New York County Clerk's
Index Nos. 113227/08, 650354/08

COURT OF APPEALS
STATE 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-Respondents.

(additional caption on inside cover)

AFFIRMATION IN OPPOSITION

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of Counsel.

December 22, 2011

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.

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 the appeals to the Appellate Division, 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 December 19, 2011, for leave to appeal to this Court from an order of the Appellate Division, First Department, entered June 23, 2011. The Appellate Division 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 New York City Board of Standards and Appeals ("BSA") "in all respects," denied the applications, and dismissed the petitions. In these article 78 proceedings, petitioners, as stated by the Appellate Division, "challenge a zoning variance granted by BSA to respondent Congregation Shearith Israel (the Congregation), a not-for-profit religious institution." In an order entered October 20. 2011, the Appellate Division denied petitioners' motions for leave to appeal to this Court.

3. The motions should be denied. The standard of review of a determination of the BSA, well-established in case law and correctly applied by both the Motion Court and the Appellate Division, 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); *see Matter of Toys "R" Us v. Silva*, 89 NY2d 411, 418 (1996). 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); *see Matter of Cowan v. Kern*, 41 NY2d 591, 599 (1977).

4. The issues presented are thus not of such novelty or public importance as to warrant additional review by this Court. Upon the extensive record in these proceedings, including the comprehensive evidence before the BSA, bound into 12 volumes and filed in the Motion Court along with the BSA's answer to the petition, the Appellate Division, echoing the Motion Court, relying on the applicable and well-established law, 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 [New York City Zoning Resolution] § 72-21 has a rational basis and is supported by substantial evidence."

4. In this regard, and in order to avoid unnecessary repetition, the Court is respectfully referred to the decisions of the Courts below and to the briefs of municipal respondents and the Congregation filed in the Appellate Division on the *Kettaneh* appeal for a complete review of the BSA's findings.

5. The Appellate Division correctly determined that "[t]here is no merit to the Landmark petitioners' contention that BSA lacked jurisdiction to grant the variance here." As fully reviewed in municipal respondents' brief filed in the Appellate Division on the

Landmark appeal, petitioners' argument that the BSA has only appellate jurisdiction ignores section 666(5) of the New York City 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' motion papers provide no basis for concluding that this Court should review the Appellate Division's correct determination.

WHEREFORE, petitioners' motions for an order granting them leave to appeal to this Court should be denied in all respects, with costs.

Dated: New York, New York
December 22, 2011

RONALD E. STERNBERG

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