrow 17-foot tower in the R10A portion of Lot 37.[44] See BSA Res. ¶94. Yet, it is the limitations of the landmarking law that prevent the construction of a sliver tower on Lot 37, not the sliver law, and not a result of the split zoning. Landmarks Preservation Commission made it clear that the maximum height it would allow on any part of Lot 37 was 95 feet in the R10A part of Lot 37. Alleged hardships imposed by application of the landmarks laws are not hardships caused by a physical condition, and, even if they are, they are not

[44] The Congregation's Architect, in a letter to the BSA dated March 28, 2008, stated that Section 23-692 is not applicable. R-4332, ¶ 2. This suggests perhaps that the sliver building is a ruse seized upon by the Congregation and the BSA to help contrive the split lot hardship claim.

hardships for which relief may be provided under Z.R. §72-21(a). For the reasons discussed elsewhere, hardships resulting from the landmark laws are not the basis for a variance under §72-21.

Lot 37 is 64 feet wide; the east portion of the 17 feet is in an R10A district, which permits building to the height of 185 feet. *See* Resolution ¶93. The R10A portion of the lot is the least restrictive portion of the lot. The rest of Lot 37 is in the more restrictive R8B district, which applies the contextual zoning limit of 75 feet. Under circumstances not applicable here, Z.R. §73-52 (*see* Resolution at ¶98) and Z.R. §77-00 provide relief from the split lot condition.

The Congregation is unable to satisfy the requirements of these provisions, but the BSA ignores this limitation. Both provisions restrict relief to where 50% or more of the lot is less restrictive; here the R10A portion is far less than 50% of the lot.[45] More importantly, however, is that for bulk variances, Z.R. §77-00's only relief is to realize the transfer of air rights from one part of the lot to another; it does not provide relief from height and setback requirements. This is one reason that Petitioners have stressed that this case does not involve the transfer of air rights. The Respondents do not disagree. Without such transfer, then, most of the BSA discussion in the resolution as to split lots as a hardship is irrelevant.

Although there is no need for the transfer of air rights from one part of the lot to another in this application, the BSA then states disingenuously in its decision:

> ¶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

Not only is there no need to "transfer a small share of its zoning lot area," but the dominant constraint here is the landmark restriction, not just the contextual zoning and the sliver law, so what the board is doing here is considering landmarking as the hardship for which relief is being granted and,

[45] §73-52 Modifications for Zoning Lots Divided by District Boundaries
Whenever a zoning lot existing in single ownership on December 15, 1961, or on the effective date of any applicable subsequent amendment to the zoning maps is divided by a boundary between two or more districts in which different uses are permitted, the Board of Standards and Appeals may permit a use which is a permitted use in the district in which more than 50 percent of the lot area of the zoning lot is located to extend not more than 25 feet into the remaining portion of the zoning lot, where such use is not a permitted use.

most importantly, relying upon a hardship not arising out of the strict application of the zoning laws. Since there is no need to transfer zoning lot area in this matter, then there is no "arising from" as it relates to this claimed hardship.

1. The Eighth DOB Objection Requiring a 40-Foot Separation Between Upper Floors and the Synagogue Lot Would Have Prevented the Tall Sliver Building

Another constraint against a tall building on the 17-foot wide R10A sliver that was ignored by the Board is Z.R. §23-711, which requires that there be a 40-foot separation between a residential building on a lot on the upper floors. With the initial application, the DOB had required a variance for this 40-foot separation, and the drawings submitted by the Congregation to the DOB and BSA "40 foot standard minimum distance between building" objection. The BSA staff agreed with the DOB and asked why the separation was not shown on the as-of-right drawings.[46] *See* Pet. N. 13 to ¶ 97.[47] The Congregation's architect agreed with the DOB as well. There was no indication at all that the DOB mistakenly applied Z.R. §23-711.

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[46] The BSA staff, in its first notice of objection of June 15, 2007, R-253 at R-256, specifically pointed out the need to meet this requirement:

> 21. Page 24: Please note that ZR § 23-711 prescribes a required minimum distance between a residential building and any other building on the same zoning lot. Therefore, within the first full paragraph, please 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.

[47] An opposition expert with extensive planning experience, Simon Bertrang, provided a cogent explanation of Z.R. §23-711 in a letter dated June 28, 2007, R-279 at R-281:

> BUILDING SEPARATION AND AS-OF-RIGHT DRAWINGS: ZR §23-711 requires a minimum distance between a residential building and any other building on the same zoning lot — in this case, with both buildings over 50' tall and with blank wall facing blank wall, the minimum distance is 40'. The As-of-Right drawings submitted by CSI in support of their BSA application are not as-of-right since the new building shown there would need a variance. Since As-of-Right drawings are a required part of any BSA submission, CSI's application is currently incomplete. A truly as-of-right building would either show the separation (40' minimum distance) or not include residential so that such a minimum distance was no longer required (a new community facility building would not trigger the requirement). Another way of avoiding the need for a 40' separation between the residential building on Lot 37 and the synagogue on Lot 36 would be to continue to treat them as separate zoning lots (i.e. not combine them in the way that CSI is proposing). Of course, as stated above, this would mean that their as-of-right FAR would be much lower: 5.59 instead of 8.36.

The Eighth Objection from DOB created a problem for the BSA — if the zoning resolution required a 40-foot separation in the upper floors, then the entire argument claiming that a split lot was a physical condition under 72-21(a) would not be a valid argument for the simple reason that even if all of Lot 37 was in the 10A zone, the Congregation still could not build a tall structure on the eastern 40 feet of the 64-foot wide lot.

The DOB eighth objection was curiously and mysteriously removed in August 2007, without any changes to plans and without any explanation or curiosity on the part of the BSA. The BSA Statement of Facts at ¶ 205 asserts that:

> "After revisions to the application by the Congregation, the Manhattan Borough Commissioner issued a second determination on the Congregation's application which eliminated one of the prior objections."

and again claims, incorrectly, at N. 7 to ¶ 230:

> 7 That the Congregation's initial application initially requested waivers related to Z.R. §23-711 (minimum distance between buildings), but then later withdrew its request for that variance after obtaining revised objections from DOB which, based upon revised plans, did not object to the distance between buildings at the site, is, contrary to petitioners' contentions [Petition, ¶ 97, fn. 13], of no moment. Indeed, this issue was addressed by the Board during the February 12, 2008 hearing where Chair Srinivasan and Vice-Chair Collins explained first that it is typical for an applicant to submit revised plans to DOB and receive updated objections which become the subject of the BSA's review, and second, that all that is being reviewed and acted upon by the Board are the requested zoning waivers, not the differences between the first and second sets of plans submitted to DOB [R. 3724-28].

However, there were no such revisions to the plans, and the Congregation's "direct[ing] the Court to the record" is not at all helpful in identifying that which is non-existent. In light of these denials and factual distortions, Petitioners in reply provide herewith a composite showing that there were no changes in the drawings between April 2007 and August 2007. Pet. Ex. N-8.[48]

The fact is that the DOB initially required the separation and the BSA staff agreed, but then the Congregation and BSA needed to conjure up a physical condition. So without any discernible changes in drawings and with no explanation, the Congregation was able to refile the same building and have the DOB remove the eighth objection, and the BSA asked no questions. These machinations allowed the Congregation to contrive the split lot as a physical condition — if the eighth objection were still in effect, the split lot argument would have been even more baseless. It is also curious, to say the least,

[48] The 40 foot separation objection was presented at the improper November 8, 2006 ex parte meeting, and based upon the check mark next to the relevant item 20, appears to have been discussed. Pet. Ex. Q-1, P-4261.

that the BSA in any proceeding would observe that an applicant was violating a provision of the zoning resolution not in the DOB objection, and be silent.

I. The BSA's Findings Under Z.R. §72-21(c) and §72-21(e) as to the Blocked Windows Were Arbitrary and Capricious

Petitioner Lepow owns two apartments in the adjoining 18 West, which apartments have windows that would be blocked by the proposed building, but would not be blocked by an as-of-right building; thus, variances blocking the window run afoul of Z.R. §72-21(c), as is fully described in the Petition. Pet. at ¶¶ 8, 262-288. The BSA action as to the windows violated Z.R. §72-21(e) as well.

1. By Instructing the Congregation to Create a Courtyard to Relieve the Adverse Impact Upon Only Some Adjoining Property Owners with Lot Line Windows, Acted Arbitrarily and Capriciously

The BSA instructed the Congregation to modify its building to create a courtyard in the rear to accommodate the rear side lot line windows in 18 West 70th Street, but acted arbitrarily and capriciously by not so instructing the Congregation to create a courtyard to accommodate the front side lot line windows. According to the Resolution and the BSA Answer at ¶319, the waivers of variance law to the Congregation resulting in the blocking of the lot line windows did not impair the appropriate use of the 18 West 70th Street cooperative apartment owners under Z.R. §72-21(c). The setback requirements in the zoning regulations would have protected these windows. The BSA dismissed the impairment of these cooperative apartments as being of "no moment."

The BSA provides no explanation of the distinction drawn between the nearly identical front and rear cooperative apartment. Even so, despite the BSA's "no moment" statement of dismissal of the concerns of the cooperative owners, BSA did in fact realize that there was an impairment under Z.R. §72-21(c). This section requires a BSA finding that the variance, if granted "will not substantially impair the use … of adjacent property."[49]

[49] The BSA falsely claims (BSA Answer ¶ 18) that Petitioners or other opponents asserted that the windows were legally required or that it had a legal right to not have the windows blocked under the building code or under general property rights and can provide no statement in the record that such assertion was ever made by other opponents.

Obviously, the BSA did recognize the impairment, otherwise it was acting upon an arbitrary whim in instructing the Congregation to create the rear courtyard. The BSA just does not have the power to order applicants to modify buildings on a whim. Zwitzer v. Zoning Board of Appeals of the Town of Canandaigua, 74 N.Y.2d 756 (1989).

This was a "compromise," but if the cooperative owners had no claim, then what was being "compromised"? BSA Answer at ¶319. Certainly, it was a compromise that in no way benefits owners of the front apartments.

2. A Front Courtyard Not Blocking the Front Windows Would Have Still Permitted the Congregation to Earn a Reasonable Return -— Z.R.§72-21(e) — the Minimum Variance

Ultimately, waiving the setback regulation in the front increases income to the Congregation, and thereby reduces the financial burdens borne by members of the Congregation - and the BSA should have expressly balanced the equities, but did not do so, especially where the proposed building so exceed a reasonable return to the Congregation. The BSA did not even make the required specific finding as to the front setback variance which results in the blocking of the windows - and improperly lumped all the condominium variances into one finding.

The BSA Answer at ¶292 crystallizes the fact that the rate of return approved by the BSA was nearly 11%, but that this is in excess of the return that the Congregation acknowledges as sufficient. The BSA's failure to require a courtyard for these windows was also in violation of Z.R.§72-21(e) which provides that a variance must be the minimum variance,, since the proposed/approved building earned a rate or return far in excess of the adequate reasonable return of 6.55%, and indeed was 67% in excess of the rate of return (6.55%) the Congregation itself deemed to be adequate. R-140, R-287.

J. In Considering Whether the Variances Will Alter the Essential Character of the Neighborhood and Impair Appropriate Use of Property and Be Detrimental to Public Welfare, Satisfaction of CEQR and SEQR Is Not Sufficient — the BSA Must Satisfy Z.R. §72-21(c) and Act Consistently With the Purposes of the Zoning Regulation

The Answers of the Respondents, as well as the BSA Resolution at ¶¶ 194-201, focus almost exclusively, when considering the impact on light and air, upon the provisions of CEQR and SEQR. See BSA Answer at ¶320. Yet, a project could satisfy SEQR and CEQR, but still not satisfy Z.R. §72-21(c). Oddly, Respondents focus on issues never raised by opponents (such as shadows in Central Park)[50] and on issues not raised in the Petition. BSA Memorandum, p. 8-10, 11-13, 40, 48, 53-54. It almost as if the Respondents are responding to another petition in another matter. *See* Pet. ¶ 54.

The BSA findings at BSA Res. ¶ 197 and ¶200 are wholly conclusory, and in conflict with reality. In its Answer at ¶ 320, the BSA states that "BSA properly considered and rejected the Opposition's assertion that the proposed building will cast shadows on the midblock of West 70th Street [R. 12 (¶ 194)]." The photographs (for example, those at Pet. Ex. L and R-1831-1850) and even the AKRF shadow study show this is not true at all, for they show sun where the studies show shadows. There also seemed to be a belief that existing shadows from the tall building at 91 West Central Park West were already casting the street into the dark, but the photographs show that this is not the case.

It is incumbent upon the BSA to respect the purposes of the zoning regulations: the mid-block contextual zoning regulations establish height and setback requirements to allow light and air into the narrow streets. Further, satisfaction of CEQR and SEQR requirements in no way means that Z.R §72-21(c) has been satisfied, or that the purposes of the particular zoning regulation are honored.

[50] When the Congregation filed its application, it provided no shadow studies. Opponents requested street level shadow studies of West 70th Street; the BSA responded with a non-issue, a request for shadow studies of Central Park (R-198-208), resulting in more community objections. When the BSA did ask for a West 70th Street shadow study, it requested minimalist studies of no value in evaluating the impact in the real world. The street shadow studies were not conducted over a period of a year, but were supplied a year after the variance application was filed. BSA Answer ¶322.

Dr. Elliot Sclar of Columbia University, who helped draft and implement the studies and reports underlying contextual zoning in 1984, submitted a letter in opposition to the Congregation project. Although the purpose of contextual zoning are self-evident from the parameters of the specific height and setback limitations, Dr. Sclar stated that:

> The Upper West Side today is a delicate balance of intense and highly congested urban living. The low-rise midblocks give the area the necessary respite of light, air and human scale to remain vital.

Letter of Dr. Elliot Sclar, February 12, 2008. R-3762 at 3763.

The proposed tower building will have a substantial detrimental impact on the character of West 70th Street and will be detrimental to the public welfare as a consequence of, among other things, the shadows that would be cast upon the mid-blocks by the tower building, and thus runs afoul of Z.R §72-21(c).[51] The impact of shadows from the proposed building on the narrow mid-block streets would be substantial, especially in the winter months, when the sun is low in the sky. At that time, even adding a mere 10 feet to a building height can have a substantial impact. Sunlight in the winter is known to have health and psychological benefits. And sunlight provides heat energy, lowering winter heating costs. What is not of consequence — of "no matter" — to the BSA is of great consequence to Mr. Kettaneh, who owns a historic brownstone across the street from the proposed tower, and to the many members of the community and the public who enjoy historic West 70th Street.[52]

In analyzing the impacts described in §72-21(c), the BSA is obligated to consider the impact that the zoning regulation sought to protect, and, further, to utilize a methodology that reveals rather than conceals the impact that contextual zoning seeks to protect. Because of the scale of the studies and the absence of street-level analysis, it is simply not possible to use the Congregation studies to evaluate the street-level impact of shadows. With the availability and wide if not universal use of

[51] A.R. §72-21(c) provides, in part "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." The out-of-scale proposed building is self-evident - and that fact that the Congregation's own Synagogue building is essentially compliant with R8B zoning, although in an R10A district, makes the proposed building all the more objectionable.

[52] Clearly, City residents who live close to the project nearly uniformly oppose the project. The Congregation could only muster 3 or 4 residents in the 400-foot zone to file statements in support of the project. Pet. Ex. K.

three-dimensional computer software, there can be no excuse for not considering the impact from a vantage point high in the sky and for limited periods.

After the filing of this case, Petitioners had the first opportunity subsequent to the consultant's report to take further photographs in late December 2008 of existing conditions. Pet. Ex. M. *See* Henrietta Smigel v. Town of Rensselaerville, 283 A.D.2d 863; 725 N.Y.S.2d 138 (3rd Dep't 2001) .

The BSA, in its misplaced reliance upon CEQR and SEQR, its misunderstanding of its obligations under 72-21(c), its rejection of any consideration of the purposes of the zoning regulation in question, its failure to require meaningful studies for analysis, and then its own reliance upon meaningless studies and the conclusory statements of a paid consultant for the applicant, was in violation of law, was arbitrary and capricious, and was without support in the record in making the finding under Z.R. §72-21(c).

K. As to 10-Foot Rear Yard Variances for the Second, Third, and Fourth Floors of the Community House, Respondents Still Have Been Unable to Show the Programmatic Needs Could Not Be Addressed Elsewhere in an As-of-Right Building

Before the BSA considered whether to provide variances to the Congregation for rear yard variance on the second, third, and fourth floors, under the minimum variance requirement of §72-21(e) — as well as the "arising from" requirement of §72-21(a), the BSA should have considered whether the uses could be accommodated on floors five and six of the as-of-right building, where the Congregation wished to have condominiums.

1. The Caretaker's Apartment and the Adult Classroom Can Be Accommodated on the Fifth Floor of an As-of-Right Building. Thus There Is No Support for Finding (a) and (e) for the Fourth Floor Variance

Respondents could not cite evidence as to why the caretaker's apartment on the fourth floor could not be moved from the fourth floor to the fifth floor. *See* Answers to Pet. ¶ 307, 330. The BSA's conclusory findings lacked any evidence to support findings under (a) or (e). Respondents could only repeat the assertion that the apartment needed to be in the community house rather than the parsonage

(currently rented as a private residence), rather than explain why it could not be on the fifth floor. BSA Mem. at p. 20, Answer at ¶ 236. *See also*, Congregation Mem. at p. 19. The BSA provided the fourth floor variance to the Congregation for the simple reason of supporting income generation, not programmatic need. The BSA did not impose a condition that the caretaker's apartment must be used for the caretaker. There is nothing in the conditions to the BSA Resolution that would prevent the Congregation from renting this apartment at market rates, in the same way that it has rented the Parsonage at a monthly rent of close to $20,000.

2. The Rationale for Second Floor Variances Lacked Substantial Evidence and Was Irrational Because Even the Last Statement in Support Shows That the Congregation Intends Offices on That Floor

The Respondents were unable to cite to any evidence that disputed the assertions in Petition ¶307 that the 60-student toddler program need was a contrivance. From 2001 to December 2007, no plans showed an all-toddler program on this floor. Until late in the game, the 10-foot waiver in the back was always shown to provide larger offices, not to accommodate "toddlers."[53] The Congregation's statement of July 8, 2008 is unambiguous: the second floor is for 1,473 sq. ft. of offices, not toddler classrooms.[54]

Without specific citation, the Congregation in its Memorandum asserts that "The record confirms that the Congregation described the toddler program to the BSA during the first BSA hearing." The transcript belies this assertion — there is passing testimony to a very small toddler program, which the Congregation wished to expand from 2 to 5 mornings. R-1741, line 332. The 60-toddler "need" was contrived later — 50 toddlers would not justify a variance, but 60 would. *See* Pet. ¶¶331-332. The BSA Resolution does not require the Congregation to use the space for the contrived toddler programs. This is confirmed by the drawings submitted to the BSA as the November 8, 2006 ex parte meeting - the second floor is allocated for "meeting rooms, offices, or office area." Pet. Ex. S.

[53] See Pet. Ex. S, the drawings shown to the Chair and Vice Chair at the November 8, 2006 improper ex parte meeting, which show no reference at all to toddlers on the second floor - only offices and meeting rooms. R-4275-4277.

[54] See 4th column, 6th row of table at R-5114 at R-5144.

3. Respondents Failed to Provide Any Citations to Evidence As to the Need for the Third Floor Variances

Respondents were unable to cite to a pressing programmatic need for the third floor 10-foot rear yard variance. The Congregation claims that the floor is designed to accommodate larger classrooms, but these are easily accommodated on the fifth or sixth floors of the as-of-right building. Respondents are as well unable to respond to the point that, were it not for the common areas on that floor allocated for residential use, the floor plates would be larger to accommodate larger classrooms. Even though a religious entity, the Congregation cannot expect to have the ideal, especially when the ideal is so obviously based upon contrivance and conclusory use of code words, such a floor plates.

L. The Standard of Review

Z.R. §72-21 is clear; a BSA resolution must have "a rational basis and is supported by substantial evidence in the record." *See also*, Cowan v. Kern, 41 N.Y.2d 591, 599 (1977), as cited by the BSA Mem. at 15. *See also*, Conley v. Town of Brookhaven Zoning Board of Appeals, 40 N.Y.2d 309, 314 (1976).

Rational basis and substantial evidence are not direct equivalents. Substantial evidence is not a minimal standard, requiring merely some evidence or a scintilla of evidence. And ultimate facts are not evidence at all. BSA findings that merely parrot assertions of the Congregation, themselves based on conclusory statements of counsel, do not constitute substantial evidence absent any actual evidence.[55] Nor are citations to the BSA Resolution substantial evidence, or any evidence. A review of the Respondents' Answers show that most "fact" citations are to the BSA Resolution.

Yet, on the basis of repetition of assertions unsupported by ANY evidence, the Respondents seem to maintain that the role of the Court in reviewing a BSA variance determination can be nothing more than to rubber stamp the BSA, to be the proverbial potted plant. Their contention is that no

[55] The BSA cites to a Court of Appeals case that mandates that proof that a property may not earn a reasonable return must be shown "beyond a reasonable doubt," a standard not met here. See, Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267 (2d Dep't 1983), discussed *supra*. *See also*, Spears v. Berle, 48 N.Y.2d 254, 263 (N.Y. 1979) *supra*.

review is the "standard of review," even in the many instances in this matter where the BSA cannot point to any facts (much less substantial facts) to support its conclusory findings. The Respondents appear to go so far as to suggest that the BSA may make, rather than only interpret, the law. *See* Lousoun v. Deutsch, 152 A.D.2d 657, 543 N.Y.S.2d 528 (2d Dep't 1989):

> Although the BSA has been granted rule-making power (New York City Charter § 666[2]; New York City Zoning Resolution § 72-01[d]), it is well settled that it has "no authority to create a rule out of harmony"with the law (see, Matter of Jones v. Berman, 37 N.Y.2d 42, 53, 371 N.Y.S.2d 422, 332 N.E.2d 303). Since the instant rule confers upon the BSA a power which has no legal "predicate either express or implied" (see, Matter of Bates v. Toia, 45 N.Y.2d 460, 464, 410 N.Y.S.2d 265, 382 N.E.2d 1128), it must be declared null and void (See also, Matter of Tohr Indus. Corp. v. Zoning Bd. of Appeals of City of Long Beach, App.Div., 538 N.Y.S.2d 610).

1. Substantial Evidence, not a Scintilla of Evidence, Must Support the BSA Findings, and the Congregation Failed to So Demonstrate

Notwithstanding the clear expression in Z.R. § 72-21[56] as to the requirement of substantial evidence, the Congregation asserts improperly that only a bit more than a scintilla of evidence is needed to support a BSA finding,[57] citing to a 1971 employment discrimination case where the court found there was substantial evidence to support the decision. Bethlehem Steel Corp. v. New York State Division of Human Rights, 36 A.D.2d 898 (4th Dep't 1971). Clearly the standard is one of substantial evidence. *See* Fuhst v. Foley, 45 N.Y.2d 441, 444 (1978) (cited by the BSA).

The Congregation resorts to the scintilla of evidence rule when it is unable to cite to the Record for support of key BSA "findings," findings that:

- are purely conclusory; and/or,
- rest entirely on representation and assertions by the Congregation, or by Counsel for the Congregation; and/or,
- rest on assertions by one Congregation representative asserting that another representative had made a statement; and/or,
- have no support of substantial evidence; and/or,

[56] Z.R. §72-21 states that "In any such case, each finding shall be supported by substantial evidence or other data considered by the Board in reaching its decision."

[57] Congregation Mem. at 12.

> "First, while Petitioners assert that the Congregation's accessibility needs could have been addressed by building an alternate structure as-of-right (Petitioners' Mem. at 35), the BSA considered such alternatives but found that they would not be viable. See BSA Res. ¶¶60-61. The BSA's reliance on materials indicating that such alternatives would not be workable clearly satisfies the more-than-a-scintilla "substantial evidence" test. See Bethlehem Steel, 36 A.D.2d at 899, 320 N.Y.S.2d at 1001."

- have no support even of a scintilla of evidence — example: false assertion that an as-of-right building does not resolve access and circulation.

2. Because New York Courts Have Frequently Scrutinized BSA and Other Zoning Board Actions and Assertions of Religious Programmatic Needs, the Court Here Should Carefully Scrutinize the Insufficiency of the Evidence What Fails to Support the Congregation's Claims for Variances

Respondents wish to mislead the Court into accepting that BSA and New York State zoning board decisions essentially are unreviewable and are always affirmed by the courts. Similarly, Respondents wish the Court to believe that courts have rejected applying scrutiny to the assertions of religious and community organizations.

A most recent case, Pantelidis, *infra*, 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 remand to the BSA, affirmed in 2008. The Appellate Division in Pantelidis observed:

> Beyond question, judicial deference to administrative authority and expertise is an important principle, as illustrated by the decisional law cited by the dissent. Such deference does, however, admit of some elasticity, especially 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.

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.) The Appellate Division made it clear that not every issue before the BSA required deference to the claimed expertise of the BSA:

> As to the dissent's claim that we and Supreme Court lack the "competence and expertise" to resolve the remaining outstanding issues on the existing record, neither the dissent, BSA, nor intervenors-respondents explain how the glass-enclosed staircase here in question raises land-use issues so complex and technical as to be beyond judicial competence. While there are undoubtedly many variance cases that courts will be unable to analyze without guidance from BSA on all relevant factors, this does not appear to be such a case. The dissent may believe that a high degree of technical expertise is required to determine whether allowing a one-time variance for the rear-wall, glass-enclosed staircase at issue will alter the "essential character of the neighborhood," but we respectfully disagree with this view.

Id. at 318. Neither do the issues here 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.

Nor do the cases cited by Respondents support the view that zoning boards and courts must defer to whatever assertions are made by religious organizations. Cases that support the proposition

that there must be some deference at the same time have not accepted the characterizations and wishes of the organization, particularly with regard to "accessory uses." As the Court of Appeals noted in Diocese of Rochester v. Planning Board, 1 N.Y.2d 508 (1956):

> That is not to say that appropriate restrictions may never be imposed with respect to a church and school and accessory uses, nor is it to say that under no circumstances may they ever be excluded from designated areas.

Id. at 526.

Another case cited by Respondents clearly demonstrates that courts and zoning boards will scrutinize the assertions of religious programmatic needs and the variance required to satisfy those needs. In Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981), the court overruled the zoning board after having scrutinized the decision of that board, and finding in essence that excessive deference was given to the school, and modified the variance to reduce it to the minimum necessary.

Thus, while respectful to the wishes of churches and schools, courts have indeed scrutinized requests of religious organizations with greater care. In a case cited by the BSA (BSA Memorandum, page 23), Yeshiva & Mesivta Toras Chaim v Rose (136 A.D. 2d 710, 711) (2d Dept. 1988), the court engaged in exactly the kind of scrutiny of an accessory religious use that the Respondents claim the courts should not and cannot engage: "The appellant supports this position by arguing that the place of burial and burial rites are important elements within the dogma of its religion. We feel that this argument goes too far."

Another case cited by Respondents that shows that courts need not, in the name of deference, accept every assertion — no matter how improbable or how much it conflicts with other evidence — is McGann v. Incorporated Village of Old Westbury, 170 Misc. 2d 314 (Nassau Cty. Sup. Ct. 1996), which held that a church was subject to the zoning regulation, even observing the cemetery that the church wished to establish may not even be a "religious use," and not supporting a variance, and disregarding the church's assertion that "it is running out of burial space." *See also*, Albany Preparatory Charter School v. City of Albany, 31 A.D.3d 879 (3d Dep't 2006).

Even Westchester Reform v. Brown, 22 N.Y. 2d 488 (1968), relied upon heavily by the BSA, was a regulation that excluded the religious use (which is not the situation here) and the court clearly stated that even in an exclusion case "the power of regulation has not been obliterated."[58]

Nor can the backdoor attempt to use religious programmatic need disguised as a landmark hardship be used to avoid the land use regulation here. That issue was laid to rest in Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York, 914 F.2d 348, 356 (2d Cir. N.Y. 1990):

> We agree with the district court that no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities. Cf. Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 872 (2d Cir. 1988).
>
> In sum, the Landmarks Law is a valid, neutral regulation of general applicability, and as explained below, we agree with the district court that the Church has failed to prove that it cannot continue its religious practice in its existing facilities. *Id.* at 356,
>
> So long as the Church can continue to use its property in the way that it has been using it -- to house its charitable and religious activity — there is no unconstitutional taking.

Id. at 357

> While expanding the amount of available space in the Community House may not provide ideal facilities for the Church's expanded programs, t does offer a means of continuing those programs in the existing building.

Id. at 358. In other words a religious institution is not entitled to the "ideal facilities" standard.

3. Arbitrary and Capricious Blindness to the Facts — Fashioning the Record

A BSA decision is to be annulled if it arbitrary and capricious. An example of a zoning board acting in an arbitrary and capricious manner would be deliberate blindness to the most critical facts, as the Second Circuit stated in describing the arbitrary and capricious behavior of a local zoning board in a leading case involving deference to religious organizations:

> 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)

Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 351 (2d Cir. 2007).[59]

[58] Westchester Reform was interpreting a Scarsdale Zoning Ordinance that did not contain the unique provisions of the New York City Zoning Resolution. Also, in the present case, there is no evidence of any heavy financial burdens as to the 10% of variances allegedly implicated in religious programmatic need. The Westchester Reform court made clear that "a modest increase in expenditures" may not offend religious freedom.

The BSA repeatedly displayed the same deliberate blindness as the zoning board displayed in Westchester Day School; the unwillingness to either discuss or make findings regarding such critical facts was apparently deliberate in that opponents, including counsel for Petitioners, repeatedly asked that the BSA inquire as to important facts. By not asking critical questions, the BSA shaped the record. The BSA could then claim to ignore any and all conflicting evidence from opponents. If the BSA had asked and required answers to inconvenient questions, then the BSA would not have been able to ignore as easily the facts disclosed in the answers to the questions.

Examples of the BSA deliberately blinding itself are set forth in the accompanying reply in the section "The BSA Deliberately Blinded Itself As to the Facts."

Indeed, the BSA proceeding below should be viewed not as a fair effort to seek the full facts, but as a way for the BSA to elicit just enough from the applicant with or without factual support so as to support a variance, while at the same time keeping the applicant from being forced to respond to questions from the BSA that would elicit an applicant statement that the BSA could not ignore. However, as Westchester Day School makes clear, intentional blindness is every bit as actionable as the record that would have been created.[60]

The BSA argues that it did ask questions suggested by opponents. That the BSA refused to request an updated Scheme C analysis, did not ask for the missing construction estimate pages, and did

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[59] Although the Second Circuit did overturn the zoning board's refusal to provide variances, the case did quite carefully hold that unbridled acceptance of the assertions of a religious organization were the other side of the pendulum, which is what the BSA has done here by its blind acceptance of the assertions of the Congregation. ("when an institution has a ready alternative -- be it an entirely different plan to meet the same needs or the opportunity to try again in line with a zoning board's recommendations -- its religious exercise has not been substantially burdened. The plaintiff has the burden of persuasion with respect to both factors. See § 2000cc-2 (putting burden on plaintiff to prove that government's action substantially burdened plaintiff's exercise of religion)" *Id.* at 353)

[60] The attempt at "record fashioning" by the BSA is more effective where, as here, the Department of Buildings decides not to send an attorney to oppose an applicants' appeal from the DOB decision denying the building permit.

not ask the Congregation to identify its access and circulation issues with specificity shows that the BSA argument here is wrong.[61]

M. Respondents Srinivasan and Collins Acted Improperly and Should Be Barred From Future Proceedings, if Any

The impropriety of the ex parte meeting by Srinivasan and Collins on November 8, 2006 is self-evident. *See* Pet. ¶¶ 289-303. Letter Requesting Recusal, April 10, 2007, R-5527, reproduced at Pet. Ex. I. The BSA now claims that Petitioners' Attorney did not ask to participate in the meeting, notwithstanding that he learned of the meeting only after it was held, and that the BSA offered Petitioners' counsel to have a similar improper ex parte meeting — an offer he immediately refused since he considered that to be unethical, as an attorney.

Rules permitting BSA staff to meet in pre-application meetings do not authorize the Chair and Vice-Chair of the BSA to have a full-scale meeting with the Congregation and its attorneys, architects, and financial consultant. Plans submitted at the meeting were substantially identical to those submitted in April 2007 with the Application (copies of these drawings were not provided by the BSA in the Exhibits attached to its Answer).[62]

Respondents refuse to provide notes of the meeting as part of the BSA Record herein, yet these notes are not protected from disclosure under The Public Meetings Law, §108. The BSA position is that notes of meetings between the Chair and Vice-Chair (and other documents related to the variance application and in the BSA files) are part of the BSA Record only if the Chair and Vice-Chair deign to designate them as part of the record. The Public Meetings Law, by implication, states that BSA

[61] An example of intentional blindness is the BSA claiming that the drawings provided to the Chair and Vice Chair at the ex parte meeting are not part of the record and need not be considered. These drawings show without doubt that the Congregation's toddler and other programmatic needs are contrivances. Pet. Ex. S.

[62] Until days before the filing of this reply, Petitioner has been unable to obtain the drawings submitted by the Congregation to the BSA, until the BSA provided them on March 16, 2009. See Pet. Ex. S. The drawings show that the proposed building externally is the same as that for which the formal variance application was made and that the zoning calculation show as item 20 the variance requirement relating to the "40 foot standard minimum distance between building", which bears a handwritten checkmark. Pet. Ex. Q-1, P-4261. The drawings for the floorplans, however, are different and provide conclusive evidence of the contrived programmatic needs as to the second, third, and fourth floors. See Pet. Ex. S. The second floor provides meeting rooms and offices, but no toddler facility at all. R-4274, Pet. Ex. Q-15.

proceedings although quasi-judicial proceedings, are still subject the disclosure requirements under the law. ("Nothing contained in this article shall be construed as extending the provisions hereof to: 1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals.")

As stated in the Petition and the Petitioners' Initial Memorandum of Law at 100, the BSA possesses all the powers needed to conduct a quasi-judicial proceeding; it has subpoena power, can order inspection (City Charter, Ch. 27, §667, *see* P-166), can take evidence under oath (City Charter, Ch. 27, §663, *see* P-163), and was established as part of the City's Office of Administrative Trials and Hearings (OATH) (City Charter, Ch. 27, §659, *see* P-162). *See* Rules of the City of New York, Title 28, §1-14. *See* P-174 (prohibiting ex parte communications).[63]

See, Calapai v. Zoning Board of Appeals of Village of Babylon, 871 N.Y.S.2nd 28 (2nd Dep't 2008) (municipal zoning tribunals are quasi-judicial); 200 West 79th Street Co. v. Galvin, 71 Misc. 2d 190, 193 (N.Y. Sup. Ct. 1970) ("Board and others like it are quasi-judicial bodies not empowered to review their own decisions…"). *See also*, Allied v. Niagara Mohawk Power Corporation, 72 N.Y.2d 271 (1988) ("the determination of whether an agency proceeding was "quasi-judicial"). *See* Real Holding Corp. v. Lehigh, 2 N.Y.3d 297, 302 (N.Y. 2004), citing with approval Jewish Reconstructionist Synagogue, Inc. v. Roslyn Harbor, 40 N.Y.2d 158, 162 (N.Y. 1976) ("(T)he board of zoning appeals is a quasi-judicial body created by State law.")

After the commencement of a variance proceeding, the BSA seems to agree that ex parte meetings involving the Chair and Vice-Chair would be improper, but not improper if the meeting

[63] A 2005 report by the New York County Lawyers' Association discussed the lack of sufficient standards for administrative law judges in New York City agencies and specifically described the BSA Commissioners as Administrative Law Judges. The report noted that many agencies confuse their rule making and adjudicatory roles. See page 7, Administrative Law Judge Reform Report, by the New York County Lawyers' Association Subcommittee on Administrative Law Judge Reform of the Task Force on Judicial Selection, September 12, 2005. Available at http://www.nycla.org/siteFiles/Publications/Publications184_0.pdf.

preceded the application.[64] That Respondents held the meeting, did not invite known opponents, and refuse to provide any indication of what took place at the meeting is sufficient to bar these Respondents from future involvement in this case.

V. Conclusion

Because there is no doubt that the Congregation can earn a reasonable return from as-of-right buildings on the development site, the condominium variances should be annulled. Similarly, because the Congregation is able to satisfy its programmatic needs in an as-of-right building that is all community space, the community space variances should be annulled. The BSA cannot just find that there is a hardship and jump to the conclusion that variances are need to resolve the hardship. For example, no variances are all are required to resolve the asserted hardship of access and circulation. Finally - because the BSA must have substantial evidence for each of the seven variances to support each of the five findings, it is clear, for the other reasons stated herein, that all of the variances should be annulled.

Dated: March 23, 2009
New York, New York

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[64] See Letter of Margaret P. Stix, BSA General Counsel to Assemblyman Richard N. Gottfried dated November 7, 2007, page 1, last paragraph, Ex, Z to BSA Answer, P-2323 (making a distinction that the meeting was not an official hearing.)

Exhibits Provided With Revised Verified Petition

Pet. Ex. A	Reformatted BSA August 26, 2006 Decision with Numbered Paragraphs	P-00019	See R-000001-R-000024
Pet. Ex. B	Table of Contents to Appendix A — 13 Volumes - Revised January 2, 2009 to Show BSA Record References		Not in BSA Record
Pet. Ex. C	Color 3-D Graphics of Project	P-00434 P-02429 P-02430	R-003571 R-001833 R-001834
Pet. Ex. D	BSA Meeting Record November 8, 2006 Improper Ex Parte Meeting	P-01245	Not in BSA Record
Pet. Ex. E	June 27, 2007 Community Objections to BSA	P-01777	R-000263
Pet. Ex. F	July 29, 2008 Letter to BSA of Martin Levine, Metropolitan Valuation Services	P-03907	R-005210
Pet. Ex. G	Letter Dated February 4, 2008 from Charles Platt to BSA Re Access Hardships Being Resolved by Conforming Building	P-02768	R-003611
Pet. Ex. H	Graphic Showing Areas of New Building Addressing Access and Circulation and Showing Lower Floor Variances Filed as Opp. Ex. GG-12 and GG-10.	P-00477, P-00475	R-004156 at P-004168 R-004156 at P-004166
Pet. Ex. I	Letter of April 10, 2007from Alan D. Sugarman to Srinivasan and Collins Requesting Recusal	P-04088	R-005511 at R-005638
Pet. Ex. J	Programmatic Drawings Floors 2, 3, 4	P-02606-08	R-002009-R-002012
Pet. Ex. K -	Analysis of Consent Forms Submitted by Respondent BSA on December 2, 2008 in the BSA Record.	P-04244-59	SEE 005189-005209
Pet. Ex. L	West 70th Street Shadows December 21, 10 AM, Shadow Study versus Actual Photographs	P-04260-60	SEE 005187-005188

Exhibits Provided With Petitioners' Reply

Pet. Ex. M-1	Location of Variances on Each Floor of Proposed Building R-4695. Composite. Diagram Showing Location of the Variances on Each of the Floors in the Proposed Building. In Reply to City and Congregation Denials of Petition ¶¶ 21 et. seq.
Pet. Ex. M-2	Allocation of Variance Areas in Proposed and As-of-Right Buildings. M-2 and M-3 Show Source Of Averment That 90% Of Variances Relate To Condominiums. In Reply To Respondents Denial Of Petition ¶21 et. seq. and ¶51, 52 et. seq.
Pet. Ex. M-2-A	Computation of Variances - Approved Building
Pet. Ex. M-2-B	Sources of Information - Area of Approved Building
Pet. Ex. M-3-A	Computation of Areas of AOR Building
Pet. Ex. M-3-B	Source of AOR Floor Area.
Pet. Ex. N-1	To Scheme C Earning a Reasonable Return. Excerpts from Record. In Reply to BSA Answer at ¶292.
Pet. Ex. N-1-A	¶ 292 of BSA Answer.
Pet. Ex. N-1-B	Acceptable rate of return R-140.
Pet. Ex. N-1-C	Acceptable rate of return R-287
Pet. Ex. N-2	Base Unit Condominium Construction Costs. Computation In Reply to And As Described by BSA Answer at ¶291.
Pet. Ex. N-3	Excerpts from BSA Record Showing Multiple Valuations of Site Values by Freeman Frazier. In Reply To BSA Answer At ¶ 296 And Respondents Answer To ¶ 206 Of The Petition Denying That Freeman Frazier Reports Were Varying And Conflicting.
Pet. Ex. N-4	Location Of The Two Condominium Floors In As-Of-Right Scheme A Building. In Reply To Respondents Bad Faith Denials To ¶22 Of The Petition As To Number Of Square Feet On Floors Five And Six.
Pet Ex. N-5	Value Of The Two Condominium Floors In As-Of-Right Scheme A Building
Pet. Ex. N-6	Location of Parsonage and Two Condominiums in Scheme A Building. R-605, R-606, R-4694. Composite, In Reply To Denials As To The Lack Of Relationship Between AOR Scheme A Condominiums And The Air Rights Over The Parsonage.
Pet. Ex. N-7	Summary and Metrics Site Value Two Condominium Floors In As-of-Right Scheme A Building.
Pet. Ex. N-8	Missing 8th Objection - R-85. R-88. R-402, R-405. In Reply To Respondents False Assertion That DOB Removed Eighth Objection In Response To Revisions To Plans. BSA Answer ¶205.
Pet Ex. N-9	Sliver Building and 40-Foot Zone R-3871. In Reply To Respondents Assertion That The DOB Removed Eighth Variance In Response to Revisions to Plans. BSA Answer ¶205.
Pet. Ex. N-9-A	BSA Comments Re 40-Foot Separation R-256. In Reply To Respondents Assertion That The DOB Removed Eighth Variance In Response To Revisions To Plans. BSA Answer ¶205.
Pet. Ex. O-1	Elevation Existing Looking South.
Pet. Ex. O-2-	Elevation AOR Looking South R-592, Provided To Respond To The

	False Denial Of The Respondents Of ¶45 And ¶46 Of The Petition. ¶
Pet. Ex. O-3	Elevation AOR Looking West R-607
Pet. Ex. O-4	Elevation Approved Looking South R-4694
Pet. Ex. P-1	Circulation Heart of Application. June 17, 2008. Congregation statement — Egress and Circulation Are Heart of Application. R4860
Pet. Ex. Q	Drawings Submitted By Congregation For BSA Meeting of November 8, 2006 - As Supplied By BSA On March 16, 2009. P-4261-4301
Pet. Ex. R	Item M to BZ Instructions. R-4273-4275.
Pet. Ex. S	Second, Third, Fourth Floors Drawings Submitted to BSA November 8, 2006 (Pet. Ex. R.) in Reply to BSA Answer ¶¶ 337-344 and In Reply to False Statement at City Answer 202 as to the Intended Use

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

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
Petitioners,	:	Index No. 113227/08 (LOBIS)
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules	:	
-against-	:	AFFIRMATION OF ALAN D. SUGARAMN
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.	:	

Alan D. Sugarman, an attorney duly licensed to practice law before the Courts of the State of New York, hereby affirms that the following is true under penalty of perjury:

1. I am counsel for the Petitioners Nizam Peter Kettaneh and Howard Lepow and submit this affirmation in support of their motion to file a further Reply in the within proceeding. The Local Rules of the Honorable Joan B. Lobis provide that the court will not accept supplemental papers after submission or argument of the application, without authorization by the court. Similarly, Rule 13(c) of the Local Rules of the Supreme Court of Manhattan requires the "express permission in advance" by the court. Because Petitioners wish to provide a supplemental memorandum to respond to new papers filed by the Respondents, Petitioners hereby request permission to file such a memorandum

2. Unique circumstances have arisen because the Respondents herein have in essence served papers which are in the nature of a sur-reply, but in a related case in which the Petitioners are nor parties.

3. Petitioners Kettaneh and Lepow seek to further reply to the Answering Memoranda of Law served on or about May 26, 2009 by the Respondents BSA and Congregation in the related action, Landmark West! v. City of New York Board of Standards and Appeals, Index No. 650354-08.[1] The Landmark West action was filed initially as a plenary action; the respondents therein moved to dismiss, asserting that the case should have been filed as an Article 78 proceeding.

4. A joint hearing for the instant proceeding and the Landmark West action was held on March 31, 2009. Prior to the hearing, the Kettaneh proceeding had been fully briefed; the Respondents had served their answering papers February 9, 2009 and the Kettaneh Petitioners had served their reply March 23, 2009.

5. Subsequent to the hearing, the Court ordered the Landmark West action be converted to an Article 78 proceeding. Respondents therein (which include the Respondents BSA and Congregation) served answering papers on or about May 26, 2009. The Kettaneh Petitioners were provided with courtesy copies by the Respondents. Landmark West is expected submit their Reply papers on or about June 19, 2009.

6. At the hearing of March 31, 2009, counsel for the Congregation asked the Court for permission to provide a sur-reply, including providing references to the record. Hearing Tr. at 36 and 43.[2] The Congregation's counsel had argued that the BSA Resolution and Record were replete with the necessary substantial evidence to support the "magic words" (to use the Congregation's terminology) required for the Z.R. §72-21 findings. Hearing Tr. at 36. The Court did not allow the filing of a sur-reply. Notwithstanding, in many respects the Congregation's and BSA's answers to the Landmark West amended petition are in effect a sur-reply to Petitioners' last pleading in Kettaneh; the Congregation has sought to include exactly the material which at the hearing the Court had not allowed

[1] The Answering Memoranda in the Landmark West case are referred to herein as the "New Memoranda."

[2] The Transcript of the March 31, 2009 hearing before this Court is cited as "Hearing TR."

the Congregation to supply. The Respondents added further arguments and new case citations as to issues previously briefed in the instant proceeding.[3]

7. In addition to the new legal argument, Petitioners are of the view that Respondents have materially mischaracterized the Record and the BSA Resolution, in both subtle and not so subtle ways.

8. As one example, the Congregation mischaracterizes the Record and the BSA Resolution to make it appear that the BSA had made a finding that the all-residential as-of-right scheme, using the revised site value, would earn neither a profit nor or a reasonable return. This is not so and relates to a critical error made by the BSA in not requiring the Congregation to complete the Scheme C analysis. The Record is conclusive that the an all-residential as-of-right building would earn a reasonable return - in its New Memorandum, the Congregation has attempted to obscure the clarity of the Record in that respect.

9. As another example, the Respondents has reasserted falsely that the Eighth Objection was omitted from the DOB because of a changes in plans submitted to the DOB. Another example is

[3] New arguments by the City address these issues: the Eighth Objection (n. 8 at p. 16); supporting condominium variances by reliance upon programmatic needs (p. 21); landmarked Synagogue and Parsonage as basis for finding (a) (p.33); encroachment on powers of City Planning and LPC (pp. 34-35); the BSA ignoring its own written guidelines (p. 42); rational explanation of methodology of analysis of reasonable return (p. 42), reasonable return by Congregation (p. 43); assertions that variance is the minimum variance (p. 53); and assertion that Z.R. §74-711 is a parallel remedy (p. 54-5).

New arguments by the Congregation address these issues: nine new precedents (pp. ii-iv); misleading citations to supporting evidence in record (p. 1); false assertions re obsolete building and incorrect citations to Record (p. 3); unsupported assertions that sliver law and floor plates and underdevelopment are physical conditions (p. 3); assertion that the condominiums are to defray costs of community facility (p. 4); discussion of development rights (p. 4); discussion of substantial evidence (p.9); nature of the proceedings and whether quasi-judicial (pp. 9-10); reliance on hearsay sufficient to support substantial evidence (p. 10); reliance on unsworn conclusory statements of counsel (p.10); rational basis of agency decision (pp. 11, 13); that hearsay from applicant may only be opposed by conclusive evidence from opponents (p.12); jurisdiction of BSA to consider zoning regulations requiring waiver absent formal action by the DOB (p.14); deference to BSA interpretation of statute (pp. 14-15); asserted evidentiary support (pp.16-18); conflating evidentiary support for programmatic and non-programmatic variances (pp. 14-19); deferring to religious organization for non programmatic variances (p. 19); improper use of fact that Synagogue is landmarked as a unique physical condition (p. 20-22); false assertions at to irregular shape of land (p. 21); false assertion that BSA Resolution consists largely of factual findings (p. 22); false claims as to BSA factual findings as to physical hardships (p. 22); incorrect assertions that non-profits need not satisfy finding (b) for revenue generating condominiums (p. 23); unsupported assertions as to rational basis of reasonable return analysis (pp. 25-26); false assertion that BSA requested analysis of a single as of right building scheme (p. 26); false assertion that BSA found that "any" as of right building would result in "substantial loss." (n. 3, p. 27); and, incomplete discussion of whether BSA provided a minimum variance ignoring allowance of excessive return (pp. 28-29).

the Respondents obscuring the dominant role exercised by the City Planning Department as to relief from landmarking hardships, to the exclusion of a role by the BSA.

11. Because the two proceeding are so similar, due process requires that Petitioners herein be afforded an opportunity to respond to the new material submitted to the Court by Respondents in the parallel action. Otherwise, the Petitioners' will not have had an opportunity to respond to the new "answers" of the Respondents.

12. Petitioners have completed their proposed further reply memorandum and will be able to file the memorandum forthwith, without delaying the proceeding.

13. Attached as Exhibit 1 are excerpted pages from the transcript of the March 31, 2009 hearing.

Dated: June 16, 2009
New York, New York

Alan D. Sugarman

Attorney for Petitioners

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Suite 4
17 West 70th Street
New York, NY 10023
212-873-1371
sugarman@sugarlaw.com

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 6

- -

LANDMARK WEST, INC., 103 CENTRAL PARK WEST CORP., 18 OWNERS CORP., 91 CENTRAL PARK WEST CORP. AND THOMAS HANSEN,

Plaintiffs

- against -

THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS, NYC PLANNING COMMISSION, HON. ANDREW CUOMO, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK AND CONGREGATION SHEARITH ISRAEL,

Defendants

- -

Index No. 650354-2008

- -

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioner

- against -

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

- -

Index No. 113227-08

March 31, 2009
60 Centre Street
New York, New York 10007

Lester Isaacs - Official Court Reporter

problem where the congregation would have cute back on its programs. BSA does look at this. They did an extensive review, in terms they would have to cut back the number of children that could be provided service. The number of classrooms. The classroom side, therefore, the number of students, that they could have in that building. They wouldn't be able to cut on what was planned. In terms of the financial hardship that was looked at, I will go over it, unless you don't want me to --

THE COURT: Not on this stage. I need an analysis on what I have to do, at least on the 78 to the declaratory judgment, that's brought out over what I do need to review on an agency finding, anything.

MR. MILLMAN: Yes, your Honor. I believe your Honor that the analysis in particular on the Article 78 though I think ultimately, it's the same analysis, that was asserted, is what one does, one looks at the five findings, which is maximum, would have to be made. One says you look at the BSA decision. You see the magic words in each of the five. Then after that, you go to the 6,000, 7,000 page record and look to see whether there is some, something, someone is uttering those words in testimony or submission to

Proceedings

THE COURT: At this point you have given me a lot more to look at.

MR. MILLMAN: Your Honor, would it be helpful regarding the issue of page numbers? And in the record, we could provide your Honor with very simple one page or two page identifying the findings.

THE COURT: Are they in the papers?

MR. MILLMAN: I'm not sure.

THE COURT: We have two problems. The Attorney General, the lack of the Attorney General's presence and to convert the landmark to a 78, what procedures do I have to follow to do that.

Thank you very much.

Very interesting argument.

* * *

C E R T I F I C A T E

I, Lester Isaacs, an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

Lester Isaacs, S.C.R.
Official Court Reporter.

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

---------- x

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

- against -

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

AFFIRMATION IN OPPOSITION TO THE PETITIONERS' MOTION FOR LEAVE TO SUBMIT A FURTHER REPLY

INDEX NO. 113227/08

CHRISTINA L. HOGGAN, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms under the penalties of perjury, pursuant to Civil Practice Law and Rules §2106, as follows:

1. I am an Assistant Corporation Counsel in the Office of Jeffrey Friedlander, First Assistant Corporation Counsel of the City of New York, attorney for Respondents, Board of Standards and Appeals of the City of New York, Meenakshi Srinivasan, Chair and Christopher Collins, Vice Chair (collectively "BSA").

2. I submit this affirmation in opposition to the Petitioners' motion for leave to submit a further reply.

3. Petitioners, in an effort to submit additional papers in the instant proceeding, assert that Respondents, in answering the Petition in Landmark West! Inc., v. City of New York Board of Standards and Appeals, Index No. 650354/08, raised new arguments which in actuality respond to the instant proceeding. As set forth below, not only is Petitioners' request procedurally

improper, but Petitioners misrepresent City Respondents' answering papers in Landmark West! Inc..

ARGUMENT

4. Petitioners' request to submit a reply is procedurally flawed because there are no papers in the instant proceeding for Petitioners to reply to. Indeed, the last papers submitted in the instant proceeding were filed by Petitioners on or about March 31, 2009. Specifically, Petitioners filed: 1) a 60 page reply Affirmation; 2) a 68 page Verified Reply to BSA Statement of Facts; 3) a 114 page Marked Petition to Show Answers with Reply;[1] 4) a 56 page Reply Memorandum of Law; and 5) a 217 page Revised Binder of Exhibits comprised of Petitioners' Exhibits A-S. Consequently, since there are no papers in the instant proceeding for Petitioners to reply to, their request to submit a reply is procedurally improper.

5. To the extent Petitioners allege that they should be permitted to respond to City Respondents' answering papers in Landmark West! Inc., a separate Article 78 proceeding, Petitioners' argument does not merit consideration. City Respondents' answering papers in Landmark West! Inc. are not part of the record in the instant proceeding. Accordingly, it would be improper to grant Petitioners leave to reply, in the instant proceeding, to papers filed in a separate Article 78 proceeding.

6. Regardless, Petitioners' argument that they should be permitted to submit a further reply because City Respondents' answering papers in Landmark West! Inc. were in essence a sur-reply to Petitioners' voluminous reply papers in the instant proceeding is completely without merit. As noted by the parties in Landmark West! Inc., during a March 31, 2009 appearance, the

[1] The 68 page Verified Reply to BSA Statement of Facts and 114 page Marked Petition to Show Answers with Reply were submitted as attachments to the 60 page reply Affirmation.

Petition in Landmark West! Inc. raises different arguments than the Petition in the instant proceeding. Accordingly, City Respondents' answering papers in both proceedings also argue different points.

7. Despite this fact, Petitioners assert that the differing arguments were actually responsive to their papers. Contrary to Petitioners' argument, City Respondents' answering papers in Landmark West! Inc. did not reply to any papers filed in the instant proceeding. Rather, they were written in direct response to arguments set forth in Landmarks' Petition.

8. Petitioners, in support of their argument, assert that,

> New arguments by the City address these issues: the Eighth Objection (n. 8 at p. 16); supporting condominium variance by reliance upon programmatic needs (p. 21); landmarked Synagogue and Parsonage as basis for finding (a) (p.33); encroachment on powers of City Planning and LPC (pp. 34-35); the BSA ignoring its own written guidelines (p. 42); rational explanation of methodology of analysis of reasonable return (p. 42), reasonable return by Congregation (p. 43); assertions that variance is the minimum variance (p. 53); and assertion that Z.R. §74-711 Is parallel remedy (p. 54-5). Affirmation of Alan D. Sugarman ("Sugarman Affirmation") at footnote 3.

Petitioners' assertions are false.

9. First, the arguments regarding "the Eighth Objection" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at n. 8 (p. 16) respond directly to Landmark's argument that BSA lacked jurisdiction because it failed to require Congregation Seharith Israel (the "Congregation") to address the BSA's objections which were based on the objection listed as number 8 on New York City Department of Building's Notice of Objections. See Landmark West! Inc. Petition at pp. 8-13.

10. Second, contrary to Petitioners' assertion, City Respondents did not raise arguments "supporting condominium variance by reliance upon programmatic needs" at p. 21 of City Respondents' Memorandum of Law in Landmark West! Inc.. Indeed, not only are there no

arguments regarding programmatic needs on page 21 of either City Respondents' Answer or Memorandum of Law in Landmark West! Inc., but there are no arguments "supporting condominium variance by reliance upon programmatic needs" anywhere in City Respondents' Answer or Memorandum of Law in Landmark West! Inc..

11. Third, the arguments regarding the "landmarked Synagogue and Parsonage as basis for finding (a)" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p.34[2] respond directly to Landmark's argument that the BSA was not permitted to consider the presence of the landmarked synagogue because "[p]ursuant to the Charter, the Landmarks Preservation Commission and the City Planning Commission are the sole agencies authorized and empowered to consider and resolve claims of prejudice to an owner caused by landmarking." Landmark West! Inc. Petition at ¶ 94.

12. Fourth, the arguments regarding the "encroachment on powers of City Planning and LPC" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at pp. 34-35 respond directly to Landmarks' argument that the BSA improperly exercised the powers and duties delegated to the Landmarks Preservation Commission and/or City Planning Commission. See Landmark West! Inc. Petition at ¶¶94-96.

13. Fifth, the arguments regarding the "BSA ignoring its own written guidelines" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p. 42 respond directly to Landmark's argument that the Congregation did not satisfy New York City Zoning

[2] Notably, while Petitioners assert that the arguments regarding the "landmarked Synagogue and Parsonage as basis for finding (a)" are set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at page 33, it appears they are actually referring to City Respondents' arguments set forth on page 34 since the arguments set forth on page 33 repeat verbatim the arguments set forth in City Respondents' Memorandum of Law in the instant proceeding. See City Respondents' Memorandum of Law in the instant proceeding at pp. 34-5.

Resolution § 72-21(b), i.e. did not establish it could not earn a reasonable return by developing the subject premises in compliance with the Zoning Resolution, because the Congregation failed to "state the amount of equity invested [or] the return on equity" in compliance with BSA's written guidelines. See Landmark West! Inc. Petition at ¶¶ 57-8.

14. Sixth, the arguments regarding the "rational explanation of methodology of analysis of reasonable return" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p. 42 respond directly to Landmark's argument that the Congregation improperly utilized a "return on profit" methodology in order to calculate the potential financial return it could earn in developing the subject premises. See Landmark West! Inc. Petition at ¶¶54-60.

15. Seventh, the arguments regarding the "reasonable return by Congregation" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p. 43 respond directly to Landmark's argument that "the BSA improperly granted the Congregation variances to develop five market-rate residential condominium units 'solely on the ground that the use will yield a higher return than permitted by the zoning regulations.'" City Respondents' Memorandum of Law in Landmark West! Inc. at p. 43. See also Landmark West! Inc. Petition at ¶ 48.

16. Eighth, the arguments regarding the "assertions that variance is the minimum variance" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at p. 53 respond directly to Landmark's argument that the Congregation did not seek the minimum variance possible because it could have reduced the number of variances needed by eliminating the proposed residential tower. See Landmark West! Inc. Petition at ¶¶72-73.

17. Ninth, the arguments regarding the "assertion that Z.R. §74-711 is parallel remedy" set forth in City Respondents' Memorandum of Law in Landmark West! Inc. at pp. 54-5 respond directly to Landmark's argument that the BSA improperly considered the Congregation's

variance application because the Congregation did not exhaust its administrative remedies prior to applying to BSA for a variance.[3] Landmark West! Inc. Petition at ¶¶74-77.

18. Moreover, while Petitioners assert that the preceding arguments were "added... as to issues previously briefed in the instant proceeding," Sugarman Affirmation at ¶6, they fail to notify the Court that City Respondents explicitly set forth in their Landmark West! Inc. answering papers that each of the alleged "new" arguments were responsive to arguments raised in Landmark's Petition. In fact, prior to each of the alleged "new" arguments raised in Landmark West! Inc., City Respondents noted either that: 1) "Petitioners' arguments are flawed;" 2) "Petitioners argue;" 3) "contrary to Petitioners' argument;" or 4) "Petitioners, in an effort to challenge BSA's findings, argue," thus clearly denoting that the City was directly responding to the arguments raised by the Landmark in its Petition. See City Respondents' Memorandum of Law in Landmark West! Inc. at pp. 16, 34, 42, 43, 53, and 54. See also City Respondents' Answer in Landmark West! Inc. at pp. 24, 38, 46, 47, and 57. Further, to the extent Petitioners suggest that Respondents, in answering the Petition in Landmark West! Inc., were limited to asserting the arguments they previously raised in response to the Petition in instant proceeding, Petitioners' argument is illogical. Indeed, under Petitioners' rational, where Petitioners in Landmark West! Inc. raised arguments not asserted by the Petitioners in the instant proceeding, Respondents would be unable to respond to the arguments.

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[3] Notably, since Petitioners also asserted the Congregation was required to exhaust its administrative remedies pursuant to Z.R. §74-711, City Respondents' answering papers in both proceedings contained identical arguments. See City Respondents' Answer in Landmark West! Inc. at pp. 57-58; City Respondents' Answer in the instant proceeding at pp. 79-80. See also City Respondents' Memorandum of Law in Landmark West! Inc. at pp. 54-5; City Respondents' Memorandum of Law in the instant proceeding at pp. 61-2.

WHEREFORE, City Respondents respectfully request that the Court deny Petitioners' motion.

Dated: New York, New York
June 23, 2009

JEFFREY D. FRIEDLANDER
First Assistant Corporation Counsel of the
City of New York
Attorney for City Respondents
100 Church Street
New York, New York 10007
(212) 788-0461

By: 

Christina L. Hoggan
Assistant Corporation Counsel

Brief Exhibit L - 8

Index No.104077/2008

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

NIZAM PETER KETTANEH and
HOWARD LEPOW,

Petitioners,

- against -

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.

AFFIRMATION IN OPPOSITION TO THE PETITIONERS' MOTION FOR LEAVE TO SUBMIT A FURTHER REPLY

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
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100 Church Street, Room 5-153
New York, N.Y. 10007

Of Counsel: Louise Lippin
Tel: (212) 788-0790

Due and timely service is hereby admitted.

New York, N.Y. ....., *200* . . .

..... *Esq.*

Attorney for.....

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

NIZAM PETER KETTANEH and HOWARD LEPOW, Petitioners, 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, 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.	Index No. 113227/08 (LOBIS) **AFFIRMATION OF CLAUDE M. MILLMAN IN OPPOSITION TO MOTION OF PETITIONERS TO FILE SUR-REPLY**

CLAUDE M. MILLMAN, an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under the penalties of perjury:

Introduction

1. I am a partner at Proskauer Rose LLP, counsel to Respondent "Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel in the City of New York" (the "Congregation"). I am submitting this affirmation to set forth the Congregation's opposition to Petitioners' motion, dated June 16, 2009, "for an Order providing permission to the Petitioners to file a further Reply in the pending proceeding."

2. Petitioners' motion should be denied. The purported basis for Petitioners' motion is their assertion that "the Respondents herein have in essence served papers which are in the nature of a sur-reply, but in a related case in which the Petitioners are nor [sic] parties."

Affirmation of Alan D. Sugarman, dated June 16, 2009, ¶ 2. Respondents have not filed a "sur-reply."

Background

3. Petitioners Kettaneh and Lepow filed this Article 78 proceeding (the "Kettaneh Action") to set aside a resolution of the Board of Standards and Appeals (the "BSA") issuing variances for property owned by the Congregation. Around the same time, other opponents of the project filed what purported to be a plenary action seeking a declaratory judgment to invalidate the same BSA resolution (the "Landmark West! Action"). The two actions were deemed related and assigned to this Court. They were not consolidated.

4. Respondents, who were named as defendants in the Landmark West! Action, moved to dismiss the Landmark West! Action.

5. Petitioners in the Kettaneh Action took no steps with respect to the Landmark West! Action. They did not seek to intervene there; they did not seek to have the actions consolidated; they did not seek to have the Landmark West! Action stayed; and they in no way assisted in Respondents' efforts to have it dismissed. Indeed, from a strategic perspective for Petitioners, it was good for opponents of the BSA resolution to pursue challenges in two different suits (one plenary; one Article 78). The Kettaneh Action Petitioners, therefore, had every reason to hope that the Court would allow the Landmark West! Action to proceed as a plenary suit.

6. On March 31, 2009, the Court heard oral argument in both actions. At various points, the Court asked the parties for their views on whether there were differences between the two cases. Counsel in the Kettaneh Action pointed to their similarities. *See* 3/1/09 Transcript at 6-7 ("we believe they raise the same issue") (Exhibit A). As counsel for the City Respondents informed the Court at oral argument, in addition to raising arguments that were in the Kettaneh

Action, the petitioners in the Landmark West! Action purported to challenge the jurisdiction of the BSA (an argument which the Petitioners in the Kettaneh Action did not raise).

7. On April 17, 2009, the Court issued a decision converting the complaint in the Landmark West! Action into an Article 78 petition. The Court stated: "Defendants, now referred to as respondents, shall have ten (10) days from the date of service of a copy of this order with notice of entry, to serve and file their answers and objections in point of law, or otherwise move with respect to the petition." *See* 4/17/09 Decision and Order at 5 (Exhibit B).

8. After receiving extensions of time from this Court, Respondents in the Landmark West! Action complied with the Court's order by submitting their answers and memoranda of law in opposition to the petition in the Landmark West! Action.

Argument

9. The Court should deny Petitioners' motion to submit a sur-reply.

10. First, the motion is procedurally defective. It seeks a sur-reply to a brief that was never even filed in this action. It can be denied on that basis alone.

11. Second, the Petitioners in this action have had ample opportunities to be heard and have seized on those opportunities in spades. Petitioners submitted a 102-page memorandum of law in support of their petition. *See* Kettaneh and Lepow Revised Memorandum of Law in Support of Petition. Petitioners then submitted a 56-page reply brief in further support of their petition. *See* Petitioners' Reply Memorandum of Law in Further Support of Verified Petition. Petitioners' counsel also then held the floor for a significant portion of the oral argument that was heard in this Court. Thus, with the benefit of Petitioners' 158 pages of briefing and their oral arguments, the Court is now clearly aware of Petitioners' point of view. No further briefing is needed.

12. Third, the opponents of the BSA resolution will get the last word before this Court even if the Court denies this motion. Petitioners in the Landmark West! Action have responded to Respondents' briefs in the Landmark West! Action, having provided the Respondents with a reply brief on Friday, June 19, 2009, per stipulation between the parties. Given that the petitioners in both cases are taking the same position – that the Resolution should be set aside – an ***additional*** response from counsel to Petitioners in this action is not needed.

13. Fourth, there was nothing improper about the briefs that Respondents submitted in the Landmark West! Action. Respondents did precisely what they were supposed to do, consistent with the Court's order: They submitted papers that would be responsive to the petition in the Landmark West! Action. Everything in the briefs that the Congregation filed in the Landmark West! Action was responsive to the petition filed in that suit. The briefs that the Respondents filed there were filed as-of-right.

14. It could not possibly have come to any surprise to Petitioners in this case that the briefs that Respondents were required to file in the Landmark West! Action addressed some of the issues that Petitioners have also raised in this action. Nor is it surprising that some of the portions of the Congregation's brief in the Landmark West! Action that address overlapping issues are superior to the corresponding portions of the brief that the Congregation filed in this action. As the Congregation's brief in the Landmark West! Action was filed three months after the Congregation filed its brief in the Kettaneh Action and after oral argument was heard in both cases, one would expect the Congregation's papers in the Landmark West! Action to be superior. The Congregation had more time to conduct research for the Landmark West! brief. Moreover, as oral argument crystallized some of the issues, the Congregation was able to benefit from that learning in preparing the brief filed in the Landmark West! Action.

15. None of this, however, is remotely improper. Nor is it Respondents' doing. It is a by-product of the strategy pursued by the Petitioners in both cases, to bring two different suits, with two different briefing schedules. It is not a basis upon which to afford Petitioners here yet another brief. Indeed, given that both cases involved challenges to the same BSA resolution, Petitioners in the Kettaneh Action could have sought to intervene in the Landmark West! Action or could have sought to consolidate the two actions. For apparent strategic reasons, they chose not to do so. Having intentionally filed separate actions, and having intentionally kept the actions separate, Petitioners cannot now complain that they should be permitted to respond to a brief filed in very lawsuit that they have eschewed.

16. Indeed, affording these Petitioners another brief would lead to a disturbing precedent. Suppose, for example, that a lawyer in Case A submits a brief before Justice X concerning an issue that can arise in numerous lawsuits, say the law of contribution. Imagine, then, that the very same lawyer has another, unrelated case (Case B) before Justice X for a different client that also happens to raise the same issue under the law of contribution. Finally, imagine that, after attending oral argument in Case A, this lawyer submits a brief in Case B that addresses concerns that Justice X raised during oral argument in Case A, but that are equally relevant to Case B. Under the untenable theory of sur-replies that the Petitioners in our case (the Kettaneh Action) espouse, Justice X would have to notify the opponents of the lawyer in Case A that the brief that Justice X is reading in Case B is also informative as to the issue before the Court in Case A. Moreover, under that unprecedented theory, Justice X would have to give those same opponents in Case A an opportunity to reply to the brief in Case B. The Congregation respectfully submits that, since it is undisputed that the Congregation's brief in the Landmark West! Action was

relevant to the issues before the Court in the Landmark West! Action, then it was properly filed as-of-right there and did not entitle the Petitioners in this action to be heard yet again.

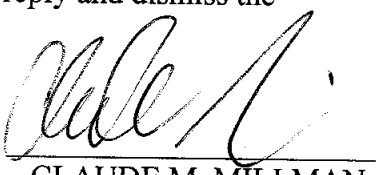
17. Finally, contrary to the Petitioners' suggestion, the Congregation did not violate any order of this Court when it identified for the Court, in the brief that the Congregation filed in the Landmark West! Action, page numbers in the administrative record that support the BSA's findings. Petitioners mysteriously rely on the following portion of the oral argument transcript to support their contention that the Court somehow restricted what Respondents could file in the Landmark West! Action:

> MR. MILLMAN: Your Honor, would it be helpful regarding the issue of page numbers? And in the record, we could provide your Honor with very simple one page or two page identifying the findings?
>
> THE COURT: Are they in the papers?
>
> MR. MILLMAN: I'm not sure.

Affirmation of Alan D. Sugarman, dated June 16, 2009, Exhibit 1 at 43. The Court never said, there or elsewhere, that, in the context of responding to the converted petition in the Landmark West! Action, the Congregation would be prohibited from identifying the record pages that support the BSA's findings. Indeed, on April 17, 2009, ***after*** the oral argument relied on by Petitioners, the Court issued its decision in the Landmark West! Action and expressly authorized the Congregation to respond to the petition in the Landmark West! Action. *See* 4/17/09 Decision and Order at 5 (Exhibit B). Thus, even if the Court rejected a sur-reply in the Kettaneh Action (and, in fact, none was discussed), the Congregation was clearly authorized to file a brief in the Landmark West! Action and to include, among other things, a listing of the BSA findings and the record pages that support those findings.

Conclusion

18. Petitioners have not made the case for yet another brief. Notably, were the Court to grant Petitioners' procedurally flawed motion, it would invite yet another monster brief from Petitioners who to date have already filed a 102-page memorandum of law and a 56-page reply memorandum. The Court should deny Petitioners' motion for a sur-reply and dismiss the Petition in this action on the merits.



CLAUDE M. MILLMAN

Dated: June 23, 2009

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 6

- -

LANDMARK WEST, INC., 103 CENTRAL PARK WEST CORP., 18 OWNERS CORP., 91 CENTRAL PARK WEST CORP. AND THOMAS HANSEN,

Plaintiffs

- against -

THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS, NYC PLANNING COMMISSION, HON. ANDREW CUOMO, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK AND CONGREGATION SHEARITH ISRAEL,

Defendants

- -

Index No. 650354-2008

- -

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioner

- against -

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

- -

Index No. 113227-08

March 31, 2009
60 Centre Street
New York, New York 10007

Lester Isaacs - Official Court Reporter

A

Proceedings

MR. ROSENBERG: I don't know. I know that my case -- I don't know what the differences between their cases are.

THE COURT: Counsel for the City, since you're involved in both cases and you're moving to dismiss, anyone that's in the Landmark case.

MS. HOGGAN: Yes.

THE COURT: Can you distinguish the differences between the two cases?

MS. HOGGAN: If you give me a minute.

THE COURT: Sure.

MR. SUGARMAN: Your Honor, if I may. While counsel is looking at our papers, would you like my view?

THE COURT: My law secretary, Ms. Sugarman, we determined that there was no relationship.

MR. SUGARMAN: None at all.

THE COURT: Unless you're trying to get me off the case?

MR. SUGARMAN: No. I think one of the important issues in the case is the problem in the City Planning, the Department of City Planning. With Landmarks, the have over seen jurisdiction over granting waivers of the zoning laws for the purpose based upon Landmark's hardships, that's not what is

BSA. So the landmark question as to them, as a defendant and properly so, we believe we raise the same issue.

THE COURT: If I understand it, in reviewing. I made a start review, I have not read everything. I have read mostly the papers in the Kettaneh, but not in the Landmark cases, I thought Landmark approved it.

MR. SUGARMAN: Landmark approved the project from the point of view of from the certificate appropriateness. They do not look at the Zoning Law. They are specifically prohibited from doing this. Landmark has a whole separate procedure of 74, 711 where they consider the hardship by the applicant. And the applicant has to show their financial hardship. They have to show that information and generally their encumbrances and other conditions put on the property, as part of that process, and then it's pursued. But the Department of City Planning, that's to get a waiver of the Zoning Laws, that the Board of Standards and Appeals is not involved in that process.

This applicant started off in 2001, that's when the case started, asking for 74 711 relief from Landmarks and for whatever reason they withdraw it

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

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LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Plaintiffs,

Index No. 650354/08

Decision and Order

-against-

CITY OF NEW YORK BOARD 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,

Defendants.

----------X

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

Motion Sequence Numbers 001 and 002 are consolidated for disposition. In Motion Sequence Number 001, defendant Congregation Shearith Israel (the "Congregation"), moves, pursuant to C.P.L.R. Rule 3211(a)(7), for an order dismissing the amended complaint for failure to state a cause of action. In Motion Sequence Number 002, defendants City of New York Board of Standards and Appeals ("BSA") and New York City Planning Commission (the "Commission"), together referred to as the "City Defendants", also move to dismiss pursuant to C.P.L.R. Rule 3211(a)(7). The sole ground on which both motions rely is the contention that this action was erroneously commenced as a plenary action, rather than as an Article 78 proceeding.

This action seeks to challenge the August 26, 2008 determination of the BSA, Resolution 74-07-BZ (the "BSA Resolution"), which approved the Congregation's application for a variance for

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the property located at 6-10 West 70th Street in Manhattan. According to the Complaint, the BSA Resolution would permit the Congregation to violate zoning regulations in its planned construction of a new building which will contain a residential tower with five luxury condominium apartments.[1]

Initially, at oral argument, this court raised a concern that the Attorney General was not present and had not appeared in this action. By letter dated April 3, 2009, the City Defendants served the Attorney General with a copy of the City Defendants' motion. According to the letter, the Attorney General has been served with the Complaint and with other papers in this action. To date, the court has not received any submissions from the Attorney General.

The Congregation and the City Defendants argue that plaintiffs deliberately chose to commence this as a declaratory judgment action, rather than as an Article 78 proceeding, because had it been commenced as an Article 78, it would be untimely. Case law supports their contention that parties should not be permitted to circumvent that shorter statute of limitations set forth for Article 78 proceedings "through the simple expedient of denominating the action one for declaratory relief." New York City Health and Hosps. Corp. v. McBarnette, 84 N.Y.2d 194, 201 (1994).

The statute of limitations for an Article 78 proceeding is set forth in C.P.L.R. § 217(1), which provides that "[u]nless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." Pursuant to the New York City

[1] This court also has before it a related case, Kettaneh v. Board of Standards and Appeals, Index No. 113227/08, which also challenges the BSA Resolution; this matter was brought as an Article 78 proceeding, within the thirty (30) day period.

Administrative Code (the "Administrative Code"), the time to challenge a final determination of the BSA is shorter than the four months provided in the C.P.L.R. Section 25-207 of the Administrative Code provides that

> [a]ny person or persons, jointly or severally aggrieved by any decision of the [BSA] may present to the supreme court a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition must be presented to a justice of the supreme court or at a special term of the supreme court within thirty days after the filing of the decision in the office of the board.

Therefore, instead of four months, plaintiffs had thirty (30) days within which to bring this action. Defendants assert that since the BSA determination was made on August 26, 2008, and this action was commenced on September 29, 2008, this action is untimely under the Administrative Code, and that plaintiffs should not be able to circumvent the Administrative Code by filing this as a plenary action rather than an Article 78 proceeding.

The Congregation and the City Defendants are simply wrong. They used the incorrect date to begin calculating the time period within which to commence this proceeding. The Administrative Code plainly states that the time to bring a proceeding is "thirty days after the filing of the decision in the office of the board." (Emphasis added.) The last page of the BSA Resolution contains the following language, in bold italic type with dates underlined:

CERTIFICATION

This copy of the Resolution
dated August 26, 2008
is hereby filed by
the Board of Standards and Appeals
dated August 29, 2008

Jeff Mulligan /s/
Jeff Mulligan
Executive Director

Thus, the calculation of the thirty-day period begins on August 29, not August 26. Once the period is calculated from the correct date, it is clear that plaintiffs had until September 29, 2008 to bring a proceeding to challenge the BSA Resolution.[2]

Plaintiffs first commenced this action on September 26, by electronic filing. Even if this court were to utilize the date that the amended complaint was filed, which was September 29, this action would still be timely. Therefore, defendants' argument that this action should not be converted to an Article 78 proceeding because such a proceeding is untimely is without merit. Since the statute of limitations had not expired as of the date of commencement, this is not a reason to deny converting this action to an Article 78 proceeding.

Defendants also assert that this court should not convert this proceeding to an Article 78 proceeding because plaintiffs were given an opportunity to stipulate to a conversion before the motions to dismiss were filed. Notably absent from defendants' argument is whether they would have been willing to waive the affirmative defense, which all parties erroneously believed to be valid, of statute of limitations. Plaintiffs were not required to consent to the conversion, and neither their failure to do so, nor their failure to affirmatively cross-move for such relief, bars the conversion of this proceeding.

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[2] August 29, 2008 was a Friday. Thirty days from that date was Sunday, September 28. Since the thirtieth day was a Sunday, pursuant to General Construction Law § 25-a, the limitations period is extended until the next business day. Therefore, plaintiffs had until Monday, September 29 to commence an action or proceeding to challenge the BSA Resolution. Rodriguez v. Saal, 43 A.D.3d 272, 276 (1st Dep't 2007).

This court has the power to convert a declaratory judgment action into an Article 78 proceeding, sua sponte. C.P.L.R. §103(c); Rosenthal v. City of New York, 283 A.D.2d 156 (1st Dep't 2001), lv. denied 97 N.Y.2d 654 (2001). Therefore, plaintiffs' failure to move for such relief, or failure to consent to such a conversion, does not preclude this court from converting this action into an Article 78 proceeding. Plaintiffs are challenging the BSA Resolution. Although plaintiffs couch some of their objections in terms of the BSA having lacked jurisdiction and having given deference to the Congregation under an unconstitutional delegation of authority, the crux of their allegations is that the determination was arbitrary and capricious and erroneous as a matter of law. Allegations that the BSA failed to follow procedures and violated state laws in reaching its determination are claims that are properly adjudicated in an Article 78 proceeding. Rosenthal, supra.

Accordingly, for the reasons set forth above, this court converts this action into a special proceeding, pursuant to Article 78 of the C.P.L.R. The motions to dismiss are denied. Defendants, now referred to as respondents, shall have ten (10) days from the date of service of a copy of this order with notice of entry, to serve and file their answers and objections in point of law, or otherwise move with respect to the petition.

This constitutes the decision and order of the court.

Dated: April 17, 2009

JOAN B. LOBIS, J.S.C.

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

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-Appellees.	:	Index No. 113227/08 (LOBIS) **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that the Petitioners, NIZAM PETER KETTANEH and HOWARD LEPOW, hereby appeal to the Appellate Division of the Supreme Court, First Department, from a decision, order and judgment entered in the above entitled special proceeding in the office of the Clerk of New York County on July 24, 2009, and served by mail upon Petitioners-Appellants on July 29, 2009, which order denied Petitioners-Appellant's Article 78 petition to annul and vacate a determination of the Respondent-Appellee Board of Standards and Appeals and dismissed said petition, and this appeal is taken from each and every part of said decision, order, and judgment as well as from the entirety thereof.

Dated: August 27, 2009
New York, New York

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In Related Matter:
Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08

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

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
	:	New York County
Petitioners-Appellants,	:	Index No. 113227/08
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules	:	
	:	**PRE-ARGUMENT STATEMENT**
-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-Appellees.	:	

Petitioners-Appellants Nizam Peter Kettaneh and Howard Lepow submit this Pre-Argument Statement pursuant to Section 600.17(a) and (b) of the Rules of the Appellate Division, First Department.

1. FULL TITLE OF THE ACTION

The full title of the action is as appears above.

2. FULL NAMES OF THE PARTIES

The full names of the original parties are as appears above. There have been no changes in the parties.

3. NAME AND ADDRESS OF COUNSEL FOR APPELLANTS

The counsel for Petitioners-Appellants is Alan D. Sugarman, Law Office of Alan D. Sugarman, 17 W. 70th Street, New York, NY 10023, 212-873-1371.

4. NAMES AND ADDRESSES OF COUNSEL FOR RESPONDENTS

Counsel for the BSA Respondents-Appellees are Jeffrey Friedlander, Esq., First Assistant Corporation Counsel of the City of New York and Christina L. Hoggan, Esq., Assistant Corporation Counsel, 100 Church Street, Room 5-153, New York, New York 10007, 212-788-0790.

Counsel for the Congregation Respondent are Louis M. Solomon, Esq. and Claude M. Millman, Esq., Proskauer Rose L.L.P., 1585 Broadway, New York, New York 10036, 212-969-3000.

5. COURT FROM WHICH APPEAL IS TAKEN AND ORDER APPEALED FROM

This appeal is taken from a decision, order, and judgment of the Honorable Joan B. Lobis of the Supreme Court of the State of New York, County of New York. The decision, order, and judgment were dated July 10, 2009, were entered in the County Clerk's Office of New York County on July 24, 2009, and were served upon Petitioners-Appellants by mail on July 29, 2009.

6. NATURE AND OBJECT OF THE CASE

The object of the Article 78 proceeding was to annul and vacate variances granted by the Respondent New York City Board of Standard and Appeals to the Respondent Congregation Shearith Israel and for other related relief. The variances related to a mixed use development consisting of five upper floors of luxury condominiums and a four floor community house on the lower floors. The condominium floors variances allow windows of cooperatives owned by Petitioner Lepow to be covered and were justified solely on the basis of money to benefit the membership of the Congregation. An as-of-right development would have allowed for only two floors of condominiums and would not block Petitioner Lepow's windows. Ninety per cent of the additional area allowed by the variances is for the luxury condominiums, and the remaining 10% of variance area is for the religious community house.

7. RESULT REACHED IN THE COURT BELOW

The court below denied Petitioners-Appellants request to annul and vacate the BSA's determination and dismissed the Article 78 Petition.

8. GROUNDS FOR APPEAL

Petitioners-Appellants seek to reverse the judgment dismissing the Article 78 Petition on the following grounds:

The lower court overlooked or failed to take into account key parts of the records, petitioners' legal contentions, and applicable law on pertinent issues, including, without limitation the following:

The lower court's decision is erroneous as a matter of law and erroneous in accepting arbitrary and capricious determinations of the BSA and in accepting the BSA's arbitrary and capricious deliberate disregard of relevant facts and issues.

The lower court erred in not properly applying the substantial evidence requirement explicitly stated in §72-21 of the Zoning Resolution, in not applying the statutory language of §72-21, and by ignoring clear and specific precedent.

The lower court erred in upholding the BSA's finding under §72-21(b) as to the luxury condominium variances that a conforming as-of-right building on the development site would not earn a reasonable return.

- First, the lower court erred as a matter of law in accepting the BSA's implicit position that a religious non-profit owner of property is entitled to both satisfy its religious programmatic needs by constructing a community house on most of the site, as well as at the same time earn a reasonable financial return by constructing luxury condominiums on the remaining upper part of the site.
- The lower court erred as a matter of law in accepting the BSA's "bifurcated" financial analysis of the development site, that is, an analysis in which the BSA considered the

financial return obtainable only from the upper two floors of the site, rather than as to an all-condominium as-of-right building using the entire site. The lower court decision ignored this issue, although such issue featured was prominently by Petitioners.

- The lower court erred in accepting the BSA's arbitrary and capricious, and indeed deliberate, refusal, after first having requested such an analysis, to complete the analysis of the all residential as-of-right building, and in accepting the BSA's deliberate disregard of the fact that such a building would earn a return in excess of the return undisputedly admitted by the Congregation as exceeding a rate of return satisfactory to the Congregation. The BSA in its Article 78 Answer verified by the Chair of the BSA, completed the computation, conclusively demonstrating that a reasonable return would be earned by the Congregation.

- The lower court erred as a matter of law in accepting the BSA's deliberate refusal to evaluate the Congregation's financial return based upon the original amounts paid by the Congregation for the site, since the Congregation financial analysis showed that the Congregation would receive a $12.3 million site payment in addition to millions of dollars of profit from the development of the condominium project itself and the Congregation would still retain ownership and use of the property allocated to the community house.

- Even as to the improper bifurcated analysis of solely the two-floor residential part of the site, the lower court erred in allowing the BSA to arbitrarily and capriciously evaluate the site value based upon the total value of the site including the part of the site used by the community house and as to which the Congregation would retain ownership and use.

- Even as to the improper bifurcated analysis, the lower court erred in allowing the site valuation to be based irrationally upon the Congregation's inability to develop air rights over the parsonage because of landmarking, in effect allowing the transfer of air rights without any statutory basis and without even discussing the irrational result that the future development on the transferring property was not restricted, restrictions generally required when air rights are transferred from landmarked property.
- Even as to the improper bifurcated analysis, the court below erred in accepting the BSA's arbitrary and capricious and deliberate acceptance of partial, altered and materially incomplete construction cost reports and the BSA's deliberate act of not requiring complete reports, when the Congregation had filed complete reports as to the other proposed schemes and the materiality and relevance of the complete reports were established by petitioners, and when the BSA could have simply required the filing of the complete report including the pages deliberately concealed by the Congregation.
- Even as to the improper bifurcated analysis, the court below erred in allowing the BSA to deliberately conceal from the record the very generous return on equity from the project when the BSA guidelines explicitly required a return on equity analysis together with a return on investment analysis.
- The court erred as well in stating that the return on equity issue was Petitioners' primary objection to the reasonable return analysis, and after misconstruing the arguments, then using the misconstruction in such as a way to ignore Petitioners' clearly expressed objections.

The lower court also erred as a matter of law in its consideration of the unique physical condition requirement of §72-21(a) of the Zoning Resolution as to the variances relating to the condominiums.

- The lower court erred as a matter of law in accepting the BSA's finding as to §72-21(a) in the absence of any physical condition and the BSA's apparent reliance upon case law interpreting zoning regulations which did not include the specific New York City requirement of "physical".
- The lower court erred as a matter of law in accepting the BSA's finding as to §72-21(a) insofar as the finding relied primarily on the existence of landmarked structures on the zoning site, when there is no authority under New York City's Zoning Resolution allowing the BSA to consider such factors in considering variances and where jurisdiction for providing relief for said hardships is exclusively assigned to the City Planning Commission pursuant to strict requirements when such relief is afforded, said requirements then having been ignored by the BSA. The decision below misconstrued the issue to be one of exhaustion of remedies alone, rather than the issue of whether the BSA had the power to do what it did.
- The lower court erred as matter of law in accepting the BSA's §72-21(a) finding for the condominiums in that the BSA clearly and improperly relied in part upon the programmatic needs of the Congregation as a hardship under §72-21(a) as to the luxury condominiums.
- The lower court erred as a matter of law in accepting the BSA's reliance upon a split zoning lot as a physical condition under §72-21(a): the lower court first having ignored the fact that such a situation is not a physical condition and that even the Zoning

Resolution authorizes relief for split lots only under specific conditions, conditions not met by the Congregation, and allowed the BSA to engage in circular reasoning of describing a zoning regulation as a physical condition.

- The lower court erred in accepting the BSA's deliberate disregard of the Zoning Resolution provision requiring a building separation on the upper floor, which provision would prevent construction of a tower condominium, even in the absence of the split lot, and the BSA's approval of a building knowing that it violated said specific prohibition in the Zoning Resolution, and in so doing the BSA's condoning and sanctioning questionable if not illegal and improper action by the Department of Buildings.

The lower court erred, as to its finding under §72-21(c) of the Zoning Resolution, in determining that the BSA's did not act arbitrarily and capriciously in deliberately failing to provide a rational basis for allowing legal lot line windows in apartments owned by Petitioner Lepow to be blocked by the luxury condominium allowed by the variances, when an as-of-right building would not block the windows and in failing to balance the economic harm done to said Petitioner as compared to the economic benefit to each and every member of the Congregation resulting from the economic benefit in allowing larger condominiums to be constructed.

The lower court erred, as to the BSA's finding under §72-21(e) finding of the Zoning Resolution as to the condominium variances. This section requires that the variance be the minimum variance. The lower court erred in not determining that the BSA acted arbitrarily and capriciously in deliberately failing to consider whether a courtyard modification would allow said windows not to be blocked or in failing to consider a condominium tower lesser in height, in that the return on investment

approved by the BSA substantially exceeded the return on investment which the Congregation stated was adequate and satisfactory.

The lower court erred, as to the §72-21(a) finding of the Zoning Resolution for the community house variances, in that there was no evidence at all to support a programmatic need for the 10 foot rear set- back variance for the fourth floor of the Community House, the Congregation having alleged that the fourth floor setback variance was to provide for larger classrooms, when the evidence conclusively showed that larger classrooms could be provided by simply moving a caretakers' apartment from the fourth floor to the fifth floor of the same building, but the Congregation did not wish to do so, asserting the unlawful legal privilege of both accommodating its programmatic needs and earning a reasonable economic return from the same property since the Congregation wished to develop a luxury condominium on the fifth floor.

The lower court erred in holding as proper and acceptable that the Chair and Vice-Chair of the BSA, knowing the identity of opponents to the project, conducted a lengthy formal secret private ex parte meeting with the Congregation and its lawyers, consultants and officers, and at the meeting reviewed the exact same building as approved by the Landmarks Preservation Commission and as would then be submitted to the BSA by the Congregation, and the BSA and the Chair and the Vice-Chair then having arrogantly refused to disclose what took place at said meeting.

The lower court erred in according deference to the determinations of the BSA despite the demonstrated repeated instances of the BSA deliberately ignoring relevant matters, refusing to collect relevant information from the applicant Congregation, and holding secret ex parte meetings with the applicant Congregation.

The lower court erred in accepting assertions by the Respondents that substantial evidence existed in the record in lieu of exact citations by the Respondents to supporting non-conclusory facts in the record.

9. RELATED ACTIONS OR PROCEEDINGS OR APPEALS

There are no additional appeals pending in this action. A related action is Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08, Supreme Court of the State of New York, County of New York, also before the Honorable Joan B. Lobis. In a decision dated August 4, 2009, the Court dismissed said proceeding; at page 2 of the Court's decision in the Landmark West decision, the Court incorporated by reference the July 10, 2009 decision being appealed herein.

Dated: August 27, 2009
New York, New York

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In Related Matter:
Landmark West! v. NYC Board of Standards and Appeals, Index No. 650354/08

Decision, Order, and Judgment July 10, 2009 of Lobis, J., Supreme Court New York County, dismissing Article 78 Petition.

Intentionally Omitted

SUPREME COURT
STATE OF NEW YORK , COUNTY OF MANHATTAN **INDEX No 113227/08 (LOBIS)**

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners-Appellants

against

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-Appellees

NOTICE OF APPEAL
with
PRE-ARGUMENT STATEMENT

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Signature (rule 130-1.1-a)

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August 27, 2009

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I affirm that I am counsel for Petitioners-Appellants and the within was served by mail, with e-mail copy, upon counsel for Respondents-Appellees and upon counsel for Landmark West, sent on August 27, 2009.

Alan D. Sugarman
August 27, 2009

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To Be Argued By:
Alan D. Sugarman

New York County Clerk's Index No. 113227/08

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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Date Completed: September 7, 2010

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CASES AND AUTHORITIES

STATUTES

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

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[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

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[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 of Appellate Division First Department dated June 23, 2011, Unanimously Affirming Supreme Court.

Intentionally Omitted

Resolution and Decision of the Board of Standards and Appeals Approving Variances, dated August 26, 2009.

Intentionally Omitted

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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. 113227/08

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners-Appellants,

—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 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 Nizam Peter Kettaneh and Howard Lepow (the "Petitioners"). In their verified petition 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 *Landmark West! Inc. v. City of New York Bd. of Standards and Appeals* (N.Y. Co. Clerk's Index No. 650354/08) ("*Landmark*"), another Article 78 challenge to the same BSA resolution. To minimize repetition, the Congregation's brief in *Landmark* contains cross-references to this brief. Accordingly, it will facilitate the Court's understanding if this brief is reviewed by the Court before it reviews the Congregation's brief in *Landmark*.

There is only one issue for this Court to decide on this appeal, and it is

simple. New York City's Zoning Resolution authorizes the BSA to relieve property owners from zoning restrictions by granting variances. The BSA may grant a variance if it makes certain findings, identified in the statute, about the property in question. Petitioners do not dispute that in its August 26, 2008 resolution granting the Congregation a zoning variance (the "Resolution"), the BSA made each of the findings referenced in the statute. Accordingly, the only issue for this Court is whether the lower court erred in concluding that the BSA's findings were neither arbitrary nor capricious given the extensive administrative record that the BSA painstakingly developed.

The crux of Petitioners' prolix brief is that Petitioners are unhappy with each of the key factual findings in the BSA's Resolution.[1] Petitioners are asking this Court to usurp the role of the BSA and conduct its own *de novo* review of the Congregation's application to the BSA for a zoning variance.

Yet, Petitioner's efforts to secure *de novo* review are impermissible. A court

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[1] Petitioners' "Questions Presented," at almost four pages (Petitioners' Br. at 3-6), are improper. *See* N.Y. C.P.L.R. 5528(a) (appellant's brief shall contain "(2) a concise statement, *not exceeding two pages*, of the questions involved without names, dates amounts or particulars") (emphasis added); *S. Tepfer & Sons, Inc. v. Zschaler*, 24 A.D.2d 1028, 1028, 265 N.Y.S.2d 987, 988 (2d Dep't 1965) ("Appellants' 'Statement of Questions Involved' consumes three and one-half pages of their brief and violates the statute (CPLR 5528, subd. [a], par. 2), as to length.)"). Similarly, Petitioner's forty-four page Statement of Facts is improperly replete with legal argument (rarely, if ever, supported by legal authority). (Petitioners' Br. at 17, 27, 29, 36, 37, 40, 41, 43, 45, 46, 49, 50, 51.) *See* N.Y. C.P.L.R. 5528(a) (appellant's brief shall contain, in this order, "(3) a *concise* statement of the nature of the case and of the facts which should be known to determine the questions involved" and "(4) the argument for the appellant, which shall be divided into points by appropriate headings distinctively printed") (emphasis added).

may not overturn an administrative agency's determination simply because it would have come to a different conclusion.

Indeed, this case is controlled by the New York Court of Appeals' decision in *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). In *SoHo Alliance*, the Court explained that the BSA may grant a zoning variance by making the five factual findings referenced in Section 72-21 of the New York City Zoning Resolution. *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citing N.Y. City Zoning Resolution § 72-21). Holding that a lower court erred in vacating the variance and granting the Article 78 petition, *SoHo Alliance* concluded that a BSA's variance must "'be sustained if it has a rational basis and is supported by substantial evidence.'" *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citation omitted).

Here, the BSA's detailed Resolution is supported by an extensive administrative record – almost 6,000 pages in eleven volumes. 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),[2] studied the issue for fifteen months, credited the testimony of the Congregation's Rabbi (R. 1736-39),

[2] References to "R __" are to the administrative record filed by the BSA below. References to "A__" are to Petitioners' appendix. References to paragraphs in the BSA Resolution follow the paragraph-numbering system Petitioners have adopted by annotating the BSA Resolution in the appendix. (*See* A52-65.)

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. Accordingly, Petitioners' efforts to re-litigate this administrative matter in this forum are to no avail. It is evident from the BSA's eighteen-page Resolution that the BSA carefully weighed the competing interests and facts presented at each of the many public hearings. As found by the lower court, the BSA indisputably made each of the five factual findings referenced in Section 72-21 of the Zoning Resolution. The BSA also acknowledged and considered arguments presented by Petitioners, and ultimately found them unpersuasive. Accordingly, the decision of the lower court denying the petition should be affirmed.

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the lower court properly find that the BSA's grant of a zoning variance to the Congregation was neither arbitrary nor capricious where, in granting the variance, the BSA made all of factual findings required by N.Y. City Zoning Resolution § 72-21 for granting variances and where each such finding was supported by an extensive administrative record?

COUNTER-STATEMENT OF THE FACTS

In April 2007, the Congregation submitted a variance application to the BSA seeking waivers of zoning regulations to construct a community facility and

residential development at 8 West 70th Street in Manhattan. (A52.) In support of its application, the Congregation submitted, among other things, a statement in support of its application, a zoning analysis, an economic analysis, and an Environmental Assessment Statement. The Congregation's submission followed a unanimous decision by the New York City Landmarks Preservation Commission ("LPC") that the Congregation's proposed construction would be appropriate in regard to its relationship to both the Congregation's landmarked Synagogue and the Upper West Side/Central Park West Historic District.

To facilitate its review of the Congregation's request, the BSA conducted four public hearings over the course of eight months. (A52 ¶ 4.) To maximize public involvement, the Congregation's application to the BSA was announced in the *City Record* and in letters sent by certified mail to all owners of record within 400 feet of the proposed development site. *Id.* Moreover, New York City Community Board 7's Land Use Committee held public hearings regarding the Congregation's proposed construction.

Both supporters and opponents of the Congregation's request testified at the BSA hearings, including members of the Congregation, area residents, legislators, and a community group. (A52-53 ¶¶ 7-11.) Proponents and opponents of the Congregation's application also submitted written materials to the BSA, including financial feasibility studies. (A52-65.) As a result, a massive, eleven-volume

administrative record, consisting of 5,795 pages, was compiled by the BSA.

On August 26, 2008, the BSA issued a Resolution expressly making the five findings referred to in Section 72-21 of the New York City Zoning Resolution and, accordingly, granting the variance. (A52.) The BSA found that: (a) there are unique physical conditions that create practical difficulties in strictly complying with the zoning requirements; (b) the physical conditions of the development site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return; (c) the variance will not alter the essential character of the neighborhood or district in which the Congregation is located; (d) neither the Congregation nor its predecessor in title created the practical difficulties that the Congregation claims as a ground for the variances; and (e) the variance is the minimum necessary to afford the Congregation relief. (A59, 61, 63-64 ¶¶ 122, 148, 201, 205, 210-11.)

On September 29, 2008, Petitioners filed the present Article 78 Petition. In their Petition and accompanying memorandum of law, Petitioners attempted to persuade Supreme Court, New York County (Lobis, J.), that the BSA reached the wrong conclusion with respect to each of the five statutory findings. The lower court disagreed and dismissed the petition. (A46.)

In reaching its conclusion, the lower court framed its analysis around the five findings referenced Section 72-21 of the New York City Zoning Resolution.

(A29.) *See also 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).

The First Finding. The lower court upheld the BSA's first finding, that the Congregation had satisfied the "unique physical conditions" prong with regard to both the community facility and the residential development. As a threshold matter, the lower court rejected Petitioners' contention that the BSA improperly analyzed the community and residential elements of the project separately, reasoning that bifurcation was needed to accord the Congregation the deference required with respect to a community facility furthering the goals of a religious institution. (A30.)

Starting with the community facility,[3] the lower court found record support for the BSA's finding that the zoning regulations impaired the Congregation's ability to meet its programmatic needs and rejected Petitioners' claims that (1) the Congregation was required to raise funds from its members in lieu of seeking variances, (2) the Congregation's programmatic needs were speculative, and (3) the Congregation's programmatic needs could be satisfied within an as-of-right building. (A30-31.) The lower court held that the BSA was entitled to rely on the Congregation's substantial and detailed analyses, submitted in response to the

[3] Petitioners explicitly abandon any challenges with regard to the community facility variance. (*See* Petitioners' Br. at 2 ("this appeal does not challenge the lower floor community house variances); *id.* at 7 ("[t]he community house variances are not challenged in this appeal"); *id.* at 15 ("in this appeal Petitioners do not challenge the community house variances")).

BSA's requests, and rejected Petitioners' suggestion that the BSA should have second-guessed the Congregation's programmatic needs. (A31.)

Turning to the residential development, the lower court focused on two of the several, unique physical conditions creating hardships for the Congregation. (A31.) Each of these conditions had independently justified the variance.

The lower court concluded that the BSA rationally deemed the division of the Congregation's lot by a zoning district boundary a "unique physical condition" within the meaning of the Zoning Resolution. (A31.) The lower court noted that, oddly, a zoning boundary runs right through the property, with 27% of the lot situated in zoning district R8B (a district with very restrictive building height limitations), such that the Congregation's ability to develop the property properly without a variance is unreasonably impeded. (A31.) The lower court rejected Petitioners' assertion that the division of the lot by a zoning district boundary is not "unique," because the BSA rationally found that, while a few other lots are divided by zoning boundaries, it is not a condition that is generally applicable to other neighboring lots. (A31-32.)

The lower court found that the BSA's second, independent, finding of a unique physical condition – the presence of a historic Synagogue on much of the lot – was also rational. (A32.) The lower court noted that, as a result of the presence of the Synagogue and of its significance to the Congregation, the

Congregation would only be able to use less than one-quarter of its developable floor area for an as-of-right development. (A32.) The lower court concluded that this condition also supported the BSA's finding that the Congregation had satisfied the first factor. (A32.)

The Second Finding. The lower court concluded that the BSA rationally found that an as-of-right building would not result in a reasonable return – a finding that, statutorily, need not be made for not-for-profit applicants such as the Congregation. (A38.) 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.) Indeed, the court observed that, at the BSA's request, the Congregation had submitted a litany of alternatives that the BSA thoroughly examined. (A34.) The lower court reached the same conclusion as the BSA: "None of these analyses, other than the original proposed structure, resulted in a reasonable return." (A34-35.)

The lower court also rejected Petitioners' claim that the BSA departed from its guidelines by failing to require the Congregation to provide the purchase price of the property, and rejected Petitioners' myriad challenges to the methodology employed by the BSA to determine return on investment. (A35-38.) With respect to the first, the lower court observed that (1) as the BSA found, an applicant is not required to provide the purchase price and (2) in any event, the Congregation

submitted the acquisition costs that were included in the deeds to the property. (A35.) With respect to Petitioners' challenges to the BSA's analytical framework, the lower court rejected Petitioners' assertions that, among other things, the Congregation's expert (1) should have used return on equity analysis,[4] (2) inflated the site value, and (3) "transparently manipulat[ed] the numbers," concluding:

> This court has considered all of [Petitioners'] 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 [Congregation's consultant's] submissions. Contrary to Petitioners' contentions, the BSA 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.

(A35-38.)

The Third Finding. The lower court concluded that the BSA rationally found that the variance would not alter the essential character of the neighborhood or impair the use of adjacent property. In so concluding, the lower court rejected Petitioners claims that the BSA's resolution was arbitrary and capricious because the variance granted would (1) result in the bricking up of some lot line windows on a building at West 70th Street in Manhattan, and (2) cast shadows on other buildings on the block. (A38.)

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[4] Petitioners have abandoned their claim that the BSA should have used a return on equity analysis. (Petitioners' Br. at 2, 27.)

The lower court concluded that the BSA acted rationally in granting a variance even though four lot line windows would be blocked. (A39.) The lower court was unconvinced by Petitioners' claim that the BSA and the Congregation "collaborated to create a record to obscure the facts" as to the number of lot line windows that would be bricked up and that the BSA should have required the Congregation to expand the courtyard to protect the eastern face of the building on West 70th Street. (A39.) The lower court noted that the BSA had successfully persuaded the Congregation to save several lot line windows by reducing the size of the project and by creating "a fully compliant outer courtyard." (A39.) The court also rejected Petitioners' assertions about the lot line windows because "a property owner has no protected right to a view" and "lot line windows cannot be used to satisfy light and air requirements." (A39.)

The lower court concluded that the BSA's analysis of the shadow impacts of the project was reasonable. The court noted that an environmental review had demonstrated that the project would have no significant adverse impact on the environment. (A39-40.) The court also rejected Petitioners' contentions that the BSA had improperly relied on environmental regulations and had failed to conduct a proper analysis of street shadows comparing shadows cast by an as-of-right building with the project:

> [W]hile 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.

(A40.)

The Fourth Finding. Because the fourth finding – that the practical difficulties or unnecessary hardship were not created by the Congregation – was not challenged by Petitioners and had ample support in the record, the lower court turned its attention to the fifth finding – namely, whether the variance granted was the minimum necessary to afford relief. (A40-41.)

The Fifth Finding. The lower court held that the BSA had rationally concluded that the variance granted was the minimum necessary to afford relief, in that the BSA findings "were based on objective facts appearing in the record." (A46.) The court rejected Petitioners' assertion that no variance was needed at all because the Congregation could have built an as-of-right structure to meet its programmatic needs. (A41.) The lower court noted that the Congregation had modified its proposed project at the BSA's request and had fully established its programmatic needs and the relationship of the project to its religious mission. (A41.) The lower court concluded that, with regard to the community facility, the BSA was required to accommodate the Congregation's proposal because (1) it was

in furtherance of its mission and (2) it did not have "significant and measureable detrimental impacts on surrounding residents." (A41.) Turning to the residential portion of the project, the lower court found that the significant modifications to the proposal required by the BSA, considered in conjunction with the reasonable return analysis, demonstrated that the variance granted was the minimum required to afford relief. (A41.)

Procedural Issues. The lower court also addressed and rejected Petitioners' challenges to the BSA's jurisdiction and the manner in which the BSA conducted its proceedings. (A42.)

The lower court rejected Petitioners' claim that the BSA lacked jurisdiction over the Congregation's request for a variance because the law also gives the LPC the power to grant relief with respect to properties containing designated landmarks. (A42.) The lower court found that there is no legal requirement that a party seek a special permit from another agency; a party may, instead, seek a variance from the BSA. (A42.)

The lower court also rejected Petitioners' assertion that the Congregation participated in an allegedly improper "*ex parte*" meeting with the BSA's staff months before the Congregation filed an application with the BSA. (A43.) The court noted that such pre-application meetings, designed to expedite the application process, are a routine part of practice before the BSA. (A43.) The court cited the

BSA's "Procedure for Pre-Application Meetings and Draft Applications," which states that "[t]he BSA historically has offered some form of pre-application meeting process to potential applicants." (A43.) The court concluded: "Since nothing in the law prohibits BSA from holding pre-application meetings, Petitioners' claim that the meeting was improper is without merit." (A44.)

Finally, the lower court rejected as meritless Petitioners' claim that "the entire proceeding [w]as arbitrary and capricious." (A44-45.) Addressing Petitioners' (now abandoned) challenges to (1) the time limits on their presentations at the hearing, (2) the BSA's decision not to question some of the opposition's expert witnesses, (3) the refusal to allow the opposition's architect to inspect the premises, and (4) the BSA's refusal to subpoena witnesses, the court concluded: "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. . . . [P]etitioners' claim that the procedures employed by the BSA were improper is rejected." (A44-45) (internal cross-reference omitted).

ARGUMENT

I. THE STANDARD OF REVIEW IS EXCEEDINGLY DEFERENTIAL

While Petitioners invite this Court to review the BSA's grant of a variance *de novo*, the Court's role on this appeal is narrow. The only issue for the Court is

whether the BSA's grant of a variance, grounded in the five factual findings, had a rational basis in the administrative record. This Court should not second guess the BSA's findings of fact or grant of the variance.

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." *Matter of SoHo Alliance v. New York 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) (quoting N.Y. City Zoning Resolution § 72-21). (The "b" finding is statutorily inapplicable to not-for-profit organizations, such as the Congregation.)

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. "The BSA, comprised of five experts in land use and planning, is the ultimate administrative authority charged with enforcing the Zoning Resolution." *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). As a result, the Court of Appeals has held that a BSA decision granting a variance "'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.'" *SoHo Alliance*, 95 N.Y.2d at 440, 718 N.Y.S.2d at 262, 741 N.E.2d at 108 (citation omitted).

It should be emphasized that *SoHo Alliance*'s use of the term "substantial evidence" was not an indication that a BSA decision must meet the "substantial evidence" test of CPLR 7803(4). Years before *SoHo Alliance*, the Court of Appeals distinguished decisions of a zoning board, which it described as "administrative or quasi-legislative in character," subject to a "rationality . . . standard of review," from "quasi-judicial determinations reached upon a hearing involving sworn testimony." *Sasso v. Osgood*, 86 N.Y.2d 374, 384 n.2, 657 N.E.2d 254, 259 n.2, 633 N.Y.S.2d 259, 264 n.2, (1995) . The *Sasso* Court said: "When reviewing the determinations of a Zoning Board, courts consider 'substantial evidence' only to determine whether the record contains sufficient

evidence to support the rationality of the Board's determination." *Id.* at 385. As the Second Department recently has explained:

> Municipal land use agencies like the Zoning Board are "quasi-legislative, quasi-administrative" bodies . . . , and the public hearings they conduct are "informational in nature and [do] not involve the receipt of sworn testimony or taking of 'evidence' within the meaning of CPLR 7803(4)" . . . . While parties may have a right to be heard by such agencies and to present facts in support of their position, the forum in which they do so is not "a quasi-judicial proceeding involving the cross-examination of witnesses and the making of a record within the meaning of CPLR 7803(4)" . . . . Accordingly, determinations of such agencies are reviewed under the "arbitrary and capricious" standard of CPLR 7803(3), and not the "substantial evidence" standard of CPLR 7803(4).

Matter of Halperin v. City of New Rochelle, 24 A.D.3d 768, 772, 809 N.Y.S.2d 98, 105 (2d Dep't 2005) (citations omitted) .

Petitioners' contention, that the degree of deference contemplated by *SoHo Alliance* is only warranted in cases involving the "resolution of highly complex technical issues" (Petitioners' Br. at 53), is unfounded. While Petitioners rely on *Pantelidis v. N.Y. City Bd. of Stds. & Appeals*, 43 A.D.3d 314, 315, 841 N.Y.S.2d 41, 43 (1st Dept. 2007), *aff'd* 10 N.Y.3d 846 (2008), that case concerned the BSA's ***denial*** of a variance and the question of whether a remand to the BSA was required where the BSA's findings were "arbitrary and capricious," where the BSA had addressed "less than all" of the five statutory factors, and where there was a complete administrative record that could be used for a review of the issues that the BSA had failed to address. *Id.* at 317. It was only in that peculiar situation that

the normal degree of deference accorded to the BSA could "admit of some elasticity" to ensure that the BSA did not "indefinitely prolong[] administrative proceedings by repeatedly considering less than all of the factors relevant to an application." *Id.* at 316-17. Here, by contrast, deference is plainly required as the BSA granted the variance and considered all five of the statutory factors.

The case for deference here is particularly strong given that aspects of the Congregation's proposal bear on its religious programmatic mission. In this Court's already narrow Article 78 review, even greater care must be taken not to second-guess the Congregation's assessment of what it needs to further that religious purpose. *See Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Town of Moreau*, 5 N.Y.3d 407, 413, 804 N.Y.S.2d 708, 713, 838 N.E.2d 624, 630 (2005); *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 595, 510 N.Y.S.2d 861, 867, 503 N.E.2d 509, 515 (1986) (holding that the law will presume that educational and religious uses benefit the public health, safety and welfare); *Albany Preparatory Charter Sch. v. Albany*, 31 A.D.3d 870, 871, 818 N.Y.S.2d 651, 653 (3d Dep't 2006) ("because of their inherently beneficial nature, educational institutions enjoy special treatment and are allowed to expand into neighborhoods where nonconforming uses would otherwise not be allowed . . . educational use is consistent with the public good"); *see also Trustees of Union College v. Schenectady City Council*, 91 N.Y.2d 161, 164, 667 N.Y.S.2d 978, 981, 690

N.E.2d 862, 865 (1997) (holding that a city law denying educational institutions from a residential historic district was unauthorized and unconstitutional).

Under the applicable Court of Appeals test, "a reviewing court may not substitute its judgment for that of the BSA – even if the court might have decided the matter differently" provided that substantial evidence exists. *Toys "R" Us*, 89 N.Y.2d at 423, 654 N.Y.S.2d at 107, 676 N.E.2d at 869. The supporting evidence will be considered "substantial" provided that key findings are substantiated by more than a "scintilla of evidence," *i.e.*, that "a reasonable mind ***might*** accept [the proof] as adequate to support the [agency's] conclusion." *Bethlehem Steel Corp. v. New York State Div. of Human Rights*, 36 A.D.2d 898, 899, 320 N.Y.S.2d 999, 1001 (4th Dep't 1971) (emphasis added). "That conflicting inferences may have been drawn from this evidence is of no moment." *Toys "R" Us*, 89 N.Y.2d at 424, 654 N.Y.S.2d at 107, 676 N.E.2d at 869. Since "'weighing the evidence and making the choice'" is the exclusive province of the BSA, the courts "'may not weigh the evidence or reject the choice'" that the BSA has made. *Id.* (citation omitted); *see also 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) ("[T]he responsibility 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.").

Since the agency is charged with weighing the evidence, it follows that it is the agency's province to decide what types of proof the agency will deem reliable. Thus, in *SoHo Alliance*, the Court of Appeals held that the BSA can "reasonably rely upon expert testimony submitted by the owners" to support the agency's findings of fact. *SoHo Alliance*, 95 N.Y.2d at 441, 718 N.Y.S.2d at 263, 741 N.E.2d at 108. Indeed, the BSA properly may rely on the unsworn statements of counsel appearing before it to support its findings. *See, e.g.*, *Matter of Millennium Custom Homes, Inc. v. Young*, 58 A.D.3d 740, 873 N.Y.S.2d 91, 92 (2d Dep't 2009) (zoning board properly relied on "oral statements from area residents" and "memoranda" submitted by town); *Hampton Mgmt. v. Div. of Hous. and Comm. Renewal*, 255 A.D.2d 261, 261, 680 N.Y.S.2d 245, 245 (1st Dep't 1998) ("letter from counsel's office responding to [agency's] inquiries, provided [agency] a rational basis for its [factual] finding"); *Hart v. Holtzman*, 215 A.D.2d 175, 175, 626 N.Y.S.2d 145, 146 (1st Dep't 1995) ("IAS court properly found that the determination of the Comptroller had a rational basis relying upon two Opinion Letters issued by the Corporation Counsel"); *RHS Realty Co. v. Conciliation and Appeals Bd. of City of New York*, 101 A.D.2d 756, 475 N.Y.S.2d 72 (1st Dept'

1984) (rational basis was "properly supplied" by affirmations that were "not sworn to"). In other words, here, the Congregation's submissions, where relied on by the BSA, can be "substantial evidence."

Not surprisingly, this Court repeatedly has applied this liberal, *SoHo Alliance* standard to uphold BSA decisions to grant zoning variances. *See, e.g., Torri Assocs. v. Chin*, 282 A.D.2d 294, 295, 723 N.Y.S.2d 359 (1st Dep't 2001) ("Despite petitioner's numerous challenges, '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 . . . variances here' . . . . Accordingly, the challenged determination must be confirmed.") (citations omitted); *UOB Realty (USA) Ltd. v. Chin*, 291 A.D.2d 248, 249, 736 N.Y.S.2d 874, 875 (1st Dep't 2002); *see also Mainstreet Makeover 2, Inc. v. Srinivasan*, 55 A.D.3d 910, 914, 866 N.Y.S.2d 706, 710 (2d Dep't 2008) ("decision of the BSA may not be set aside in the absence of illegality, arbitrariness, or abuse of discretion"); *see also Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 237, 814 N.E.2d 404, 407 (2004) ("[L]ocal zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one. Courts may set aside a zoning board determination only where the record reveals that the board

acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure.").

While Petitioners repeatedly assert that some of their specific contentions were not explicitly "mentioned" by the BSA in its Resolution (Petitioners' Br. at 54.), this argument is legally irrelevant (and false). An agency's decision "need not be exhaustive." *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768, 777, 809 N.Y.S.2d 98, 109 (2d Dep't 2005) (upholding variance); *cf. Gulf States Utilities Co. v. Fed. Power Comm'n*, 518 F.2d 450, 458-59 (D.C. Cir. 1975) ("cursory" agency decision may be adequate; "a detailed semantic exegesis" is not required where agency's "path may reasonably be discerned" to establish that it "genuinely engaged in reasoned decision making") (citation omitted). The evidence submitted by a party opposing a variance will only be relevant in an Article 78 proceeding challenging the grant of a variance where the opponent's evidence is "conclusive." *Vomero v. City of New York*, 54 A.D.3d 1045, 1046, 864 N.Y.S.2d 159, 161 (1st Dept. 2008) , (variance may be upheld "despite the presence of countervailing evidence" if that evidence "was not conclusive"), *rev'd on other grounds*, 13 N.Y.3d 840, 892 N.Y.S.2d 284, 920 N.E.2d 340 (2009). Petitioners do not – and cannot – contend that they submitted "conclusive" evidence. Thus, it is enough that the BSA made the five, statutory factual findings – each one indisputably and explicitly set forth in the Resolution.

II. THE BOARD OF STANDARD AND APPEALS' DECISION IS NOT ARBITRARY OR CAPRICIOUS

The BSA's Resolution is a model of rational decision-making. The BSA applied its expertise to this matter by visiting the site, listening to hours of testimony, suggesting and then considering alternative approaches, and reviewing a massive record of written submissions. The BSA thoroughly considered the five factual areas referenced by the statute, made each of the required findings in a detailed fashion, and, accordingly, granted the variance. The BSA's findings are plainly supported by more than a "scintilla" of evidence. *See Bethlehem Steel*, 36 A.D.2d at 899, 320 N.Y.S.2d at 1001; *see also* A52-65 ¶¶ 37-215:

- ***"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)." (A59 ¶ 122; A54-59 ¶¶ 37-122.) This finding is fully supported in the record. (*See, e.g.,* A1193-1197; A1293; A1701-1702; A1719-1724; A2484-2486; A2490-2491; A2495-2496; A2502 A3792-3803; A4024-4026; A4199-4209; A4418.)
- ***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." The BSA's reasonable return finding is

supported by the record. (*See, e.g.,* A1288-1315; A1724-1725; A2152-2153; A3803-3804; A4209-4211.) (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.*, A1197-1198; A1724; A2152; A2480-2484; A3803; A4026-4027; A4418-4419.))

- ***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." (A63 ¶ 201; A61-63 ¶¶ 149-201.) This finding is fully supported by the record. (*See, e.g.,* A1198-1199; A1275-1284; A1725-1726; A3328-3329; A3705-3743; A3804-3809; A4082-4085; A4211-4216; A4419; A4422-4426.)

- ***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." (A63 ¶ 205; A63 ¶¶ 202-05.) This finding is fully supported by the record. (*See, e.g.,* A1199-1200; A1726-1727; A3809; A4419.)

- ***"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. (A64 ¶¶ 210-211; A63-64 ¶¶ 206-215.) This finding

is supported by the record. (*See, e.g.,* A3809-3813; A4216-4219; A4420-4421; A4440.)

In each of the five sections of its Resolution, the BSA addressed each of Petitioners' objections to the Congregation's request for a variance. While the BSA dealt explicitly with the issues that Petitioners raise here, the BSA also noted that the contentions it failed to address in detail were nonetheless considered, evaluated, and rejected as unpersuasive. (*See* A64 ¶ 216 (determining that "all cognizable issues" including any objections raised but "not specifically addressed herein . . . are addressed by the record")).

The BSA found support for its five findings in the oral statements and written reports of the Congregation's leaders, architects, economists, and attorneys. Committed to conducting a thorough inquiry, the BSA took nothing initially presented by the Congregation at face value. After reviewing the Congregation's initial application (A1170, A1287, A1315), the BSA proceeded to "check under the hood and kick the tires," by peppering the Congregation with questions (A1491-1497), which were answered (A1649-1673), asking more questions (A1863-1866), which were answered (A2101-2120), holding numerous hearings (A2477, A3152, A3630, A4102), and requiring that the Congregation revise its factual, architectural, and economic submissions over and over and over (A2810, A3097, A3324, A3606, A3758, A4024, A4164, A4406.) – a rigorous process that

lasted more than 15 months. As a result, the BSA was able to rely on final submissions from the Congregation that had bested cross-examination from the Congregation's opponents, the BSA's staff, and the BSA's Commissioners. These submissions more than satisfy the "rational basis" test.

Since the BSA applied its expertise to this matter by visiting the site, listening to hours of testimony, suggesting and then considering alternative approaches, and reviewing a massive record of written submissions, this Court should defer to the BSA in accordance with *SoHo Alliance.* Here, "'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 . . . variances.'" *Torri Assocs.*, 282 A.D.2d at 295, 723 N.Y.S.2d 359 (citation omitted). "Accordingly, the challenged determination must be confirmed." *Id.*

Petitioners' attacks on each of the BSA's five findings are discussed below. Petitioners are unable to show, with respect to any of them, any irrationality or failure of proof.

A. The BSA's Finding of "Unique Physical Conditions" Was Rational

Petitioners argue that the BSA should not have found that there were unique physical conditions at the site that create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations, BSA Res. ¶ 122. (Petitioners' Br. at 59.) Specifically, Petitioners

contend that BSA erred in treating as "physical conditions" the (1) circulation and access issues on the property (*id.* at 17), (2) the fact that the site straddles a zoning district boundary (*id.* at 60), and (3) the Congregation's landmarked Synagogue (*id.* at 62).

Petitioners' contentions turn on an unduly narrow construction of the term "physical condition" as used in the Zoning Resolution, which Petitioners seek to support by citing *Vomero v. City of New York*, 13 N.Y.3d 840, 892 N.Y.S.2d 284, 920 N.E.2d 340 (2009) (cited in Petitioners' Br. at 59.) *Vomero*, however, did not concern what constitutes a "physical condition." The Court merely addressed what it means for a physical condition to be "unique," holding that "[p]roof of uniqueness must be 'peculiar to and inherent in the particular zoning lot' (N.Y. City Zoning Resolution § 72-21[a]), rather than common to the whole neighborhood." *Id.* at 841.

The narrow view of "physical condition" espoused by Petitioners has not carried the day in New York. To the contrary, this Court has warned against second-guessing the BSA's expert view of what is a "physical condition" within the meaning of the Zoning Resolution. For example, in *UOB Realty*, this Court, citing the deference required in *SoHo Alliance*, "reject[ed the] 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." *UOB Realty*,

291 A.D.2d at 249, 736 N.Y.S.2d at 875.

A property's location can lead to "unique physical conditions." *See Matter of Elliott v Galvin*, 33 N.Y.2d 594, 596, 347 N.Y.S.2d 457, 459, 301 N.E.2d 439, 441 (1973) (location of zoning lot within two different zoning districts constituted "unique physical conditions" within the meaning of zoning resolution). This is especially true here because, as the lower court and the BSA found, "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." (A31 *citing Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor*, 38 N.Y.2d 283, 286-87, 379 N.Y.S.2d 747, 752, 342 N.E.2d 534, 537 (1975)) ; *see also* A55-56 ¶62 (BSA resolution).)

In fact, even the term "unique" has not been construed strictly. It has been employed as a flexible standard that focuses on the statutory purposes of the variance provision. Thus, "[u]niqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship." *Douglaston Civic Ass'n v. Klein*, 51 N.Y.2d 963, 965, 435 N.Y.S.2d 705, 707, 416 N.E.2d 1040, 1042 (1980) (citations omitted). "What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed." *Id.*

Under the deferential standard of Article 78 review, each of Petitioners' objections quickly crumbles:

First, while Petitioners assert that the Congregation's accessibility needs could have been addressed by building an alternate structure as-of-right, (Petitioners' Br. at 17), the BSA considered such alternatives but found that they would not be viable. (A55 ¶¶ 60-61.) The BSA's reliance on materials indicating that such alternatives would not be workable clearly satisfies the more-than-a-scintilla "substantial evidence" test. *See Bethlehem Steel*, 36 A.D.2d at 899, 320 N.Y.S.2d at 1001.

Furthermore, as the BSA found, it is well established that "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." (A56 ¶63 *citing Islamic Soc. Of Westchester v. Foley*, 96 A.D.2d 536, 464 N.Y.S.2d 536 (2d Dep't 1983)) . Thus, even if correct (which it is not), Petitioners' claim that an as-of-right building could have addressed these access and circulation issues is irrelevant.

Second, contrary to Petitioners' unsupported assertions, (Petitioners' Br. at 44-45, 60), courts specifically have held that the fact that a site straddles a zoning district boundary can contribute to unique physical conditions at the site. *See Matter of Elliott*, 33 N.Y.2d at 596, 347 N.Y.S.2d at 458, 301 N.E.2d at 440.

Moreover, the BSA's prior similar holdings, in connection with other variance applications (A58 ¶ 104), further undermines Petitioners' assertion that a lot's split-zone condition cannot be considered by the BSA. *See Matter of Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 746-47, 834 N.Y.S.2d 295, 296 (2d Dep't 2007) (BSA may not disregard its prior rulings).

Third, Petitioners' contention concerning the Congregation's landmarked Synagogue similarly is unavailing. Petitioners cite no authorities providing any support for their assertion that, in evaluating whether a site suffers from a unique physical condition under Section 72-21 of the New York City Zoning Resolution, the BSA cannot consider the limitations in developing a site that abuts a structure of historic and religious significance. (*See* Petitioners' Br. at 62-64, 67.) Indeed, the only remotely relevant authority cited by Petitioners is *Matter of 330 West 86th Street* (BSA No. 280-09-A, July 13, 2010). Not surprisingly, however, the only reference to landmarking in the entire resolution was the following passage: "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." Of course, this discussion does not negate the BSA's

authority to consider the presence of a historic building that happens to have been designated as a landmark and, thus does not support Petitioners' assertion that "[t]he BSA acted highly improperly in using landmarking as a factor when the BSA had no jurisdiction whatsoever." (Petitioners' Br. at 67.)

To the contrary, it is axiomatic that this court must defer to the BSA's interpretation of the Zoning Resolution. *Toys "R" Us*, 89 N.Y.2d at 418-19, 654 N.Y.S.2d at 104, 676 N.E.2d at 866. As both the BSA and the lower court found, an entity, whose property contains a landmarked building, may seek either a special permit pursuant to § 74-711 or a variance from the BSA pursuant to § 72-21. (A42.) This is a rational construction of § 74-711, which 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." Nothing in this section vests the City Planning Commission or the CPC with exclusive jurisdiction. At the very least, nothing in that section purports to divest the BSA of its authority under § 72-21 of the Zoning Resolution to deem aspects of zoning lots as "unique physical conditions" under the Zoning Resolution. Because, as found by the lower court, 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.

In any event, the Resolution does not suggest that the BSA, here, treated the landmarked ***status*** of the Synagogue as a hardship. Indeed, the Congregation would have suffered from "unique physical conditions" even in the absence of any historic preservation law. Specifically, the Congregation demonstrated that:

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

(A3793.) In sum, the BSA considered Petitioners' arguments with respect to "unique physical conditions," but rejected them as unpersuasive.

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.) Given that the BSA's finding regarding "unique physical conditions" is rational and supported by substantial evidence, this Court

should not disturb it.[5]

B. The BSA's Finding of "No Reasonable Return" Was Rational

Petitioners also argue that the BSA should not have found that, because of the site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return. (Petitioners' Br. at 55; A61 ¶ 148.) Petitioners' convoluted attacks on the expert financial analyses cited by the BSA do not undermine the conclusion that the evidence before the BSA was "substantial."

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[5] Ignoring the fact that the BSA forced the Congregation to modify its proposal several times and the BSA's lengthy and thoughtful resolution, Petitioners contend that that the BSA "exhibited 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)." (Petitioners' Br. at 45 n.118.) Petitioners, however, fail to disclose the myriad factual findings that prompted the Second Circuit to reach this conclusion. Specifically, that court had been presented with evidence that (1) the application was denied, in part, because of an unsupported accusation that the school made a willful attempt to deceive the zoning board, (2) the zoning board's allegations of deficiencies in a study were based on its own miscalculations, (3) the board impermissibly based its decision on unsupported speculation about future expansion, and (4) "the resolution drafted by the ZBA's consultants, which would have approved WDS's application subject to conditions addressing various ZBA concerns, was never circulated to the whole zoning board before it issued the challenged denial." *Westchester Day Sch.*, 504 F.3d at 351 (citations omitted). The court concluded that, "[i]n 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." *Id.* at 351-52. Such a factual record clearly is not present in this case. Similarly, Petitioners' claim that the Congregation and the BSA "reached a tacit, collusive understanding" is devoid of any factual support and, indeed, is belied by the record. (Petitioners' Br. at 45-46.) Far from providing evidence of collusion, the record reflects that the BSA (1) required the Congregation to revise its proposal significantly, (A63-64 ¶¶ 207-209), and (2) considered whether one of several alternatives to the Congregation's proposal would accommodate the Congregation's needs. (A64 ¶¶ 210-211.) The record is replete with analyses of alternatives, including as-of-right approaches. (*See, e.g.*, A60, A61, A64 ¶¶ 128, 129, 132, 133, 147, 211.)

1. No Finding Was Required

As a threshold matter, the BSA did not even have to consider "financial return" under Section 72-21(b) of the New York City Zoning Resolution.[6] While that provision ***generally*** requires a finding that "there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of [the zoning requirements] will bring a reasonable return," the provision concludes: "***this finding shall not be required for*** the granting of a variance to ***a non-profit organization***." N.Y. City Zoning Resolution § 72-21(b) (emphasis added). The record clearly shows, and it is undisputed, that the Congregation is a "non-profit organization" within the meaning of the Zoning Resolution.

The BSA, however, nevertheless proceeded to take testimony regarding whether the residential portion of the Congregation's proposal satisfied the "reasonable return" standard usually applied to for-profit enterprises. In proceeding with such caution, the BSA cited three decisions. (A59 ¶ 125.) Those cases did not deal with the New York City Zoning Resolution or hold that

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[6] Petitioners appear to claim that this argument was abandoned because "[t]he Congregation did non file a cross-appeal herein on the BSA's rejection of that argument." (Petitioners' Br. at p. 13 n.34.) Petitioners, however, ignore the fact that the Congregation had no obligation (or right) to file a cross-appeal in light of the fact that it obtained complete relief from both the BSA and the lower court. *See Parochial Bus Systems, Inc. v. Bd. of Ed.*, 60 N.Y.2d 539, 544-45, 470 N.Y.S. 2d 564, 566, 458 N.E.2d 1241, 1244(1983) ("Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal. . . . The major exception to this general rule, however, is that the successful party may appeal or cross-appeal from a judgment or order in his favor if he is nevertheless prejudiced because it does not grant him complete relief.") (citations omitted). Thus, this Court is free to consider this argument as an alternate ground for affirmance.

municipalities may not legislatively exempt not-for-profits from a "reasonable return" requirement statutorily-imposed on other zoning variance applicants. *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 742, 395 N.Y.S.2d 428, 431, 363 N.E.2d 1163, 1166 (1977), only held that, when a town operates a for-profit enterprise, it has an "obligation to comply with [the] zoning regulations." *Foster v. Saylor*, 85 A.D.2d 876, 877, 447 N.Y.S.2d 75, 77 (4th Dep't 1981), merely held that a school's lease of school property to a corporation was "subject to local zoning regulations" and that the school's showing regarding its inability to sell the property satisfied those particular regulations. Finally, *McGann v. Inc. Vill. of Old Westbury*, 170 Misc. 2d 314, 319, 647 N.Y.S.2d 934, 937 (Sup. Ct. Nassau County 1996), concerned a church's First Amendment challenge to a local zoning ordinance and held that "because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of legality," which must be overcome "beyond a reasonable doubt." In the present case, the Congregation did not argue that it was exempt from zoning regulations or that the zoning regulations were unlawful. To the contrary, the BSA was not required to consider "reasonable return," because the lawful zoning regulations, promulgated by the legislature, state: "this finding shall not be required for the granting of a variance to a non-profit organization." N.Y. City Zoning Resolution § 72-21(b).

Significantly, the Zoning Resolution's statement that "reasonable return"

findings are not required "for the granting of a variance to a non-profit organization" applies without regard to whether the non-profit is seeking a variance that may facilitate the construction of residential homes. The statute and cases focus on the nature of the applicant, not the project. For example, recently, in *Fisher v. N.Y. City Bd. of Standards and Appeals*, 21 Misc. 3d 1134(A), 2008 WL 4966546 (Sup. Ct. N.Y. County Nov. 21, 2008), the court considered a project "to permit the construction of a twenty story hotel." 2008 WL 4966546 at *2. The court stated, without regard to the nature of the hotel: "As a non-profit organization, Xavier was not required to demonstrate the second criteria, that the subject premises could not yield a reasonable return without the variance (Zoning Resolution § 72-21[b])." *Id.*; *see also Homes for Homeless, Inc. v. Bd. of Standards and Appeals*, 24 A.D.3d 340, 345 n.1, 807 N.Y.S.2d 36, 40 n.1 (1st Dep't 2005) (McGuire, J., dissenting) ("A fifth showing, that due to the unique physical conditions, conforming uses would not 'enable the owner to realize a reasonable return' from the zoned property, is inapplicable where, as here, the applicant is a not-for-profit entity (NY Zoning Resolution § 72-21[b])."), *rev'd*, 7 N.Y.3d 822, 822 N.Y.S.2d 752, 855 N.E.2d 1166 (2006).

2. <u>The Finding Was Rational</u>

In any event, the BSA clearly was entitled to rely on the expert financial analysis submitted by the Congregation at the BSA's request. The record before

the BSA on this point was exhaustive. *See, e.g.*, A1287-1315, A1649-1674, A3094-3096, A3330-3360, A3607-3614, A4427-4446. Notwithstanding Petitioners' unfounded assertions that the Congregation "manipulate[ed]" and "inflated" the data and its invocation of the Madoff Ponzi scheme (Petitioners' Br. at 23, 38), the BSA was provided with substantial evidence that only the proposed building was feasible, and that an as-of-right building would not result in a reasonable financial return. (A60 ¶ 133.) The Congregation also provided the BSA with an alternative analysis that considered the rear terraces of the residential facility as sellable and revised the sales prices of the units accordingly. (A60 ¶ 135.) The Congregation then, at the BSA's request, analyzed data for the following scenarios: the proposed building; an eight story building; a seven story building, and the as-of-right building. (A60 ¶ 136, 137.) The Congregation then submitted a revised analysis of the as-of-right building using a revised estimated value of the property, which still showed that the as-of-right alternative would lead to a substantial loss. (A60 ¶ 138.) Based on this extensive record, the BSA found that, as a result of the property's unique physical condition, there was no reasonable possibility that development in strict compliance with applicable zoning requirements would result in a reasonable return. (A61 ¶ 148.)

While Petitioners now want to quibble with some of the expert analysis on which the BSA relied, that assessment was for the BSA to make. In *SoHo*

Alliance, the New York Court of Appeals expressly stated that the BSA can "reasonably rely upon expert testimony submitted by the owners" to support a "reasonable return" finding. *SoHo Alliance*, 95 N.Y.2d at 441, 718 N.Y.S.2d at 263, 741 N.E.2d at 108; *see also Matter of William Israel's Farm Co-op. v. N.Y. City Bd. of Standards and Appeals*, 22 Misc. 3d 1105(A), 2004 WL 5659503, *4 (Sup. Ct. N.Y. County Nov. 15, 2004) (approving BSA's reliance on submissions from developer's "financial expert"). Moreover, the courts have repeatedly declined to micromanage such agency analyses. *See, e.g., West Vill. Tenants Ass'n v. N.Y. City Bd. of Standards and Appeals*, 302 A.D.2d 230, 231, 755 N.Y.S.2d 377, 378 (1st Dep't 2003) (BSA is not required to consider the return for every permissible use).

Petitioners maintain: "The Congregation may elect either 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." (Petitioners' Br. at 55.) Petitioners, however, fail to cite to ***any*** authority in support of this position and thus clearly fail to meet their significant burden of proving that the BSA acted arbitrarily and capriciously in allowing the Congregation to do so.[7] Of course, as the BSA found, case law is to the contrary –

[7] Furthermore, as noted *supra*, Petitioners have abandoned all claims with regard to the Community House variances. *See* footnote 3 of this brief. Thus, the sole question presented is whether the BSA irrationally found that the Congregation could not earn a reasonable return in

non-profit entities, such as the Congregation, have the same right to generate a reasonable return from their property as any private owner. (A59 ¶ 119 *citing Matter of the Soc'y for Ethical Culture in the City of New York v. Spatt*, 51 N.Y.2d 449; 434 N.Y.S.2d 932 (1980)) . Furthermore, with regard to the residences, the BSA did not (1) accord the Congregation ***any*** deference or (2) allow the Congregation to rely on any of its programmatic needs. Accordingly, it is apparent that, with respect to that portion of the project, the Congregation satisfied all of the requirements that for-profit applicants are required to satisfy. In such circumstances, there is no principled reason to reverse the BSA's grant of a variance. Indeed, a contrary result would punish the Congregation because of its religious nature. Of course, as the BSA found, a land use regulation may not impose a greater burden on a religious institution than on a private owner. (A59 ¶¶ 118-19, 121 *citing Spatt*, 51 N.Y.2d at 449, 434 N.Y.S.2d at 932, 415 N.E.2d at 922). Accordingly, the BSA's reasonable return finding should be affirmed.[8]

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the absence of the variance – all of Petitioners' perceived issues regarding the community house variance are, in essence, moot.

[8] Furthermore, the cases cited by Petitioners on pages 54 and 55 of their brief in support of their claim that the BSA improperly bifurcated its reasonable return analysis are all plainly distinguishable because *none* involved applications for variances by non-profit organizations, let alone mixed variance applications such as the application in the present case. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); *N. Westchester Prof. Park Assocs. v. Bedford*, 60 N.Y.2d 492, 470 N.Y.S.2d, 458 N.E.2d 809 (1983); *Spears v. Beale*, 48 N.Y.2d 254, 422 N.Y.S.2d 636, 397 N.E.2d 1304 (1979); *Koff v. Flower Hill*, 28 N.Y.2d 694, 320 N.Y.S.2d 747, 269 N.E.2d 406 (1971) ; *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 (3d Dep't 1995) ; *Citizens for Ghent, Inc. v. Zoning Board of Appeals of Town of*

C. The BSA's "Neighborhood Character" Finding Was Rational

Despite the BSA's well reasoned and thoughtful conclusion that the variance would 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), Petitioners assert that the BSA erred because it could have reached a contrary finding. (Petitioners' Br. at 64-65.) Specifically, Petitioners argue that because (1) the variance will result in the closure of a few lot line windows (those located on a wall abutting a property line) and (2) development in accordance with the variance will reduce air and light in the neighborhood, the BSA's finding must be rejected. *Id.* at 64-65. These contentions are meritless.

Petitioners' claim ignores the fact that Section 72-21(c) of the Zoning Resolution merely requires a finding that the variance "will not ***substantially*** impair the appropriate use or development of adjacent property." N.Y. City Zoning Resolution § 72-21(c) (emphasis added). The assessment of whether a project's effect on an adjacent property will "impair" its use or development, as that term is used in the Zoning Resolution, lies ***exclusively*** within the province of the BSA.

Here, the BSA reasonably could conclude that the impact on lot line windows, light, and air – and any other effect on neighbors – would not be

---

Ghent, 175 A.D.2d 528, 572 N.Y.S.2d 957 (3d Dep't 1991) . Petitioners have cited to no authorities demonstrating that the BSA improperly bifurcated its analysis.

"substantial" such that the use or development of the adjoining property would be "impaired," especially considering that the LPC had already unanimously determined that the proposed construction would be an appropriate addition to the historic district. These are precisely the kind of "sensitive planning decisions" that the New York Court of Appeals has held should be left to the "quasi-legislative, quasi-administrative boards composed of representatives from the local community," here the BSA, because those officials "possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community." *Cowan*, 41 N.Y.2d at 599, 394 N.Y.S.2d at 584, 363 N.E.2d at 310. Thus, it matters not whether this Court would have "decided the matter differently" after considering any impacts on neighbors. *See id.*; *see also* (Petitioners' Br. at 49 (arguing that BSA could have required BSA to provide another feasibility study)). The only question is whether the BSA's conclusion was rational.

With respect to the lot line windows, Petitioners' claim seems to be premised on the following proposition: because even a single window was blocked, the BSA's resolution necessarily was arbitrary and capricious. Petitioners, however, cite no authority suggesting that such windows enjoy any special legal protection, nor can they since such windows may not even be used to

provide legally required light and air to the rooms they service.[9] (In fact, Petitioners do not cite any legal authority in the section of their brief in which they contest the BSA's "neighborhood character" finding). Moreover, any impacts were minimized. In an effort to block as few lot line windows as possible, the Congregation modified its original development plans by pulling back its rear wall to create terraces and thereby free up four or five lot line windows on 18 West 70th Street. Indeed, Petitioner Lepow cannot complain at all since his building at 18 West 70th Street has an outer court along its shared property line with the Congregation that contains columns of windows that are not on the lot line. The new building will not affect those windows. Furthermore, the BSA required the Congregation to modify its proposal in order to provide a courtyard and "thereby retain[] three more lot line windows than originally proposed." (A63 ¶192.)

Accordingly, Petitioners' contentions that the BSA (1) ignored the impact of the proposed buildings on windows and (2) "seemed to believe that it only need review legally protected rights" is contradicted by the record. (Petitioners' Br. at 48, 50.) Indeed, as the lower court explained, the BSA's analysis clearly reflects the type of review and balancing required under Section 72-21 (c) that Petitioners, at page 50 of their brief, inexplicably claim was absent:

[9] Indeed, Petitioners' argued before the BSA that the Congregation's programmatic needs could have been accommodated within the existing parsonage house even though "development of the parsonage house . . . would block ***several dozen windows*** on the north elevation of 91 Central Park West." (A55 ¶61.) (emphasis added).

> 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.

(A39.)

Petitioners attempt to turn these facts on their head, reasoning that because the Congregation modified its proposal to minimize the number of windows blocked in the rear of the building, the BSA also should have required the construction of a courtyard in the front of the building and, therefore, the BSA's Resolution was arbitrary and capricious. (Petitioners' Br. at 65.) 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. This determination was exclusively within the province of the BSA and should not be disturbed here.

Petitioners' contentions regarding air and light similarly are misplaced. (Petitioners' Br. at 64.) The BSA acted well within its discretion in relying on the shadow study, commissioned by the Congregation, comparing the shadows cast by the existing building with those cast by the proposed building. The BSA reasonably could conclude, based on the study of shadows cast over the course of

the year, that the variance would lead to few additional shadows and that those few shadows would be insignificant in size. (A63 ¶ 199.) Indeed, the lower court reached precisely this conclusion:

> 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.

(A40.)

This well-supported finding must not be disturbed.

D. The BSA's Finding of "No Self-Imposed Hardship" Was Rational

Petitioners do not appear to contend in their brief that the BSA's finding that there was "no self-imposed hardship" was irrational. There was record support for that finding. (*See, e.g.,* A1199-1200; A1726-1727; A3809; A4419.) Thus, the BSA's conclusion that the Congregation did not create any of the limitations that warranted the variance is unassailable. (*See* A63 ¶ 205.)

E. The BSA's "Minimum Variance" Finding Was Rational

Finally, relying on meritless claims previously addressed in this brief, Petitioners claim that the BSA should have found that the variances granted were not the minimum required to afford relief. (Petitioners' Br. at 41-42, 49, 68.)

Petitioners maintain that because the BSA ***could*** have used a different valuation strategy and because the Congregation ***could*** have been required to construct a courtyard in the front of the building, the variances granted were not the minimum necessary. This argument, premised on claims already rejected, certainly does not establish that the BSA's finding was arbitrary or capricious. Indeed, Petitioners cite to no legal authority in connection with this argument.

The BSA considered the argument that no variance was required and found it unpersuasive. The BSA noted that Petitioners had argued "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." (A64 ¶ 212.) Yet, 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." (A64 ¶ 213.)

Petitioners cannot show that this finding was irrational. To the contrary, the BSA required the Congregation to scale back its proposal, (A63-64 ¶¶ 207-209), and also considered numerous alternatives to the Congregation's proposal to determine whether an alternative approach would accommodate its needs. (A64 ¶¶ 210-211.) The record is replete with analyses of alternatives, including as-of-right

approaches. (*See, e.g.*, A60, A61, A64 ¶¶ 128, 129, 132, 133, 147, 211.) Based on this record, the BSA determined that the Congregation's final proposal would involve the minimum variance. (A64 ¶ 212-15.) This Court should not upset the BSA's "minimum variance" finding.

CONCLUSION

For the foregoing reasons, the lower court's dismissal of 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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/s/ Daniel Vinci

Case Name: Kettaneh v. Board of Standards

To Be Argued By:
CLAUDE M. MILLMAN

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.

---

[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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Case Name: Landmark West! v. City of NY

To Be Argued By:
Alan D. Sugarman

New York County Clerk's Index No. 113227/08

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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Date Completed: March 10, 2011

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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

[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.
>
> * * *
>
> 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]

[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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ALAN D. SUGARMAN
Attorney for Petitioners-Appellants

Order and Judgment of Appellate Division First Department dated June 23, 2011, Unanimously Affirming Supreme Court.

Intentionally Omitted

Decision, Order, and Judgment July 10, 2009 of Lobis, J., Supreme Court New York County, dismissing Article 78 Petition.

Intentionally Omitted

Resolution and Decision of the Board of Standards and Appeals Approving Variances, dated August 26, 2009.

Intentionally Omitted

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

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
Petitioners-Appellants,	:	New York County Index No. 113227/08 (LOBIS)
-against-	:	AFFIRMATION IN SUPPORT OF MOTION TO REARGUE AND ALTERNATIVELY FOR LEAVE TO APPEAL
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-Appellees.	:	

AFFIRMATION OF ALAN D. SUGARMAN

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

Alan D. Sugarman, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms under the penalties of law:

1. I am the attorney for the Petitioners Kettaneh and Lepow herein and submit this affirmation on personal knowledge in support of the motion of these Petitioners for reargument of this Court's order and decision of June 23, 2011, or in the alternative for leave to appeal to the Court of Appeals. No previous application has been made for this relief.

2. On June 23, 2011, by unanimous decision,[1] the Appellate Division First Department affirmed the July 10, 2009 decision and order of the Supreme Court, New York County[2] upholding the August 26, 2008 decision of the New York City Board of Standards and Appeals (BSA) granting seven variances to the politically influential and affluent Congregation Shearith Israel to construct luxury condominiums on a highly desirable development site on Manhattan's West Side adjacent to the Congregation's landmarked Synagogue. As to almost all of the issues raised on appeal by Petitioners, the Appellate Division's consideration was summary in nature, the decision simply stating: "We have considered petitioners' remaining arguments and find them without merit." The Appellate Division further erroneously asserted that the "BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." On the contrary, the BSA — engaging in deliberate blindness — ignored the arguments raised by Petitioners before the BSA, and then later in this appeal. Thus, for the Appellate Division to assert that the issues were expressly acknowledged and considered by the BSA, when the reverse it true, shows that the Appellate Division misapprehended or overlooked the points raised by Petitioners and then summarily dismissed as lacking merit by the Appellate Division.

3. This affirmation will not repeat the arguments made in Petitioners' Appeal Brief

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[1] Justices Angela M. Mazzarelli, Dianne T. Renwick, Leland G. DeGrasse, Helen E. Freedman and Rosalyn H. Richter.

[2] Justice Joan B. Lobis. Justice Lobis, clearly uncomfortable with the action of the BSA unfortunately applied an incorrect standard of review (Reply at 4), and did not apply the substantial evidence standard. Justice Lobis further stated:

> 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.

and Reply – but will note the failure of the Appellate Division to address the issues clearly raised by Petitioner and mostly ignored by the BSA. The Appellate Division has ignored long-standing law and, by eviscerating the Zoning Resolution, has also disturbed in a material way land use regulation in New York City,. The Decision and Order is of enormous practical significance to the regulation of land use in the City of New York. Of greater concern is that the Decision and Order conflicts with the decisions of the Court of Appeals and of this and other Departments of the Appellate Division in the following ways:

4. The questions of law to be considered by the Court of Appeals include:

- In a variance application by a religious non-profit for a mixed–use project with (i) religious programmatic and (ii) luxury condominium components, may the analysis of reasonable return ignore the reasonable return that could be obtained if the entire development site were used solely for condominium and other income production?
- In a variance application by a religious non-profit for a mixed–use project with (i) religious programmatic and (ii) luxury condominium components, may the analysis of reasonable return be based upon only the return that could be obtained from the luxury condominium component?
- In a reasonable return "dollar and cents" analysis supporting a variance for a building, may the analysis use as the starting point site value an arbitrary site value of a site other than the site where the building is located?
- In a reasonable return "dollar and cents" analysis supporting a variance for a building, may the analysis use as the starting point a site value other than the site value of the as-of-right site area?
- In a reasonable return "dollar and cents" analysis supporting a variance for a building, may the analysis ignore the acquisition cost of the property?

- Under the New York City zoning laws, is a hardship arising out of landmarking a physical condition creating a hardship that may be resolved by granting variances for the construction of luxury condominiums?
- Under New York City law, does the BSA have statutory jurisdiction to consider landmarking hardships to support a variance, or does New York City law assign that power solely to the New York City Planning Commission?
- Under New York City law, may the BSA engage in the transfer of landmarked development rights without restricting future use of the rights transferred from the landmarked site?
- Under New York City law, may a condition that is not "physical" be the basis of a hardship justifying the variance?
- May the Chair and the Vice Chair of a zoning board hold private meetings with a variance applicant to consider the exact application to be submitted to the zoning board and then refuse to disclose what occurred at the meeting, and, is such a meeting and refusal to disclose not evidence of bad faith by the zoning board?
- Is a zoning board not required to take as hard look at alternatives suggested to the board by knowledgeable experts if such alternatives would prevent the blocking of windows in an adjacent property where the variances are solely for the production of profit to the applicant and the rate of return for the project is the largest return ever granted by such board and is nearly twice the rate of return that the sole expert for the applicant opined was reasonable and adequate return?
- Where a zoning board engages in multiple acts of deliberate blindness, refuses to take a hard look at alternatives, engages in private meetings with the applicant without disclosing what transpired, and conceals key considerations in its written decision, should a court defer to vague and conclusory findings by that board, or

should the court carefully require specific factual support for each finding for each variance, or dismiss or remand the case?

- May the BSA rely on a reasonable return analysis using allocations of construction costs in a mixed use building, where the applicant deliberately conceals the allocations of costs by submitting spoliated documents, and the BSA deliberately refuses to take a hard look at the facts by not requiring the submission of complete documents after repeatedly being informed of the spoliated documents? [Pet. Br. at 250].

5. The variances challenged by Petitioners on appeal provide only one benefit to the Congregation: money. Without these variances, the only hardship suffered by the Congregation is loss of funding to subsidize its wealthy members in order to construct a community center for use by these same members. To emphasize again, these variances are only about money, and money, not for the disadvantaged, but for the most advantaged. The Congregation is most influential and prestigious with wealthy members. Prominent real estate developers and allies of Mayor Bloomberg such as Jack Rudin are members, and even the members of the family of the current Corporation counsel are past and/or current members.

6. In order to justify the variances the BSA needed to make the incredible finding that a conforming building on this perfect development site would be unable to yield a reasonable return. Because this perfectly rectangular, 6400 square foot site just 100 feet from Central Park has no physical impairments of any type whatsoever, the lesson here is that no site subject to contextual zoning would be able to earn a reasonable return, thus consigning contextual zoning to the dustbin. The BSA could only find that a reasonable return could not be obtained by not considering an as-of-right development on the entire site, in direct conflict with precedent as well as common sense, and then by engaging in the most irrational act of using a site value - not of the development site but of another site - and then to conceal what the BSA

was accepting in its decision. This behavior of the BSA is not credible but irrational and shocking.

7. Furthermore, since the BSA and Supreme Court decisions are lengthy, the summary affirmation by the Appellate Division of the error-filled BSA and Supreme Court decisions wreaks havoc upon the New York City scheme of zoning and landmark regulation as discussed below. As just one error, the BSA was clear that its decision — with the affirmation of the Supreme Court — was in essence a transfer of air rights from the landmarked Parsonage to the 6400 square foot development site. Amazingly, the summary affirmation by the Appellate Division — without discussion — has now authorized the BSA to consider landmarking as a physical condition hardship where no such statutory authority is accorded the BSA to do so.

The BSA decision states at paragraph 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.

Because the BSA decision at paragraph 120 is so explicit that the BSA was transferring landmarked air rights in the section of the BSA decision devoted to the condominium physical condition finding, the Appellate Division by its summary decision has conferred on the BSA jurisdiction where none exists. Clearly, the Appellate Division decision in the future will be read together with the BSA decision it affirmed.

8. The Appellate Division was also notably incorrect in asserting that the "BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." The BSA deliberately avoided most of the issues raised again by Petitioners in the appeal. There is no discussion in the BSA decision, for example, of the erroneous use by the Congregation's consultant of the site value of 21,000 square feet of undeveloped air rights over the parsonage in calculating the site value of the 6700 square feet of the two as-of-right

condominium floors. Critically, the BSA did not even acknowledge in its decision it reliance upon a bifurcated analysis. With respect, the Appellate Division should again compare the Brief and Reply against the BSA decision and revise its decision accordingly.

9. Similarly, the Appellate Division decision, by allowing the BSA to analyze the feasibility of only a part of the development site, and not the entire site, — the so-called bifurcated approach — is in direct conflict with extensive precedent. Pet. Br. at 54-5.

10. In affirming the Supreme Court decision sanctioning the bifurcated approach, the Appellate Division has reversed precedent. If the Appellate Division supports the bifurcated analysis of mixed-use project proposed by non-profits without an analysis of the full income potential of the development site, then the Court should state so clearly, and indicate why the precedent cited by Petitioners is inapplicable or distinguishable.

11. The Appellate Division also misapprehends the facts — it states incorrectly that the "BSA concluded that the Congregation had shown its entitlement to the requested *variance*." This is significantly inaccurate for the BSA granted not one, but seven variances; on appeal only four variances relating only to the luxury condominium were challenged by Petitioners. Significantly, § 72-21 requires that the five conditions be met for each variance - this requires not a conflated analysis of all the variances, but a discrete analysis of each variance and application of each of the five conditions to each variance. As to each one of the condominium variances, the BSA needed to specifically find that, because of the "physical conditions" the BSA asserts to exist, 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." § 72–21(b). The statute provides that this finding is to be made as to each of the variances granted — a global finding is not sufficient.

A. The Analysis of Reasonable Return for an As-Of-Right Building

12. The Appellate Division overlooked the BSA's failure to identify the specific

reasonable return analysis upon which the BSA's reasonable return finding was based, and also the Appellate Division itself did not clarify which reasonable return analysis it believed constituted the substantial evidence claimed to support the finding. The Appellate Division states that "[the] BSA rationally concluded that due to the unique physical conditions, the Congregation could not realize a reasonable return from an as-of-right building." While the record contains a dizzying array of analyses submitted by the Congregation's expert, the Appellate Division does not indicate which as-of right building analysis it is relying upon. If the Appellate Division cannot identify the exact analysis upon which the BSA relief is based, then it would seem that the Appellate Division cannot rationally conclude that substantial evidence supports the § 72–21(b) finding.

13. The responsive papers of the City narrowed down the possible analyses upon which the City relied to these two analyses: (i) the December 2007 seven-floor building (the Scheme C), which was not updated and was not all-residential, and (ii) the July 2008 so-called bifurcated approach analyzing only two of the potential seven floors of space (the Scheme A.) The Appellate Division overlooked the fact that neither of these analyses meets the standards of law and precedent. *See* cases cited at Pet. Br. at 54–5.

(1) The BSA Did not Consider an All Income Producing As-Of-Right Building

14. If the Appellate Division believed that the BSA relied upon the December 2007 analysis, then the Appellate Division overlooked the fact that the Congregation's expert admitted that the December, 2007 example was not an all-income producing building and did not follow the precedent requiring that in a variance proceeding, the dollars and cents analysis must be of the entire site. Thus, the Appellate Division decision would conflict with settled law. Moreover, the Appellate Division overlooked the fact that even this analysis yielded a rate of return that exceeded that the return the Congregation's expert opined was reasonable. At the

same time, the Appellate Division was holding that it was appropriate for the BSA to rely upon the opinion of the same expert. Thus, this analysis cannot be the analysis that is the substantial evidence supporting the § 72–21(b) finding.

15. Respondents do not dispute that the Congregation did not present an all–income-producing analysis. See Pet. Br. at 39. Perhaps the Appellate Division overlooked the unequivocal statement by the Congregation's expert accompanying his December, 2007 report cited at Pet. Br. at 39:

> "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].

An all-residential development of the nature typical in the neighborhood would have had condominiums and professional offices on floors 1–7 and would have utilized the value of the two basements for professional offices and other permitted uses.

16. Thus, the Appellate Division should not have relied upon the December 2007 analysis; moreover, because the BSA did not require the updating of this analysis in July 2008, it seems that the BSA was not relying upon it but only upon the analysis of the two floors. This failure to present an analysis of an as-of-right building occupying the entire development site was admitted by the Congregation's consultant; further, at oral argument Respondents did not dispute the fact of this failure to present such an analysis.

17. Petitioners cited the extensive precedent requiring analysis of the entire site. The Supreme Court ignored the cited precedent. Respondents did not even attempt to distinguish the precedent, ignoring the issue altogether. Then, the Appellate Division summarily dismissed the issue as having no merit without discussing the precedent to the contrary.

18. Even more important, the as-of-right analyses were addressed on page 1 of Petitioners' Reply and were the only issues argued by Petitioners during oral argument, yet the Appellate Division overlooked the issue in its decision.

19. And, if the Appellate Division was relying upon the December 2007 analysis, it overlooked the undisputed fact the return for this scheme was 6.77% return yet the Congregation's expert opined specifically that 6.55% was an adequate return. Oddly, the Appellate Division stated that the BSA was relying upon the expert opinion, but apparently, the BSA was not, for it then ignored this specific opinion of the Congregation's expert.

(2) The Bifurcated Analysis of Two Floor As-Of-Right Building Was Not Considered and the BSA Did Not Use the Site Value for the Two Floors

20. The second possible analysis which the Appellate Division may have relied up as the substantial evidence is the so-called bifurcated analysis of the two floors of development rights consisting of 7,494 square feet in total, atop the community space. The applicant was required to provided a dollars and cents analysis of the development site - the upper two floors of 7494 square feet. The Congregation did not do this — rather, as admitted by the Congregation's expert, that expert used as a starting point in the financial analysis the value of 19,755 square feet of undeveloped space over the adjoining parsonage, not the value of the two floors of the development site. The Appellate Division apparently overlooked the fact that the expert and the BSA did not use the value of the as-of-right site being considered in the analysis, but a wholly irrational and arbitrarily different site. It is undisputed that a conforming two floors of condominiums would only contain 7,494 square feet, not 19,755. If the Appellate Division did not overlook this fact, then the Appellate Division overlooked the fact that there was no rational explanation provided by the BSA or the expert or by the Respondents' papers or oral argument as to why a different site was used for valuation or why 7,494 was not used as the size of the site.

21. It is clear that there was never an analysis conducted of the two-floor development site using the value of the site under consideration, since the value used was of a separate site nearly three times larger. These facts are completely undisputed; it is apparent that

the BSA was too embarrassed to include these facts in its decision - as it should have been. Had the BSA done so, every zoning practitioner and economist would have ridiculed them. So, the BSA just hid what they did so as not to be ridiculed and perhaps to hope that future variance applicants may not attempt the same trick. Yet the record is clear and the BSA has opened the door to irrationality.

22. The Appellate Division may have overlooked pages 3 and 4 of the Congregation's expert's report of May 13, 2008 [A-3818-9], quoted at page 35 of Petitioners brief. Here the expert readily admitted the use of the undeveloped area over the parsonage as a basis to determined the value of the 7,494 square feet of the two-floor site being developed:

> 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.

Without question, rather than value the 7,594 square feet available on the two as-of-right floors, the expert contrived to inflate this value to 19,755 square feet - by using space from above the parsonage. But the only reasonable return computation is to use the value of the space as-of-right as the starting value, and, the expert clearly did not do this.

23. That the value of the two floors of development rights was not used in the analysis was not disputed by respondents in their responsive papers or at oral argument (the Petitioners having devoted all of their argument time to the issues of the as-of-right analyses) and the Appellate Division lumped this issue into a summary dismissal. It is thus undisputed that the BSA did not consider a dollar and cents analysis of the development site but of something different. Under any rational world-view, the reliance upon this analysis by the BSA was wholly irrational.

24. Thus the Appellate Division was incorrect in its assumption that there was any rational conclusion by the BSA that the Congregation could not realize a reasonable return from the development site. This issue was fully briefed as Petitioners' primary issue and fully discussed at oral argument; it was ignored by Respondents in their responsive papers and not refuted at oral argument. Despite the assertion of the Appellate Division, the BSA in its decision did not discuss it. The Appellate Division itself ignored the issue except for its omnibus statement that "We have considered petitioners' remaining arguments and find them without merit."

25. Even if the bifurcated analysis had been conducted using rational starting facts, it still remains clear, as discussed above, that New York law would not accept a valuation of only part of the as-of-right space available for construction.

(3) The Actual Acquisition Price of the Site Was Not Considered

26. The Appellate Division also apparently overlooked the fact that in neither analysis did the BSA consider the actual acquisition price of the site — there are no analyses at all of the return on investment using the actual acquisition price of the site. (*See* cases cited Pet. Br. at 58, Pet. Reply at 15). No one can show such an analysis using the actual acquisition price — the Respondents refer to no analysis using the original acquisition price. The Respondents cannot even provide a dollars and cents value of the original acquisition price. Indeed, the BSA ignored the issue, and thus the Appellate Division incorrectly asserts that " BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." The Supreme Court asserted falsely that the actual acquisition price was submitted, but neither that Court, nor the Respondents, nor the Appellate Division have been able to state what that figure is — and, again, it is undisputed that no analysis was done using the actual number. Indeed, the Appellate Division omnibus "no–merit" denial avoids addressing the New York precedent to the contrary.

(4) No Substantial Evidence of a Relevant Reasonable Return Analysis to Support the §72–21(b) Finding

27. The Appellate Division asserts that there was substantial evidence in the record to support the finding that a reasonable return could not be earned. It is respectfully requested that on rehearing, the Appellate Division identify with specificity the exact analysis that it asserts constitutes the substantial evidence of an analysis of an as–of–right building. If the Appellate Division relies upon the July 2008 bifurcated analysis, then it needs to explain why it is rational to use a site value of a different site and to explain how an analysis of only a portion of the site is consistent with the extensive jurisprudence stating that the entire property is to be analyzed.

B. No Physical Condition as Defined in 72–21(a).

28. The Appellate Division decision overlooks the exact language of § 72–21(a) of the Zoning Resolution as to the nature of the required physical condition: "physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions." *See* cases cited at Pet. Br. at 59.

29. The Appellate Division, citing *Galvin*, asserted that:

> "The location of the zoning district boundary, along with other factors, including the Congregation's need to preserve the existing synagogue, provides a rational basis for BSA's finding of unique physical conditions." and then cites Galvin."

In so stating, the Appellate Division cites no physical conditions of the type enumerated in the statute, and gives no hint of what are the "other factors" upon which the Appellate Division relies. The record is silent as to why variances for construction by the Congregation of the extra floors of the condominiums and the elimination of setback are required to "preserve the existing synagogue." Perhaps the Congregation could argue that somehow variances were required for the lower floors to somehow preserve the Synagogue adjoining the lower floors, but there is no relationship between the condominium floors and the Synagogue. So this would have been a nonsensical finding not supported by any evidence had the BSA indeed made such a

finding, which it did not do.

30. *Galvin* follows the explicit requirement of 72–21(a) that there be a unique physical condition referring to the "irregular" shape:

> "The record supports the finding that the location of the zoning lot within two different zoning districts, as well as the irregular shape and small size of the C1–9 portion of the zoning lot constitute such "unique physical conditions" which allow the granting of a variance."

31. The Appellate Division overlooked not only the clear language of the statute but the consistent interpretation of the very case it cites which refers to the irregular shaped physical condition. Nothing of that sort of physical condition exists here, and the Appellate Division — without explanation — does not follow the direction of *Galvin* or the statute.

(1) The Other "Conditions" Relied Upon by the BSA

32. Moreover, the Appellate Division misstates the findings of the BSA by alleging that the BSA made a finding based upon "the need to preserve the existing synagogue." The Appellate Division cannot put words into the mouth of the BSA — the BSA in its paragraph 122 specifies no physical conditions and does not refer to "the need to preserve the existing synagogue" as a physical condition. Instead the BSA relies upon programmatic needs as a physical condition, and also expressly relies upon its self-created powers to transfer air rights of a landmarked building to another part of the zoning site.

33. The statute does not just state that there must be a physical condition, but that the variance must somehow be related to the specific hardship.

34. Upon reargument, it is respectfully requested that the Appellate Division identify any finding by the BSA allegedly stating that the "need to preserve the existing synagogue" was a physical condition and moreover any explanation of how in any way this "need" was related to the construction of the luxury condominiums on the upper floors which had no physical connection or relationship to the Synagogue.

(2) Programmatic Needs Are Not a Physical Condition and Not Related to the Condominium Variances.

35. As to the four variances for the luxury condominiums, the BSA does not even make the effort to draw the connection between the Congregation's claimed programmatic needs and the variances requested. The four condominium variances do not resolve or affect the Congregation's programmatic needs in any way whatsoever. The BSA's decision does not even attempt to rationalize the use of programmatic need as a basis for the physical condition. The only relationship between programmatic needs and the condominium variances is that the money provided by the condominium variances makes it easier on the pocketbooks of the well–off Congregation to fund the community house. This indeed was the express argument of the Congregation, which the BSA had rejected.

(3) The BSA's Improper Reliance upon Landmarking as a Physical Condition Hardship

36. The second issue is the express reliance by the BSA on the landmarked status of the Synagogue, at paragraph 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 ..

37. Unmistakably the Board here and elsewhere uses landmarking as a hardship and a factor justifying the condominium variances. The City admits that the Board took the landmarking hardship into account under its (a) finding.[3] But, the Appellate Division seems to disagree with the City Respondents, and ignores the BSA's express reliance upon the landmarking hardship.

38. As demonstrated clearly the BSA has no power to afford relief from landmarking

[3] City Br. at 10: "The BSA determined 'that there are unique physical conditions' (ZR §72–21(a) in three particular respects …"

hardships, for that power resides solely in the hands of the City Planning Department, with some assistance from the Landmarks Preservation Commission. What the BSA should have added to this paragraph is the following "but all such provisions of the Zoning Resolution require action by the Department of City Planning, and the BSA is provided no authority under the Zoning Resolution to consider landmarking hardships in a variance proceeding for that would trample the powers expressly delegated to the Department of City Planning." This issue was clearly raised by Petitioners, but, despite the assertion of the Appellate Division, it was ignored by the BSA, and equally ignored by the Appellate Division in its omnibus dismissive statement.

39. Moreover, the BSA, in effectively transferring air rights from the Parsonage to the development site, completely ignored the requirements of the Zoning Resolution to restrict development of the air rights being transferred. Justice Lobis agreed, stating that: "There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage." The Supreme Court did not appreciate that the BSA had completely subverted the landmarking hardship relief provisions in its evident desire to satisfy the Congregation. What the BSA did is absolutely outrageous; the Appellate Division's sanctioning this subversion of the Zoning Resolution is unfortunate as well.

(4) The assertion that the split zoning lot is a physical condition hardship is irrelevant because ZR § 23–711 prevents the Congregation from building a tower on the R10A sliver portion of the lot.

40. The Appellate Division erroneously assumed that the Congregation is unable to construct a building exceeding 75 feet in height on the R10A 17–foot wide sliver portion of the development site. This section of the lot is too narrow to allow the Congregation to construct a sliver tower in that section up to the 185 feet allowed by R10A zoning. So, apparently the Appellate Division reasoned that the Congregation suffered a hardship as to the entire development site because a tall building could not be built on the sliver, and that this hardship

was not a merely just a hardship relating to the zoning, but a physical condition. (Of course, even without a tower on the sliver, the Congregation could build a completely useful and profitable building on this highly desirable perfect site.)

41. But, the Appellate Division overlooked the fact that ZR § 23–711, is the overriding factor in limiting a tall building on the R10A sliver. Pet. Br. at 16, 19, and 44. Pet. Reply at 5 and 22-3. That provision requires a 40–foot separation between the Synagogue structure and the upper floors of any residential tower on both the R10A and the R8B portion of the development site. The Appellate Division overlooked the fact that all parties, the Congregation's expert architect, the BSA, and the DOB agreed that the 40–foot separation was required. Thus the split zoning lot is wholly irrelevant - the limiting factor is ZR § 23–711.

42. Then mysteriously, the Congregation "persuaded" the DOB under a shroud of secrecy not to object to the Congregation's clear failure to comply with ZR § 23–711 — the Eighth Objection. The BSA refused to discuss this requirement of ZR § 23–711, merely stating — completely untruthfully — that there was a change in the plans submitted to the DOB and because of that the Eighth Objection no longer applied. However, this is completely untrue for, among other things, the Congregation was merely applying for variances for the same building with the same envelope for which the LPC issued a Certificate of Appropriateness. The BSA statement at footnote 1 to its decision that modifications to the plans were made by the Congregation and resulted in the elimination of the eighth objection is completely untrue and the BSA statement was known by the BSA to be untrue when made. Further, despite the belief of the Appellate Division that the BSA had addressed the issue of ZR § 23–711, it did not, avoided the issue, and indeed made a materially untrue statement to cover up its refusal to take a hard look.

43. There is no evidence, let alone substantial evidence, to support that material statement, and the BSA and the Congregation in three years of litigation have yet to identify the

modifications that justified removal of the 40-foot separation Eighth Objection. The BSA then approved a building knowing that it violated the zoning regulation so that is could use the weak argument that the split zoning lot was a physical condition. For this reason, the split zoning lot cannot be considered the hardship causing problems for the Congregation.

C. Application of § 72–21(b) to Non–Profits Engaged in Income Production Activities

44. The most grievous damage done by the Appellate Division's decision is to suggest that the § 72–21(b) may not be applicable to non–profits engaged in the construction of luxury condominiums and would not be required to show that the non–profit could not earn a reasonable return, challenging the explicit decision of the BSA to the contrary in paragraphs 124–126 of its decision. This issue was not properly before the Court, as admitted by counsel for the Respondent Congregation at oral argument for the simple reason that the Congregation did not cross–appeal, and, having only raised the argument in its responsive papers, prevented the Corporation Counsel from defending the position of the BSA.

45. The Appellate Division's recognition of this argument is simply toxic to zoning regulation in New York City, particularly because of the extensive ownership of land in New York City by all sorts of non–profits, from churches to private schools. Indeed, many non–profits are not even 501(c)(3) organizations or charitable organizations registered with the state, but merely entities that have decided not to have shareholders and simply pay their profits out as salaries.

46. The suggestion by the Appellate Division invites real estate developers, such as Congregation member Jack Rudin, to find any one of the innumerable "non–profits" in New York City to partner with and then circumvent zoning regulation. Many of the creative interpretations of the zoning resolution adopted by the BSA and seemingly approved here by the Appellate Division are at odds with the policies supporting zoning. Yet, clearly the entire policy

of New York state law requiring reasonable return computations in variance proceedings is completely ignored.

D. The Minimum Variance Condition

47. The BSA did not taken a "hard look" at the whether the minimum variance condition would be satisfied by a building with a front courtyard which would not block the legal windows in the adjoining building, including windows in the apartments owned by Petitioner Lepow. (Reply, p. 18). *Kahn v. Pasknik*, 90 N.Y.2d 569 (1997). The BSA did not make a reasoned elaboration of the basis for its determination, but avoided reasoned determination by not even attempting to analyze the impact on return of such a small front courtyard, despite specific insistent requests of opponents. *Gernatt Asphalt v. Sardinia*, 86 N.Y. 2d 668 (1996). Instead, the BSA, acting with intentional blindness, took no look at all in making the minimum variance finding.

48. As shown in Petitioners' appeal papers [Reply at 18], a courtyard would have only minimally diminished the 10.93% return and the coffers of the Congregation, which 10.93% return would have still been far higher than the 6.55% return which the Congregation's expert opined was sufficient. A front courtyard would have diminished the condominium space by a mere 771 square feet, barely affecting the profitability of the condominiums. In the litany of its proposals the Congregation would not provide this alternative, and the BSA deliberately refused to request that the alternative be provided. [Pet. Reply at 18; Pet. Br. at 65]. The summary affirmation on this point by the Appellate Division merely ratified the intentional blindness displayed by the BSA. Moreover, the Appellate Division was incorrect in stating that "The BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." To the contrary, the BSA coyly avoided reference to the blocked front windows and was completely silent as to the possibility of a front courtyard. Thus, the BSA put on blinders and deliberately refused to take a hard look at the claim of the Congregation that the variances

requested were the minimum required.

49. The deliberate blindness by the BSA is evidence of bad faith. (Reply at p. 18, n. 71.)

E. The Appellate Division Sanctions Improper Behavior

50. The Appellate Division seemed to be completely oblivious to the improper behavior of Respondents and in it "no merits" ruling, has now approved the following behavior:

- The Appellate Division has approved a wholly improper *ex parte* meeting between the BSA members and applicant discussing the exact application to be submitted and reviewed by the BSA and then refusing to disclose what transpired at the meeting. (Pet. Brief at 14, Pet. Reply at 23). Because this private meeting considered the same project and design to be submitted to the BSA a few weeks later (a requirement since the Congregation was required to submit the project as approved by the LPC), the precedent set by the Court is that the Chair and the Vice Chair of the BSA may have meetings with an applicant, exclude the public, not keep a record of the meeting, or if they do, conceal that record from the public.
- The Appellate Division has approved the submission of false spoliated material financial data by the applicant's expert, and the BSA turning a blind eye toward such falsity. (Reply, Page 16.)

F. Conclusion

51. Not only does the Appellate Division decision wreak havoc on land use regulation and question long–standing jurisprudence, but also its unquestioning affirmance of the ambiguous and unsupportable BSA decision merely provides fodder for political and other corruption at this much–criticized agency. We do not suggest that there were any payoffs

involved in this particular matter, but the unhappy history of this agency is part of the public record. This unqualified rubber–stamping of whatever the BSA does is problematic — the record of this matter contains far too many suggestions of bad faith, failure to adhere to BSA regulations, vague findings and deliberate blindness to just automatically affirm the BSA's actions herein. Rehearing is in order, as well as appeal to the Court of Appeals.

Attachments:

Appellate Division Decision
Supreme Court Decision
BSA Decision

Dated: July 22, 2011
New York, New York

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Order and Judgment of Appellate Division First Department dated June 23, 2011, Unanimously Affirming Supreme Court.

Intentionally Omitted

Decision, Order, and Judgment July 10, 2009 of Lobis, J., Supreme Court New York County, dismissing Article 78 Petition.

Intentionally Omitted

Resolution and Decision of the Board of Standards and Appeals Approving Variances, dated August 26, 2009.

Intentionally Omitted

AFFIRMATION OF SERVICE

I, Alan D. Sugarman, Attorney for Petitioners-Appellants, hereby affirm that I served the **Petitioners-Appellants Motion for Reargument or in the Alternative Leave to Appeal dated July 22, 2011,** upon counsel for Respondents to the physical and e-mail addresses below as follows:

An Acrobat PDF file by electronic mail to the e-mail addresses below on July 25, 2011.

Two paper copies by Federal Express for delivery on July 25, 2011.

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Dated: July ___, 2011
New York, New York

_____
Alan D. Sugarman
Attorney for Petitioners-Appellants

NEW YORK SUPREME
APPELLATE DIVISION : FIRST DEPARTMENT

---------- x

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.

---------- x

AFFIRMATION IN OPPOSITION

New York County Clerk's Index No. 113227/08

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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.

---------- x

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

RONALD E. STERNBERG, an attorney duly admitted to practice in the State of New York, and of counsel to JEFFREY D. FRIEDLANDER, First Assistant Corporation Counsel of the City of New York, the attorney of record for municipal respondents-respondents in the captioned proceedings, consolidated on appeal, hereby affirms that the following statements are true, under penalty of perjury:

1. I am an Assistant Corporation Counsel in the Appeals Division of the Office of the Corporation Counsel. I am fully familiar with the facts and the proceedings had herein on the basis of the information contained in the files maintained by my office with regard to this matter.

2. This affirmation is submitted in opposition to the motions of the respective petitioners-appellants, both returnable August 15, 2011, for reargument of, or leave to appeal to the Court of Appeals from, an order of this Court, entered June 23, 2011. This Court unanimously affirmed an order and judgment (one paper) of the Supreme Court, New York County (Lobis, J.), entered July 24, 2009, that confirmed the challenged determination of respondent Board of Standards and Appeals ("BSA") "in all respects," denied the applications, and dismissed the petitions. In these article 78 proceedings, petitioners, as reviewed by this Court, "challenge a zoning variance granted by BSA to respondent Congregation Shearith Israel (the Congregation), a not-for-profit religious institution."

3. The motions should be denied.

Reargument

4. Petitioners' papers do not demonstrate that in considering these appeals, argued on April 5, 2011, and decided on June 23, 2011, this Court overlooked or misapprehended any relevant facts or law. Rather, petitioners merely advance arguments that

they previously raised and that were rejected by the BSA and, upon extensive briefing, by both the Court below and this Court. As noted by this Court, "BSA expressly acknowledged and considered the arguments raised here by petitioners and found them unavailing." "A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Foley v. Roche*, 68 AD2d 558, 567 (1st Dept. 1979).

5. Upon the extensive record in these proceedings, including the comprehensive evidence before the BSA, bound into 12 volumes and filed in the Court below along with the BSA's answer to the petition, this Court, echoing the Court below and explicitly rejecting each of petitioners' arguments, reasonably concluded "that BSA's finding that the proposed building satisfies each of the five criteria for a variance set forth in [City Zoning Resolution] § 72-21 has a rational basis and is supported by substantial evidence." Petitioners provide no basis for revisiting that determination.

6. In particular, the Landmark petitioners reiterate, and seek to "make clear," their argument that the BSA lacked jurisdiction to consider the Congregation's application and to grant the requested variance. As fully reviewed in municipal respondents' brief on the appeal, petitioners' argument that the BSA has only appellate jurisdiction ignores 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." Indeed, in response to a question from the bench during oral argument, petitioners' counsel acknowledged that acceptance of petitioners' argument would require the Court to read that section out of the Charter. Petitioners' papers

provide no basis for concluding that this Court should revisit its appropriate rejection of their contention.

7. Petitioners' request for reargument of this Court's inclusive decision should be denied.

Leave to appeal

8. Leave to appeal should be denied because, contrary to petitioners' contentions, the issues involved are not of such novelty or public importance as to warrant further review by the Court of Appeals. Relying on well-established law, and applying it to the facts, this Court appropriately affirmed the dismissal of the petitions, concluding that the BSA's determination "has a rational basis and is supported by substantial evidence."

Conclusion

9. For a complete discussion of the issues, this Court is respectfully referred to the briefs of the respective respondents filed on petitioners' appeals.

WHEREFORE, petitioners' motions for reargument or leave to appeal should be denied in all respects, with costs of the motions.

Dated: New York, New York
August 8, 2011

_____
RONALD E. STERNBERG
Assistant Corporation Counsel

NEW YORK SUPREME
APPELLATE DIVISION : FIRST DEPARTMENT

---------- x

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.

---------- x

---------- x

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.

---------- x

AFFIRMATION IN OPPOSITION

New York County Clerk's Index No. 113227/08

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

CLAUDE M. MILLMAN, an attorney duly admitted to practice in the State of New York, the attorney of record for respondent-respondent Congregation Shearith Israel (the "Congregation") in the captioned proceedings, consolidated on appeal, hereby affirms that the following statements are true, under penalty of perjury:

1. I am a partner at Kostelanetz and Fink, LLP, counsel of record to the Congregation. I am familiar with the facts and proceedings in this matter.

2. I submit this affirmation in opposition to the motions (returnable August 15, 2011) of petitioners-appellants for reargument of, or leave to appeal to the Court of Appeals from, this Court's June 23, 2011 decision. Petitioners present no new information to the Court and no issues of importance. The motions should be denied.

Reargument

3. The Landmark petitioners repeat their argument that the respondent Board of Standards and Appeals ("BSA") lacked the authority to grant the requested zoning variance because (i) according to the Landmark petitioners, the wrong official of the Department of Buildings ("DOB") acted on the Congregation's submission, and (ii) BSA allegedly lacked the "original" jurisdiction it would have needed to overlook that purported defect. In its decision, this Court rejected this argument because, even if the Landmark petitioners were correct as to "(i)," it would be of "no consequence" because BSA plainly has "original" jurisdiction and is not limited to "appellate" jurisdiction.

4. While the Congregation certainly agrees with the Court in this regard, the Landmark petitioners' motion is ***also*** lacking for a reason that this Court did not need to reach: The Landmark petitioners failed to establish "(i)," a technical deficiency in DOB's action. The record, in fact, established, among other things, that DOB reviewed plans submitted by the

Congregation and that the DOB objections before the BSA were issued by a provisional administrative "borough superintendent" using the official stamp of the "Boro Commissioner," which was sufficient to justify "appellate" BSA jurisdiction even under the Landmark petitioners' erroneous theory. *See* Congregation's Brief on Appeal at 19-20. (The Landmark petitioners argue in their motion that BSA somehow conceded a defect in the DOB's process. In fact, BSA merely argued that any alleged defect was of no consequence. There was no concession.) In any event, the Landmark petitioners have never claimed that the DOB objections were wrong; all parties agreed that the objections issued by DOB and considered by BSA were correct. The Landmark petitioners merely argued that the wrong DOB employee issued the DOB's matter-of-fact objections. The Landmark petitioners were wrong about that, and, as this Court correctly found, the alleged clerical defect in the DOB's process did not prevent BSA from granting the Congregation a variance in any event.

5. The Kettaneh petitioners raise no less than 13 issues in their motion. Their contentions are also meritless. As this Court correctly determined, BSA had a rational basis to find "unique physical conditions" in light of the location of the zoning district boundary and other factors, including the Congregation's need to preserve its existing synagogue. This Court also correctly held that BSA's "reasonable return" finding was rational given BSA's reliance on expert analysis in the record. The Kettenah petitioners' efforts to argue from post-administrative-decision statements in the municipal respondents' answer and trial court brief in this action are unavailing because those statements (which do not support petitioners in any event) were obviously not in the administrative record that this Court was asked to review. Finally, while the Court appropriately declined to reach the Congregation's contention that the "reasonable return" requirement does not apply the Congregation, the Court could not reverse

and find for the Kettaneh petitioners on that issue without considering and rejecting the Congregation's contention, which the Congregation respectfully submits is squarely supported by the statutory language exempting not-for-profit entities from the no-reasonable-return requirement.

Leave to appeal

6. Leave to appeal should also be denied. The issues presented by petitioners are not of such novelty or public importance as to justify review by the Court of Appeals.

Conclusion

WHEREFORE, petitioners' motions for reargument or leave to appeal should be denied in all respects, with costs of the motions.

Dated: New York, New York
August 8, 2011

CLAUDE M. MILLMAN

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

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
Petitioners-Appellants,	:	New York County Index No. 113227/08 (LOBIS)
-against-	:	REPLY IN SUPPORT OF MOTION TO REARGUE AND ALTERNATIVELY FOR LEAVE TO APPEAL
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-Appellees.	:	

REPLY AFFIRMATION OF ALAN D. SUGARMAN

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

Alan D. Sugarman, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms under the penalties of law:

1. I am the attorney for the Petitioners Kettaneh and Lepow herein and submit this affirmation on personal knowledge in support of the motion of these Petitioners for reargument or in the alternative for leave to appeal to the Court of Appeals and in reply to the responses of Respondents, dated August 8, 2011, and served by e–mail on August 8 or 9, 2011.

2. The City makes no substantive response, merely repeating the wholly false canard that these issues had been considered by the BSA and discussed and rejected by "both courts,"

but without indicating where in those decisions were the issues addressed. With all due respect, a sweeping statement by an adjudicator asserting that issues not addressed by the adjudicator had no merit without any further explanation is not a "discussion" by the courts. The Congregation states that "The Kettaneh petitioners raise no less than 13 issues in their motion", but then the Congregation was unable to identify where any of these issues were addressed by the BSA, the court below, or in the Appellate Division. Respondents could have simply listed each point, and then provided the citation as to where the issue was addressed. They have not done so, and cannot do so.

3. The Congregation's main substantive point is that "This Court also correctly held that BSA's "reasonable return" finding was rational given BSA's reliance on expert analysis in the record." The Congregation posits an extremely low bar for a variance applicant. According to the Congregation, all an applicant needs to do is retain a financial "expert" for hire who specializes in concocting reasonable return analyses and the job of the BSA is done, according to the Congregation.[1]

4. To the Respondents, the size of the record and the length of the BSA proceeding are sufficient, and there is no need to adduce the facts alleged to constitute substantial evidence. Justice Cardozo, who happened to have been a member of the Congregation, observed that if requirements that hardships supporting variances be fully exhibited were relaxed, then "judicial review would be reduced to an empty form." *Fordham Manor Reformed Church v Walsh*, 244 NY 280, 290 (1927) cited with approval in *Village Bd. of Fayetteville v. Jarrold*, 53 N.Y.2d 254, 259 (1981). The Congregation simply wishes to have judicial review be an "empty form."

5. The Congregation, rather than address the legal insufficiency and irrationality of the reasonable return analysis, simplistically asserts: "This Court also correctly held that BSA's

[1] The Congregation's hired expert has no professional appraisal certifications with accompanying ethical codes and is subject to no professional discipline, as contrasted to the expert submitting detailed critiques in opposition.

"reasonable return" finding was rational given BSA's reliance on expert analysis in the record." Thus, under the Congregation's view of judicial review, a court is foreclosed from examining an expert analysis in conflict with the applicable standards or is on its face irrational.

6. The paid expert's bifurcated analysis presented to and relied upon by the BSA did not meet the standards applied by New York courts. It is a stretch of the imagination to suggest that this Court cannot question the propriety of the assumptions of an expert opinion merely because the BSA accepted the opinion.

(1) The Congregation expert–for–hire used of a bifurcated standard that conflicts with applicable law.

7. The Congregation's paid–expert opinion was incorrect in using a bifurcated approach not approved by the New York Court, and, then, in that bifurcated analysis, made a further error by not using as his starting point the value of the number of square feet in the two floors available for development as–of–right.

As stated in *Concerned Residents v. Zoning Bd. of Appeals*, 222 A.D.2d 773, 774–775 (3d Dep't 1995):

> Our review of the record discloses that KRM's proof of unnecessary hardship was deficient. The primary deficiency is that *its analysis of the rate of return of the property as currently zoned is limited to its 8.2-acre leasehold rather than the 96.4 acres* owned by Lebanon Valley (see, Matter of Citizens for Ghent v Zoning Bd. of Appeals, 175 A.D.2d 528, 529, 572 N.Y.S.2d 957). This deficiency was not cured by the conjectural opinion of KRM's expert that expanding the site would not increase the rate of return (see, Matter of Wheeler v City of Elmira, 101 A.D.2d 647, 649, 475 N.Y.S.2d 163, affd 63 N.Y.2d 721, 480 N.Y.S.2d 194, 469 N.E.2d 515). Another significant deficiency is that *KRM did not submit any evidence regarding the price Lebanon Valley paid* for the 96.4-acre parcel, the present value of the parcel, the real estate taxes and other carrying charges, the amount of any mortgages or liens or the income Lebanon Valley is presently deriving from the property, all factors relevant to the determination of whether the property is yielding a reasonable return (see, Matter of Miltope Corp. v Zoning Bd. of Appeals, 184 A.D.2d 565, 566, 584 N.Y.S.2d 865, lv denied 80 N.Y.2d 760; see also, 2 Anderson, New York Zoning Law and Practice § 23.13, at 179-180 [3d ed]).

> Thus, given these deficiencies, we concur with Supreme Court's finding that the evidence before the ZBA did not support the granting of a use variance to KRM. (emphasis supplied).

8. One commentator in explaining *Concerned Residents* stated:

> The evidence of proof of an inability to realize a reasonable return also may not be segmented to examine less all of an owner's property interest. In Concerned Residents v. Zoning Board of Appeals, a use variance to permit an asphalt plant was annulled because the applicant's proof of hardship related only to the eight acre portion of the site on which the plant was to be located, rather than the entire ninety-six acre parcel. An applicant generally must provide financial proof with respect to all portions of his original related holdings and may not segment his proof so as to ignore profitable portions of a parcel in order to obtain relief as to a less profitable part of the property.

Terry Rice, *Zoning and Land Use*, 47 Syracuse L. Rev. 883, 918 (1997).

9. Similarly, the Court of Appeals stated in *Northern Westchester Professional Park Associates v. Bedford*, 60 N.Y.2d 492, 503–504 (1983):

> An owner will not have sufficiently established his confiscation claim, therefore, if the adverse factors demonstrated affect but a part of the property but do not prevent a reasonable return from the tract as a whole.

10. And, again the Court of Appeals stated in *Koff v. Flower Hill*, 28 N.Y.2d 694 (1971) stated:

> In its reversal, the Appellate Division found that, although plaintiff was permitted, without objection, to amend his complaint so as to encompass therein only that portion of the property comprising the sites fronting on Northern Boulevard, defendant did not consent to removal from the court's consideration the fact that the entire parcel was owned by plaintiff and that, because there was no proof that financial returns on the whole tract would not permit recovery of the purchase price if the property were developed as permitted by the ordinance, there was no showing of confiscation;

11. Even the United States Supreme Court has adopted the same stance in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130–1 (U.S. 1978):

> Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular

> segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole …

12. Petitioners cited these precedents to the BSA, to the New York Supreme Court, and in Petitioners' briefs in the Appellate Division herein. Neither Respondent ever attempted to distinguish these cases or even refer to the argument. Then, the Appellate Division wholly overlooked this issue. When raised by Petitioners reargument motion, once again the Respondents fall mute, except to falsely state that the Appellate Division, the Supreme Court, and the BSA had addressed the issue. Why are the Respondents mute and why do they misrepresent? It is obvious that they have nothing they can say, and do not wish to bring to the attention of the court the complete impropriety of the BSA action. The Respondents' ploy is clever advocacy — hoping that by ignoring an argument, the court will be deceived into ignoring it as well.

> *(2) Even if a bifurcated analysis was a proper approach, the expert's approach was irrational and did not use value of property as currently zoned, which limits the two floors to 7,494 square feet.*

13. The Congregation's simplistic response is that because the Congregation's analysis was prepared by a hired–gun expert, then the BSA's reliance upon the expert is rational. But, the record is clear, as pointed out in Petitioners' moving affirmation, that the very essence of the expert's bifurcated analysis was irrational because he did not use a rational site value and did not use the as–of–right site area. As I stated in ¶ 22 of my moving affidavit:

> 22. The Appellate Division may have overlooked pages 3 and 4 of the Congregation's expert's report of May 13, 2008 [A–3818–9], quoted at page 35 of Petitioners brief. Here the expert readily admitted the use of the undeveloped area over the parsonage as a basis to determined the value of the 7,494 square feet of the two–floor site being developed:
>
> > 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.
>
> Without question, rather than value the 7,594 square feet available on the two as–of–right floors, the expert contrived to inflate this value to 19,755 square feet — by using space from above the parsonage. But the only reasonable return computation is to use the value of the space as–of–right a as the starting value, and, the expert clearly did not do this.

14. Not only is the "expert's" approach irrational, but his approach conflicts with the requirement that the value of the site be based upon the "value of the property as presently zoned" and that the original cost should be used as well. *Douglaston Civic Assoc. v. Galvin*, 36 N.Y.2d 1, 9 (1974) (cited in Petitioners brief on appeal.) The two floors of development site permit as–of–right only the construction of 7,594 square feet, for the sliver law restrictions (as well as the building separation requirement) prevent a tower sliver. So, it was irrational as well as not in accord with law that the "expert" used a different site and a different size of the site. In *Douglaston*, the Court of Appeals stated:

> We would merely add that in affirming the decision below we do not intend to imply our approval of the Appellate Division's statement that the board acted correctly "in apparently concluding that a projected return of income, for a parcel for which a variance is sought, may be based on present value, rather than its original cost." (43 A.D.2d 739, 740.) 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.* While the record does not speak to this point, we suspect that the $ 121,000 figure here represents the value the parcel would have if granted the variance. Neither do we think that Matter of Crossroads Recreation v. Broz (4 N Y 2d 39, 172 N.Y.S.2d 129, 149 N.E.2d 65) fairly supports that statement as suggested by the Appellate Division. Our intention in Crossroads was simply to reaffirm the rule that the proper inquiry is whether the presently permitted use can yield a

> reasonable return, even if not the most profitable return. (4 N Y 2d at p. 46.) *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.* (See Matter of Jayne Estates v. Raynor, 22 N Y 2d 417, 421-422, 293 N.Y.S.2d 75, 239 N.E.2d 713) (emphasis supplied*)*.

See also, supra, Concerned Residents v. Zoning Bd. of Appeals, 222 A.D.2d 773, 774–775 (3d Dep't 1995) requiring analysis of the property "as curently zoned."

15. The Congregation does not in any way refute or attempt to justify or explain or rationalize the pure irrationality of the expert's approach or why the site area as currently zoned was not used in the analysis. The BSA accepted the improper and flawed analysis despite Petitioners' objections. Although explicitly addressed in Petitioners' moving papers, the BSA and the Supreme Court ignored these objections, and the Appellate Division overlooked them completely as well.

(3) The Congregation does not deny that an analysis of the entire development site was not submitted to the BSA.

16. There is no dispute that the Congregation never submitted and the BSA never considered whether the entire 64–foot x 100-foot perfectly rectangular prime development site could provide a reasonable return to the Congregation. In its motion, Petitioners once again challenged the BSA and the Congregation to point to such an analysis. They have both failed to do so.

17. The closest thing to an analysis of the entire site that can be found in the record is the December 2007 analysis. Not only does the Congregation's expert readily admit that his mislabeled analysis was not an analysis of an all residential/income–producing building, but the City in its answer admitted that even this flawed analysis understated the rate of return, and that the return when corrected using the facts in the administrative record, yielded a return that exceed the return this "expert" had opined was an adequate and reasonable return. Once again,

Respondents make no effort to explain this opinion — and the admission of the City in its answer is sufficient.

18. The only weak argument that the Congregation could offer in its response to the motion is:

> The Kettenah petitioners' efforts to argue from post administrative–decision statements in the municipal respondents' answer and trial court brief in this action are unavailing because those statements (which do not support petitioners in any event) were obviously not in the administrative record that this Court was asked to review.

19. It is perfectly appropriate for the court to consider the admissions and computations by the City based upon the facts in the record. *215 East 72nd St. Corp. v. Klein*, 58 AD 2d 751 (1st Dept. 1977); *Community Synagogue v. Bates,* 1 N.Y.2d 445 (1956); *Forrest v. Evershed*, 7 N.Y.2d 256 (1959). Even accepting the Congregation's argument, the Congregation here acknowledges that the analysis was flawed and incomplete, and cannot be relied upon by the BSA in its decision. At the very least, this would require remand, except for the fact that the Congregation deliberately refused to update or complete the analysis during the proceeding - with the collusion of the BSA, which refused to require the updating. Still "[a] remand for the sole purpose of transposing the material in the return to a new formal decision would serve no useful purpose." *NYC Hous. Bd. v. Foley*, 23 A.D.2d 84 (1st Dep.t 1965)

> *(4) The Court was mistaken in stating that the BSA had found " the Congregation's need to preserve its existing synagogue" was a physical condition, and in any event, such need is unrelated to the condominium variances and is not a physical condition under § 72–21(a).*

20. As to the unique physical condition, the Congregation makes no effort to identify a condition such as one "including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions." Instead, the Congregation merely restates the mistaken assertion of the Appellate Division that:

> As this Court correctly determined, BSA had a rational basis to find "unique physical conditions" in light of the location of the zoning district boundary and other factors, including the Congregation's need to preserve its existing synagogue.

21. Yet, Petitioners were explicit in their reargument motion that there was no finding in the BSA decision that "the Congregation's need to preserve its existing synagogue" was a physical condition or was the basis of the BSA's physical condition finding. Nor does the Congregation identify any relationship at all between its claimed programmatic "need" and the variances for condominiums that do not touch the synagogue, but tower over it. Nor would such a need constitute a physical condition under §72–21(a). The BSA "finding" refers to other "conditions," which in the context of the decision would appear to relate to the use of landmarking as a hardship, another issue ignored by the Appellate Division and the Congregation, and shamefully ignored by the City response, which should act to uphold the landmarking relief provisions of the law, not destroy them.

> *(5) If § 72–21(b) does not apply to non–profits, then the Congregation is only allowed variances to meet its programmatic needs, and the condominium variances are unrelated to programmatic needs.*

22. The Congregation wholly undercuts its own position when arguing that as a non–profit, it is not required to show the inability to earn a reasonable return when constructing a luxury condominium project.

23. The Congregation states:

> Finally, while the Court appropriately declined to reach the Congregation's contention that the "reasonable return" requirement does not apply the Congregation, the Court could not reverse and find for the Kettaneh petitioners on that issue without considering and rejecting the Congregation's contention, which the Congregation respectfully submits is squarely supported by the statutory language exempting not–for–profit entities from the no–reasonable–return requirement.

24. Of course, the Congregation’s statement is incorrect as well as being incomplete, because it evades the question as to what standards should apply when a non–profit is requesting

a variance for a profit–making project. The Congregation seems to suggest that no standards should apply, and that it should be allowed any variances it requests with no limitations. This is plainly wrong — for, clearly the statute would require that the standard is whether the non–profit is unable to meet its reasonable programmatic mission without receiving a variance. But, here, to satisfy its programmatic needs, the Congregation argued that it only needed variances for the lower floor community house. The Petitioners' do not appeal those community house variances. But, there is nothing in the record to provide any basis for the Respondents' claim for variances for the luxury condominiums — and thus this Court should invalidate the condominium variances, even assuming the correctness of the Congregation's argument.

25. The application of the height and set–back zoning regulations to the upper floor condominiums in no way restricts the religious or other ancillary uses of the property by the Congregation. *Community Synagogue v. Bates*, 1. N.Y. 23 445, 453 (1956); *Diocese of Rochester v Planning Bd.*, 1 N.Y.2d 508, 526 (1956); *Islamic Society, Inc. v. Foley*, 96 A.D. 2d 536 (2nd Dep't 1983):

> There are undoubtedly feasible alternatives for locating the most intensive uses of the facility further from the neighboring lot lines, in order to minimize the interference with the privacy and enjoyment of the neighboring properties and to reduce the extent of the variance required (Matter of Mikveh of South Shore Congregation v Granito, 78 AD2d 855, supra). Therefore, the court properly annulled the determination under review and remitted the matter to the zoning board with the direction to grant the variance under such reasonable conditions as will permit petitioner to establish its house of worship and part-time religious school, while mitigating the detrimental or adverse effects upon the surrounding community.

26. In the Congregation's case, all of the religious and programmatic needs of the Congregation can be met within the upper–floor as–of–right envelope. See *Pine Knolls v. Zoning Bd.*, 5 N.Y.3d 407 (2005) (holding that a zoning board may impose legitimate zoning requirements even upon religious organizations) (concurring, Chief Judge Kaye, a member of the

Respondent Congregation herein.)

27. In an important case involving hardships caused by landmarking, *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449 (1980) the Court of Appeals in the landmarking context rejected the very same arguments being made by the Congregation herein.

> Instead, petitioners' arguments seem to emphasize aggrievement with respect to the prohibition against high-rise development. There is no genuine complaint that eleemosynary activities within the landmark are wrongfully disrupted, but rather the complaint is instead that the landmark stands as an effective bar against putting the property to its most lucrative use.
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> * * *
>
> The Society also contends that the existence of the designation interferes with the free exercise of its religious activities; however, rather than argue its desire to modify the structure to accommodate these religious activities, the Society has suggested that it is improper to restrict its ability to develop the property to permit rental to nonreligious tenants. For this reason the Society's reliance on our decision Matter of Westchester Reform Temple v Brown (22 N.Y.2d 488), which dealt with restrictions actually impairing religious activities, is clearly misplaced. Although the Society is concededly entitled to First Amendment protection as a religious organization, this does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters (cf. Wisconsin v Yoder, 406 US 205, 215).

Clearly, *Spatt* would wholly reject the use by the BSA of the landmarking hardship to justify variances completely unrelated to the landmarking hardship.

28. Variances to brick–up windows in the adjoining building are unrelated to any programmatic needs of the Congregation and have nothing to do with any needs by the Congregation to preserve its synagogue. Again, this is purely about money, transferring value from the adjoining building to the membership of the Congregation in the form of reduced support requirements.

29. When construing a statute, a court is to seek to discern and give effect to the legislative intent. *Roberts v Tishman Speyer*, 13 N.Y.3d 270, 285–6 (2009). There is no indication of a legislative intent to absolve non–profits from complying with zoning regulations.

It is not enough for the Congregation to merely assert that it need not provide a reasonable return analysis for luxury condominium project sponsored by a non–profit — it needs to enunciate the standard that consequentially would apply to non–profits in such a situation.

30. The City's silence on the issue is shameful. The BSA explicitly found that § 72–21(b) requires even a non–profit to show that a reasonable return cannot be earned in these circumstances and clearly the City must have read the Congregation's brief herein and the statements of the Congregation's counsel at oral argument. But, the City, so intent in serving the interests of this wealthy and influential congregation, is willing to sit by silently while the zoning regime is being perverted and the door swung wide open for any non–profit to evade zoning regulation.

(6) The Congregation did not meet its burden of showing a hardship to support the condominium variance.

31. The Congregation shows nothing in the record that demonstrates that, without variances for the luxury condominiums, it will suffer a hardship preventing it from either using the property to meet its programmatic needs or earning a reasonable return. The Court of Appeals aptly described the standards to be applied in *Spears v. Berle*, 48 N.Y.2d 254, 263 (1979):

> Nonetheless, there has evolved from our decisions a standard which, while retaining an element of flexibility, is capable of practical application. Under this test, a land use regulation -- be it a universally applicable local zoning ordinance or a more circumscribed measure governing only certain designated properties -- is deemed too onerous when it "renders the property unsuitable for any reasonable income[,] productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value" ... A petitioner who challenges land regulations must sustain a heavy burden of proof, demonstrating that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use (see Penn Cent. Transp. Co. v New York City, 438 U.S. 104, 130-131, supra; McGowan v Cohalan, supra, at pp 436-438; Williams v Town of Oyster Bay, supra, at p 82). To carry this burden, the landowner should produce "dollars

> and cents" evidence as to the economic return that could be realized under each permitted use ... Only when the evidence shows that the economic value, or all but a bare residue of the value, of the parcel has been destroyed has a "taking" been established ...

Conclusion

32. During the BSA proceeding, the Congregation had every opportunity to cure the many deficiencies in its application and was represented by sophisticated counsel. The Congregation deliberately decided not to provide a complete and proper submission over the 18 months of the proceeding. There is no need for a remand. The variances for the condominiums simply should be vacated and the BSA directed to deny those variances.

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