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).

[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/300110199200700 2SCIV.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.

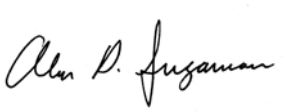
CONCLUSION

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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