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 of said Board, CHRISTOPHER COLLINS, Vice Chair of said Board, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, Respondents.	:	Index No. 113227/08 (JUSTICE LOBIS) **VERIFIED REPLY TO BSA STATEMENT OF FACTS** Attachment A to Reply

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Petitioners Nizam Peter Kettaneh and Howard Lepow, by their attorney Alan D. Sugarman, for their Verified Reply to the Statement of Facts in the Verified Answer of the City Respondents dated February 6, 2009, herein allege as follows:[1]

PETITIONERS' REPLY TO
BSA ANSWER - STATEMENT OF MATERIAL FACTS

BSA Answer - The Subject Property and Applicable Zoning Requirements

BSA Answer ¶ 196. The property which is the subject of this proceeding is known as 6-10 West 70th Street, and also known as 99-100 Central Park West in Manhattan ("the subject property"). The subject property is located within the Upper West

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[1] Because of the lengthy Answers of the City Respondents and the Congregation and also to preserve paragraph numbers, Petitioners are providing in this separate attachment their Reply to the Statement of Facts and Affirmative Defenses appearing at pages 29-87, ¶¶ 196-394 of the Verified Answer of the City Respondents. (The Congregation did not provide a statement of facts or raise any affirmative defenses.)

The Reply to the BSA Answer herein will, for the sake of clarity, use the same paragraph numbers as used by the Respondent City. Further, for the sake of clarity, the Reply will include the text of the averments of the City which are indented and shaded.

> Side/Central Park West Historic District and consists of 2 tax lots (Block 1122, Lots 36 and 37), with a total lot area of 17,286 square feet. Pursuant to Zoning Resolution Section 12-10, the lots constitute a single Zoning Lot because the two tax lots have been in common ownership since 1984 (the date of the adoption of the existing zoning district boundaries - i.e. "an applicable amendment to the Zoning Resolution"). The Zoning Lot has 172 feet of frontage along the south side of West 70 th Street, and 100.5 feet of frontage on Central Park West, and is situated partially in an R8B residence zoning district and partially in an RIOA residence zoning district [R. 1-2 (¶¶ 12, 13, 15, 19, 20, 22)].

196. As a reply to BSA Answer ¶ 196, admit, but state that the development site, Lot 37, has 64 feet of frontage on the south side of West 70th Street and is 64 ft x 100 ft, and, that only 17 x 100 ft of the development site is located in the R10A district.

> BSA Answer ¶ 197. The use and development of property located in residence zoning districts is governed by various use and bulk regulations set forth in Article II of the Zoning Resolution.

197. As a reply to BSA Answer ¶ 197, admit but state that use regulations are not relevant to the within proceeding and that the regulations in dispute herein are bulk regulations only.

> BSA Answer ¶ 198. A "use" is "any purpose for which a building or other structure or tract of land may be designed, arranged, intended, maintained or occupied" or "any activity, occupation, business, or operation carried on, or intended to be carried on, in a building or other structure or on a tract of land." See Z.R. § 12-10. Bulk regulations are essentially addressed to building size and open lot space requirements. See Z.R. §12-10.

198. As a reply to BSA Answer ¶ 198, admit but state that use regulations are not relevant to the within proceeding and that the regulations in dispute here are bulk regulations only and further state that bulk regulations are often referred to as area regulations.

> BSA Answer ¶ 199. In order to develop a property with a non-conforming use or a non- complying bulk, an applicant is first required to apply to DOB. After DOB issues its denial of the non-conforming or non-complying proposal, a property owner may apply to the BSA for a variance. Absent the grant of a variance by the BSA, the use and development of property must conform to and comply with the use and bulk regulations for the zoning district in question.

199. As a reply to BSA Answer ¶ 199, deny as to the subject property and state that because the Synagogue located on Lot 36 is landmarked and both lots 36 and 37 are in a landmark district, that first an applicant is required to apply to the Landmarks Preservation Commission for a Certificate of Appropriateness, prior to applying to the DOB, which is relevant in this proceeding in that an as-of-right building first must comply with the height and setback limitations imposed by the LPC.

BSA Answer ¶ 200. Presently, Tax lot 36 is improved with a landmarked Synagogue and a connected four-story parsonage house that is 75 feet tall and totals 27,760 square feet. Tax lot 37, which has a lot area of approximately 6,400 square feet, is improved, in part, with a four- story Synagogue community house totaling 11,079 square feet. The community house occupies approximately 40% of the tax lot area, and the remaining 60% is vacant [R. 2, 6 (¶¶ 16, 17, 82)].

200. As a reply to BSA Answer ¶ 200, deny as to the dimensions of the Synagogue and state that the Synagogue has a street wall height of 58-62 feet and basically conforms to the R8B bulk zoning, although it is in R10A and also state that on the street frontage, there is a vacant lot where a townhouse used to exist.

BSA Answer ¶ 201. This proceeding concerns an application by Congregation Shearith Israel ("the Congregation" or "the Synagogue"), a not-for-profit religious institution, to demolish the community house that presently occupies tax lot 37 and replace it with a nine-story (including penthouse) and cellar mixed-use community facility/residential building that does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear setback applicable in the residential zoning districts in which the zoning lot sits ("the proposed building") [R.1-2 (¶¶ 1-3, 24, 27)].[3]

[3] To aid the Court concerning these requirements, lot coverage is that portion of a zoning lot which, when viewed from above, is covered by a building; the rear yard is that portion of the zoning lot which extends across the full width of the rear lot line and is required to be maintained as open space; the base height of a building is the maximum permitted height of the front wall of a building before any required setback; the building height is the total height of the building measured from the curb level or base plane to the roof of the building; and a setback is the portion of a building that is set back above the base height before the total height of the building is achieved. Z.R. § 12-10.

201. As a reply to BSA Answer ¶ 201, admit in part, except state that the building being proposed and approved is 105 feet high and is properly described as being 10 1/2 half stories, and the existing community house occupies only a part of Lot 37, with the remainder a vacant lot and further state as to the footnote that the zoning resolution allows community facilities to fully cover the lot, and the as-of-right and proposed buildings do have 100% lot coverage as allowed up to 23 feet, and that the reason that the as-of-right building fully satisfies all egress, access, and circulation issues in the same manner as the proposed building, is the fact that the first floors of both buildings fully occupy the lot, and that is where the egress, access, and circulation issues are resolved fully.

BSA Answer ¶ 202. The proposed building will have community facility uses on two cellar levels and the lower four stories and residential uses on the top five stories (although a minimal amount of the floor area on the first through fourth floors will also be dedicated to the residential use) [R. 2, 7 (¶¶ 24, 84)]. The community facility uses will include: mechanical space and a multi-function room on the sub-cellar level with a capacity of 360 persons for the hosting of life cycle

> events and weddings, dairy and meat kitchens, babysitting and storage space on the cellar level, a synagogue lobby, rabbi's office and archive space on the first floor, toddler classrooms on the second floor, classrooms for the Synagogue's Hebrew School and the Beit Rabban day school on the third floor, and a caretaker's apartment and classrooms for adult education on the fourth floor. [R. 3 (T 39)]. All uses are as-of-right in the residence zoning districts in question and no use waivers were requested by the Congregation. At the first hearing before the BSA, representatives for the Congregation discussed the reasons why a new facility is needed, including the need to: 1) accommodate the growth in membership from 300 families when the synagogue first opened to its present 550 families; and 2) update the 110-year old building to make it more easily handicapped accessible [R. 1728-46].

202. As a reply to BSA Answer ¶ 202, admit in part, but deny that any variances are required "to make it more handicapped accessible", deny that the cited Record at R. 1728-46 contains any claim that variances are required to make it more handicapped accessible, state that Beit Rabban school is to use the second, third, and fourth floors and the common assembly areas on the first floor, and the subbasement, and further points out that the Petition herein does not claim that any use variances are required, deny that the representative stated that the second floor would be reserved for toddlers, and further state that the community house was completely rebuilt in 1954 from two rowhouses, and is not properly described as a 110-year-old building, and does not admit that there are 550 active families in the Congregation.

> BSA Answer ¶ 203. The residential uses will include five market-rate residential condominium units, and are proposed to be configured as follows: mechanical space and accessory storage on the cellar level, elevators and a small lobby on the first floor, core building space on the second, third and fourth floors, and one condominium unit on each of the fifth through eighth and ninth (penthouse) floors [R. 6 (¶ 83)].

203. As a reply to BSA Answer ¶ 203, admit, but deny that the residential condominium units will be the sole users of the elevators and core space, in that access is required for school use.

> BSA Answer ¶ 204. The proposed building will have a total floor area of 42,406 square feet, comprising 20,054 square feet of community facility floor area and 22,352 square feet of residential floor area [R. 2 (¶ 26)]. The proposed building will have a base height along West 70th Street of 95'-1" (60 feet is the maximum permitted in an R8B zoning district), with a front setback of 12'-0" (a 15'-0" setback is the minimum required in an R8B zoning district), a total height of 105'-10" (75'-0" is the maximum permitted in an R8B zone), a rear yard of 20'-0" for the second through fourth floors (20"-0' is the minimum required), a rear setback of 6'-8" (10'-

0" is required in an R8B zone), and an interior lot coverage of 80 percent (70 percent is the maximum permitted lot coverage) [R. 2 (¶ 27)].[4]

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

204. As a reply to BSA Answer ¶ 204, admit, but further state that the proposed lobby is located in the as-of-right portion of the proposed building and that the 100 sq foot elevator area to access the Synagogue is also located entirely in the as-of-right portion of the building, and further state that the areas stated do not include the areas in the basement and subbasement.

BSA Answer ¶ 205. The Congregation submitted its development application to DOB and, on or about March 27, 2007, DOB's Manhattan Borough Commissioner denied the Congregation's development application, citing eight objections. After revisions to the application by the Congregation, the Manhattan Borough Commissioner issued a second determination on the Congregation's application which eliminated one of the prior objections. DOB's second determination, which was issued on August 27, 2007, became the basis for the Congregation's variance application before the BSA [R. 1 (¶ 1)].

205. As a reply to BSA Answer ¶ 205, deny that the Manhattan Borough Commissioner himself approved either of the two applications, deny that the appeal of the initial application to the BSA was filed timely, deny that the BSA was seized of jurisdiction when the initial application was filed on April 2, 2007, deny that any revisions were made in the second application by the Congregation to the DOB and allege that the BSA respondent cannot identify any reference in the record identifying the nature of any revisions and, if there were any, that any such revisions in any way related to the removal of the 8th objection, the presence of which requires a 40-foot separation in the upper floors for ZR § 23-711, which prescribes a required minimum distance between a residential building and any other building on the same zoning lot and further deny that any revisions described in the footnote were ever submitted to the DOB. Pet. Ex. N-8, N-9. R-85. R-88. R-402, R-405.

BSA Answer ¶ 206. The Zoning Resolution provides that the BSA may grant a variance to modify the applicable zoning regulations only where the BSA determines that (1) there are practical difficulties or unnecessary hardships involved in carrying out the strict letter of the provision, (2) the proposed use will not have a detrimental effect on the surrounding area, and (3) the proposed variance is the minimum necessary to afford relief In making such a determination, the BSA,

pursuant to Z.R. §72-21, is required to make "each and every one" of five specific findings of fact, as follows:

[w]hen in the course of enforcement of this Resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this Resolution, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board of Standards and Appeals may, in accordance with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done. Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this Resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:

(a) that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the zoning lot is located;

(b) that because of such physical conditions there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of this Resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such zoning lot; this finding shall not be required for the granting of a variance to a non-profit organization;

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

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

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

206. As a reply to BSA Answer ¶ 206, admit that the Zoning Resolution contains such provisions but refer to the complete text of Z.R. §72-21, and further state that these provisions differ in many material respects from comparable zoning regulations in other jurisdictions in New York State law.

BSA Answer ¶ 207. In addition, Z.R. §72-21 requires the BSA to set forth in its decision or determination: each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be supported by substantial evidence of other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board. Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection.

207. As a reply to BSA Answer ¶ 207, admit.

Congregation Shearith Israel's Application for a Variance

BSA Answer ¶ 208. On or about April 1, 2007, the Congregation submitted an application to the BSA for waivers of zoning regulations for lot coverage and rear yard to develop a community facility that could accommodate its religious mission, and waivers of zoning regulations pertaining to base height, total height, front setback and rear setback to accommodate a market rate residential development that could generate a reasonable financial return [R. 2 (¶ 30)]. The application was designated by the BSA as Calendar Number 74-07-BZ [R. 1].

208. As a reply to BSA Answer ¶ 208, admit that the Congregation submitted an application on or about April 1, 2007 and but deny that the Answer fully describes the purposes of the variances as expressed by the applicant Congregation in the application.

BSA Answer ¶ 209. In support of its application, the Congregation submitted various documents to the BSA, which included, inter alia, a zoning analysis, a statement in support, an economic analysis, drawings and photographs [R. 15-183]. In its statement in support, the Congregation set forth the ways in which it complied with the five requirements of Z.R. §72-21 [R. 19-48]. In compliance with environmental review requirements the Congregation also submitted an Environmental Assessment Statement ("EAS") [R. 112-132].

209. As a reply to BSA Answer ¶ 209, admit that the documents in the record were filed but deny that the Congregation complied with environmental requirements and submitted a complying EAS and deny that the Congregation set forth ways in which it complied with Z.R. §72-21.

Environmental Review

BSA Answer ¶ 210. As part of a variance application, certain projects require review under the State Environmental Quality Review Act ("SEQRA"), which is codified in Article 8 of the Environmental Conservation Law ("ECL"). The state regulations implementing SEQRA are found at 6 NYCRR Part 617. SEQRA was enacted to compel governmental agencies to consider any environmental consequences of their actions, so that they may take steps to mitigate any adverse environmental impacts prior to approving or initiating the action. ECL § 8-0103.

210. As a reply to BSA Answer ¶ 210, admit, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly this paragraph is not relevant to this proceeding and further state that SEQR and CEQR do not supplant, but are in addition to, the requirement that the applicant satisfy the §72-21(c) finding requirement.

> BSA Answer ¶ 211. SEQRA authorizes local governments to develop and implement environmental review procedures consistent with its mandate. New York City's procedures for implementing SEQRA are set forth in the Mayor's Executive Order No. 91 of 1977, entitled City Environmental Quality Review ("CEQR"). CEQR is found in the Rules of the City of New York ("RCNY") Title 43, Chapter 6, as modified by regulations subsequently adopted by the City Planning Commission, codified as 62 RCNY Chapter 5.

211. As a reply to BSA Answer ¶ 211, admit, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly this paragraph is not relevant to this proceeding and further state that SEQR and CEQR do not supplant, but are in addition to, the requirement that the applicant satisfy the §72-21(c) finding requirement.

> BSA Answer ¶ 212. CEQR establishes a multi-stage process for environmental review of proposed governmental actions, conducted by a lead agency. Where, as here, the proposed action is a variance of the zoning resolution, the lead agency is the Board of Standards and Appeals. See 62 RCNY § 5-03(b)(5).

212. As a reply to BSA Answer ¶ 212, admit, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly this paragraph is not relevant to this proceeding and further state that SEQR and CEQR do not supplant, but are in addition to, the requirement that the applicant satisfy the §72-21(c) finding requirement.

> BSA Answer ¶ 213. Both SEQRA and its implementing regulations contemplate that environmental review will only be required of agency actions which cause, facilitate or permit some significant change in the physical environment. See 6 NYCRR § 617.11.

213. As a reply to BSA Answer ¶ 213, admit, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly this paragraph is not relevant to this proceeding and further state that SEQR and CEQR do not supplant, but are in addition to, the requirement that the applicant satisfy the §72-21(c) finding requirement.

> BSA Answer ¶ 214. Initially, the lead agency must make a threshold determination as to whether the proposed action is subject to environmental review. See 62 RCNY § 5-05(a). If the project is determined to be subject to environmental review, the proposed action must be assessed for possible environmental consequences. In this

> regard, the lead agency is required to prepare an EAS containing a detailed environmental assessment of the action, and to then make a determination, based on the EAS, as to whether the proposed action may have significant effect on the environment. See 62 RCNY § 5-05(b).

214. As a reply to BSA Answer ¶ 214, admit, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly this paragraph is not relevant to this proceeding and further state that SEQR and CEQR do not supplant, but are in addition to, the requirement that the applicant satisfy the §72-21(c) finding requirement.

> BSA Answer ¶ 215. The areas that can be analyzed in an EAS in "assessing the existing and future environmental settings," pursuant to the CEQR Technical Manual at 3A-1, include, inter alia: land use, zoning, socioeconomic conditions, open space and recreational facilities, shadows, neighborhood character, hazardous materials, waterfront revitalization programs, air quality, solid waste and sanitation services, traffic and parking, and noise.

215. As a reply to BSA Answer ¶ 215, admit, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly this paragraph is not relevant to this proceeding and further state that SEQR and CEQR do not supplant, but are in addition to, the requirement that the applicant satisfy the §72-21(c) finding requirement.

> BSA Answer ¶ 216. If the lead agency determines that the proposed action may have a significant effect on the environment, then it issues a positive declaration and an Environmental Impact Statement ("EIS") must be prepared. See 43 RCNY § 6-07(b). The EIS must describe the adverse environmental impacts identified in the EAS, identify any mitigation measures that could minimize those impacts, and discuss alternatives to the proposed action and their comparable impacts. See 43 RCNY § 6-09.

216. As a reply to BSA Answer ¶ 216, admit, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly this paragraph is not relevant to this proceeding and further state that SEQR and CEQR do not supplant, but are in addition to, the requirement that the applicant satisfy the §72-21(c) finding requirement.

> BSA Answer ¶ 217. If, however, the lead agency determines that the proposed action will not have a significant effect on the environment, then it issues either a negative declaration or a conditional negative declaration.[5] Where a conditional negative declaration has been issued, an EIS is not required, because in such circumstances there are no adverse impacts to describe, nor is there a need to identify mitigation measures or to consider alternatives to the proposed action. See 43 RCNY § 6-07(b).

> 5 A conditional negative declaration is "a written statement prepared by the lead agencies after conducting an environmental analysis of an action and accepted by the applicant in

writing, which announces that the lead agencies have determined that the action will not have a significant effect on the environment if the action is modified in accordance with conditions or alternative designed to avoid adverse environmental impacts." See 43 RCNY § 6-02. 1823],

217. As a reply to BSA Answer ¶ 217, admit, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly this paragraph is not relevant to this proceeding and further state that SEQR and CEQR do not supplant, but are in addition to, the requirement that the applicant satisfy the §72-21(c) finding requirement.

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

BSA Answer ¶ 218. [1] On or about June 15, 2007, BSA provided the Congregation with a Notice of Objections to its variance application [R. 253-59].[2] By letter dated September 10, 2007, the Congregation provided responses to the BSA's June 15, 2007 objections, including, inter alia, an updated statement in support of its application, drawings, and a shadow study [R. 308- 468]. [3]A second set of objections was sent by the BSA to the Congregation on October 12, 2007 [R. 512-15]. [4]The Congregation responded to the BSA's second set of objections in a submission dated October 27, 2007 [R. 536-641].

218. As a reply to BSA Answer ¶ 218, admit that Notices of Objections were issued by the BSA but deny that the Congregation provided complete substantive responses to the objections and state that among the items of non-compliance were failure to provide an all residential scheme C feasibility study and failure to provide a mixed use feasibility study taking into account all income from the community facilities, and failing to explain how the asserted hardships arose out of the strict application of the zoning resolution.

BSA Answer ¶ 219. After due notice by publication and mailing, a public hearing on Calendar Number 74-07-BZ was held by the BSA on November 27, 2007 [R. 1 (¶ 4), 1648-63, 1726] The public hearing continued on February 12, 2008 [R. I (¶ 4), 3653-758], April 15, 2008 [R. 1 (¶ 4), 4462-515], June 14, 2008 [R. 1 (¶ 14), 4937-74], and on to decision on August 26, 2008 [R. I (¶ 4), 5784-95].

219. As a reply to BSA Answer ¶ 219, admit that these hearings were held, but deny that due notice was provided by the BSA (illustrating the capricious manner of the proceeding) and also state that the BSA Commissioners held an improper private hearing with the Congregation in November 2006.

BSA Answer ¶ 220. Opponents to the application, including petitioners and Alan Sugarman, petitioners' counsel in this proceeding, presented testimony at each of the public hearings, and made written submissions in opposition to the application [R. 217-232, 241-252, 260-274, 472- 501, 1721-25, 1856-58, 3288-607, 3622-29, 3827-39, 3902-07, 3990-4005, 4811-58, 4925-32, 5310-750]. In their testimony and submissions, petitioners and other opponents attempted to discredit the applicant's

> arguments that the five findings had been met. Specifically, the Opposition touched on arguments including, inter alia, 1) the ability of the Congregation to satisfy its programmatic needs through an as-of-right development; 2) the ability of the Congregation to recognize a reasonable return on its investment from an as-of-right development; and 3) the detrimental effects the proposed development will have on the community, including the loss of windows in the adjoining buildings.

220. As a reply to BSA Answer ¶ 220, admit in part that hearings were held but deny that the purpose of opponents was to discredit the Congregation, but rather to establish that the Congregation had not met the specific requirements for the variances under the zoning resolution, and admit that at hearings, opponents were frequently cut-off from testifying, and on the whole, the commissioners did not engage in colloquy and questioning of opponents and treated opponents as necessary evils and with condescension, and further state Petitioners and other opponents provided expert statements and oral testimony by professional valuation experts, architects, attorneys and planners, most of which statements and testimony were ignored by the BSA, and further stated that the professionals composting the opposition did not just touch upon, but provided detailed analysis of the variances employing professional knowledge and skill.

> BSA Answer ¶ 221. During the public hearings counsel for the Congregation presented the case for granting the variance, establishing each of the five criteria necessary for the granting of a variance pursuant to Z.R. §72-21. In addition, after each hearing the Congregation followed-up with additional written submissions to respond to questions and concerns raised by the BSA Commissioners and members of the Opposition during the hearing.

221. As a reply to BSA Answer ¶ 221, admit that counsel for the Congregation provided most of the case for the Congregation, was not sworn, and provided a case consisting primarily of conclusory statements and assertions as to what consultants would say, and further deny that the BSA Commissioners had asked questions which reflected the repeated concerns of opponents and state that the Congregation replied only selectively to concerns of opponents.

> BSA Answer ¶ 222. After conducting an environmental review in accordance with SEQRA and CEQR which found that the Congregation's proposed development would not have a significant adverse impact on the environment,[6] considering all the submissions and testimony before it, and after visiting the site and surrounding area, the BSA met on August 26, 2008 and adopted a Resolution granting the variance by a vote of five to zero [R. 1-14].
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> [6] This finding obviated the need for the preparation of an Environmental Impact Statement. See 43 RCNY § 6-07(b).

222. As a reply to BSA Answer ¶ 222, admit, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly this paragraph is not relevant to this Article 78

proceeding, and further state that the observations of the BSA Commissioners were not included in the record of the August 26, 2008 meeting of the BSA.

> BSA Answer ¶ 223. Specifically, the BSA concluded as follows:
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> WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made under Z.R. §72-21; and WHEREAS, the project is classified as a Type I action pursuant to 6 NYCRR, Part 617; and
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> WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 07BSA071M dated May 13, 2008; and
>
> WHEREAS, the EAS documents that the project as proposed would not have significant adverse impacts on Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Waterfront Revitalization Program; Infrastructure; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; and Public Health; and
>
> WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment. Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes the required findings under Z.R. §72-21, to permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/ residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to Z.R. §§ 24-11, 77-24, 24-36, 23-66, and 23-633; on condition that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received May 13, 2008" - nineteen (19) sheets and "Received July 8, 2008" - one (1) sheet; and on further condition: THAT the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80; and THAT the applicant shall obtain an updated Certificate of Appropriateness from the Landmarks Preservation Commission prior to any building permit being issued by the Department of Buildings; THAT refuse generated by the Synagogue shall be stored in a refrigerated vault within the building, as shown on the BSA- approved plans;

> THAT this approval is limited to the relief granted by the Board, in response to specifically cited and filed DOB/other jurisdiction objection(s) only; THAT the approved plans shall be considered approved only for the portions related to the specific relief granted; THAT substantial construction be completed in accordance with Z.R. §72-23; THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted [R. 13-14 (¶¶ 218-230)].

223. As a reply to BSA Answer ¶ 223, admit that this resolution was passed by the BSA, but state that the Verified Petition did not challenge the BSA resolution as to SEQRA, and accordingly parts of this paragraph are not relevant to this Article 78 proceeding, and deny that the Commissioners voted on each finding for each variance, or even had a draft of the Resolution before them when they voted upon a motion made by the Congregation.

> BSA Answer - The Article 78 Proceeding
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> BSA Answer ¶ 224. Petitioners, Kettaneh, a resident of a townhouse at 15 W. 70th Street (across from the synagogue) and Lepow, the owner of several cooperative apartments in 18 W. 70th Street, commenced this proceeding by filing and serving a Notice of Petition and Petition, wherein they seek an order, pursuant to Article 78 of the CPLR, annulling, vacating and reversing as arbitrary and capricious, the BSA's decision to grant the Congregation's application for waivers of the lot coverage, rear yard, height and setback requirements otherwise applicable to developing the property at 6-10 West 70th Street (99-100 Central Park West) in Manhattan.

224. As a reply to BSA Answer ¶ 224, deny that the address of the property is 99-100 Central Park West and otherwise refer to the Verified Petition herein and further stating that relief was also sought against the Chair and Vice-Chair.

> BSA Answer ¶ 225. For the reasons set forth herein, and in the accompanying memorandum of law, the BSA's determination was rational and proper in all respects, and its Resolution should be upheld by this Court.

225. As a reply to BSA Answer ¶ 225, deny, and further state that the BSA cannot identify places in the record with evidence to support many of its findings, and further state that it accepted assertions by the Congregation as findings without any evidence to support those assertions and without making findings on specific assertions.

> BSA Answer - AS AND FOR A FIRST AFFIRMATIVE DEFENSE
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> BSA Answer ¶ 226. Respondent BSA's determination to grant the Congregation's application for a variance pursuant to Z.R. §72-21 was not arbitrary and capricious, or an abuse of discretion. Rather, the determination was rational and reasonable and supported by administrative record.

226. As a reply to BSA Answer ¶ 226, deny.

> BSA Answer - A. Applicable Standard of Review.
>
> BSA Answer ¶ 227. Administrative agencies enjoy broad discretionary power when making determinations on matters that they are empowered to decide. Judicial review of a BSA determination is limited in scope to the question of whether such determination was arbitrary and capricious or an abuse of discretion. CPLR § 7803(3). Section 7803 of the New York Civil Practice Law and Rules provides in pertinent part: The only questions that may be raised in a proceeding under this article are: 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed...

227. As a reply to BSA Answer ¶ 227, neither admit nor deny the allegations contained in Paragraph 227 as same calls for a legal conclusion, and respectfully refers the Court to the Memoranda of Law submitted by applicant.

> BSA Answer - B. The Loft Board's Determination Satisfies the Standard of Review. (sic)
>
> BSA Answer ¶ 228. It is well settled that a reviewing court should not examine the facts de novo or substitute its own judgment for that of the administrative agency, but should review the whole record to determine whether there is a rational basis to support the findings supporting the agency's determination.

228. As a reply to BSA Answer ¶ 228, neither admit nor deny the allegations contained in Paragraph 227 as same calls for a legal conclusion, and respectfully refers the Court to the Memoranda of Law submitted by applicant.

> BSA Answer ¶ 229. The BSA is an expert body comprised of persons with unique professional qualifications, including a planner and a registered architect both with at least ten years of experience. See New York City Charter §659. As noted above, Zoning Resolution § 72-21 provides that the BSA may grant variances of the Zoning Resolution in specific cases of practical difficulties or unnecessary hardship, provided each and every one of the five findings of fact set forth in that section are made. See ¶ 187 supra, for the full text of that section and the required findings.

229. As a reply to BSA Answer ¶ 229, neither admit nor deny the allegations contained in Paragraph 227 as same calls for a legal conclusion, and respectfully refers the Court to §659 (reproduced at P-162) which does not contain either the phrase "expert body" or "unique professional qualifications."

> BSA Answer ¶ 230. Here, as detailed above, the Congregation applied to BSA for "waivers of zoning regulations for lot coverage and rear yard to develop a

community facility that can accommodate its religious mission," and "waivers of zoning regulations pertaining to base height, total height, front setback, and rear setback to accommodate a market rate residential development that can generate a reasonable financial return" [R. 2 (¶30)]. [7] After reviewing voluminous submissions by both the Congregation and Opposition, holding four hearings,[8] and considering the applicable law, the BSA rationally granted the Congregation's application because it had met each of the five specific findings of fact.

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

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

230. As a reply to BSA Answer ¶ 230, admit that the Congregation applied for said waivers and that in responses to voluminous and repetitive submissions by the Congregation, opponents submitted responses to said submissions, but deny that the BSA considered the opposition submissions, deny that the BSA considered applicable law, deny that the BSA acted rationally, and deny that the Congregation had met the five specific findings of fact for each variance.

As to footnote 7, deny that the Congregation submitted revised plans to the DOB that in any way affect the minimum distance between buildings requirement and otherwise deny the allegations in the footnotes, and state that respondent Collins, since February 12, 2008, has been and is still unable to identify any revisions to the second set of plans that resulted in the removal of waiver, which is evidenced by the simple fact that Respondent Collins and the other Respondents were unable in their answers and memorandums of law to provide a reference to anything in the record to support the claim that there are revisions or otherwise provide an explanation as to removal of this variance requirement, even though BSA staff had also opined that such a variance was required, or an explanation as to why the BSA would approve a project knowing that there are applicable zoning regulations which there is no compliance or proper waiver thereof under Z.R. §72-21.

BSA Answer - a. Religious and Educational Institution Deference

BSA Answer ¶ 231. The BSA properly concluded that, to the extent the Congregation was seeking variances to develop a community facility, it was entitled

> to significant deference under the laws of the State of New York [R. 2-3 (¶ 31), citing, Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968)]. This determination was rational and reasonable as it was based on decisions of the Court of Appeals, i.e., Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968), Cornell Univ. v. Ba ng ardi, 68 N.Y.2d 583 (1986)), and Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)), and Z.R. §72-21(b) which provide that a not- for-profit institution is generally exempted from having to establish that the property for which a variance is sought could not otherwise achieve a reasonable financial return. [R. 2-3 (¶ 31, ¶ 45), R.. 11 (¶ 165)]

231. As a reply to BSA Answer ¶ 231, as to conclusions of law, deny, and further state that the BSA accorded deference to the Congregation in excess of that required by the law and further extended deference to the Congregation improperly as to the residential condominium variances.

> BSA Answer ¶ 232. The BSA properly did not extend this deference to the revenue-generating residential portion of the site because it is not connected to the mission and program of the Synagogue. As found by the BSA, under New York State law, a not-for-profit organization which seeks land use approvals for a commercial or revenue-generating use is not entitled to the deference that must be afforded to such an organization when it seeks to develop a project that is in furtherance of its mission [R. 3 (¶ 34), citing, Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); Foster v. Saylor, 85 A.D.2d 876 (4th Dept. 1981) and Roman Cath. Dioc. of Rockville Ctr. v. Vill. of Old Westbury, 170 Misc.2d 314 (1996)].

232. As a reply to BSA Answer ¶ 232, deny that the BSA did not extend deference to the Congregation in connection with the revenue-generating residential portion of the site and admit the second sentence.

> BSA Answer ¶ 233. Thus, the Board properly subjected the Congregation's application to the standard of review required under Z.R. §72-21 for the discrete community facility, and residential development uses, respectively, and evaluated whether the proposed residential development met all the findings required by Z.R. §72-21, notwithstanding its sponsorship by a religious institution [R. 3 (¶¶ 33, 35, 36)]. Finding (a)

233. As a reply to BSA Answer ¶ 233, deny that that the Board in making the findings for the residential development did not consider the sponsorship by a religious institution and deny that the Board evaluated whether the Congregation met all such findings.

> BSA Answer ¶ 234. Zoning Resolution § 72-21(a) the "(a) finding"] requires a showing that the subject property has "unique physical conditions" which create practical difficulties or unnecessary hardship in complying strictly with the permissible zoning provisions and that such practical difficulties are not due to the general conditions of the neighborhood.

234. As a reply to BSA Answer ¶ 234, deny that this is a complete quotation of the Zoning Resolution in that the quotation fails to include the remainder of the provision that "as a result of such unique physical conditions, practical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the Resolution" and fails to include other references to "physical" in Z.R. §72-21.

Community Facility Variances

BSA Answer ¶ 235. The BSA properly determined that a combination of the programmatic needs of the Congregation, and the unique physical conditions at the Property, including the physical obsolescence and poorly configured floor plates[9] of the existing Community House, created an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations" [R. 5 (¶ 74)].

9 A floor plate is the total area of a single floor of a building.

235. As a reply to BSA Answer ¶ 235, deny the allegations and state that the BSA is unable to provide citations to the Record — other than conclusory statements of Counsel — in support of said determination, deny that the record contains a rational explanation of the relationship between the floor plates and the variances sought, state that when considering the floor plates, the BSA ignored the availability of space allocated for residential use on the same floors, state that the specificity as to obsolescence is so flimsy that it cannot be said which building is obsolete and how obsolescence relates to the variances, and further state that the Z.R. requires a condition that is physical in nature.

BSA Answer ¶ 236. With regard to its programmatic needs, the Congregation represented that the requested variances were needed to permit it to: 1) expand its lobby ancillary space; 2) expand its toddler program which was expected to serve approximately 60 children; 3) develop classroom space for 35 to 50 afternoon and weekend students in the Synagogue's Hebrew school, and a projected 40 to 50 students in the Synagogue's adult education program; 4) provide a residence for an onsite caretaker to ensure that the Synagogue's extensive collection of antiques is protected against electrical, plumbing or heating malfunctions; and 5) develop shared classrooms that will also accommodate the Beit Rabban day school [R. 3 (¶ 42)]. The Congregation also represented that the proposed community facility portion of the building would permit the growth of new religious, pastoral and educational programs to accommodate a congregation which has grown from 300 families to 550 families [R. 3 (¶ 43)]. Moreover, the Congregation represented that the proposed building will provide new horizontal and vertical circulation systems to provide barrier-free access to the Synagogue's sanctuaries and ancillary facilities [R. 5 (¶ 73)].10 The BSA, citing to case law, rationally found that the Congregation's programmatic needs constituted an "unnecessary hardship and practical difficulty in

developing the site in compliance with the applicable zoning regulations" [R. 5 (¶ 64), citing, Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)]; Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971)]. In doing so, BSA properly found that since the Congregation was seeking to advance its programmatic needs, the Congregation was "entitled to substantial deference under the law of the State of New York as to zoning" [R. 3 (¶45)].

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

236. As a reply to BSA Answer ¶ 236, deny and state that it was arbitrary and capricious for the BSA to accept representations of the Congregation as facts, and the BSA was required to make the factual findings as to the "representations" of the Congregation, that the BSA provided no citation to the record to support the representations, and also state that the BSA further failed to "find" any relationship between these asserted hardships and the specific variances granted, and further state that the BSA is unable to cite to any support in the record that variances are required to "provide new horizontal and vertical circulation systems to provide barrier-free access to the Synagogue's sanctuaries and ancillary facilities", and further state that there is no evidence that access and circulation have any relationship whatsoever to the 10-foot extension variances on the third, fourth, and fifth floors.

BSA Answer ¶ 237. In addition to its programmatic needs, the Congregation represented that site conditions created an unnecessary hardship in developing the site in compliance with applicable regulations as to lot coverage and yards. To this end, the Congregation submitted that if it were required to comply with the applicable 30'-0" rear yard and lot coverage, the floor area of the community facility would be reduced by approximately 1,500 square feet [R. 4 (¶ 46)]. As a practical matter, this reduction would not serve the Congregation's programmatic needs because it would necessitate a reduction in the size of three classrooms per floor, thereby. affecting nine proposed classrooms which would consequently be too narrow to accommodate the proposed students. Specifically, reducing the classroom floor area would reduce the toddler program by approximately 14 children, and reduce the size of the Synagogue's Hebrew School, Adult Education program, and other programs and activities [R. 4 (¶¶ 47-49)]. In addition, the floor plates of a compliant building would be small and inefficient with a significant portion of both space, and floor area allocated toward circulation space, egress and exits [R. 4 (¶ 48)].

237. As a reply to BSA Answer ¶ 237, deny and state that representations and submission of the Congregation are not fact, that Citations to the Resolution are not citations to the Record, that the

BSA failed to consider the availability of the space on the fifth and sixth floors and the space reserved for residential usage on floors 1-4 as a way to accommodate the programmatic needs and provide larger floor plates, that the BSA ignores the evidence that the toddler classrooms are a contrivance and that the Congregation's Statement in Support states that the second floor space will be used for offices, that the adult classrooms and caretaker's apartment could be easily moved to the fifth and sixth floors.

> BSA Answer ¶ 238. After assessing the Congregation's assertions regarding its programmatic needs and the physical characteristics of the property, the BSA rationally concluded that the Congregation satisfied the (a) finding with regard to the community facility use. Specifically, the BSA stated:
>
> WHEREAS, ... the Board finds that the aforementioned physical conditions, when considered in conjunction with the programmatic needs of [the] Synagogue, create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations [R. 5 (174)].

238. As a reply to BSA Answer ¶ 238, deny and state that the BSA was required to make factual findings on each of the underlying factual assertions of the Congregation and deny that the BSA can specify any evidence to support the requisite "physical condition" finding, and that the physical condition findings are not based upon physical conditions.

> BSA Answer ¶ 239. In coming to this conclusion, the BSA also rationally rejected arguments raised by the Opposition[11], including arguments asserted by petitioners herein [R. 4-6 (¶¶ 51- 81)].
>
> [11] As detailed above, references to the Opposition are to the group of people who testified before the BSA in opposition to the Congregation's application, including counsel for the petitioners herein. Many of the arguments raised by the Opposition before the BSA are the same as those raised in the petition.

239. As a reply to BSA Answer ¶ 239, deny and state that what is before the Court in this Article 78 proceeding are the assertions made by the Petitioners' herein, and responding to issues raised by the other opponents, or even by the Petitioners and their counsel below, are not issues properly before the Court.

> BSA Answer ¶ 240. First, the BSA considered the Opposition's argument that the Congregation cannot satisfy the (a) finding based solely on its programmatic need and must still demonstrate that the site is burdened by a unique physical hardship in order to qualify for a variance [R. 4-5 (¶¶ 51-4, 75-6)].[13]
>
> 13 [No footnote 12 in original]Petitioners' complaints about BSA's discussion of the Congregation's use of the property and programmatic needs miss the mark. Petition, ¶¶ 103-106. As is clear from the Resolution itself, the BSA discusses these issues solely to respond to the Opposition's assertions that programmatic needs cannot constitute a hardship in support of

the (a) finding for a bulk variance. The BSA does not in any way assert that the Congregation is seeking a use variance, nor does it mischaracterize the Opposition as saying that the Congregation's programs are not proper accessory uses. Rather, in discussing the Congregation's use of its community facility, the BSA simply responded to the Opposition's assertions regarding the ability of an applicant to cite to programmatic needs as the justification for the (a) finding.

240. As a reply to BSA Answer ¶ 240, deny and state that the BSA cannot find a physical condition when none exists and improperly makes such finding if it asserts that the requirement of physical condition does not apply to religious institutions, and further state the BSA Resolution and the Answers speak for themselves in that they clearly discuss community opposition to the accessory uses, and, that the BSA intends to confuse a reviewing court as to the intentions and positions of the Petitioners and opponents.

BSA Answer ¶ 241. In response to this objection, the BSA pointed out that not only did the Congregation assert that the site is burdened with a physical hardship that constrains an as-of- right development (e.g. limited development areas and obsolete existing Community House with poorly constructed floor plates), but that in accordance with cases such as Diocese of Rochester v. Planning Board, I N.Y.2d 508 (1956), Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968) and Islamic Soc. of Westchester v. Foley, 96 A.D.2d 536 (2d Dept. 1983), zoning boards must accord religious institutions a presumption of moral, spiritual and educational benefit in evaluating applications for zoning variances and, therefore, religious institutions need not demonstrate that the site is also encumbered by a physical hardship [R. 4 (¶ 52)].

241. As a reply to BSA Answer ¶ 241, deny this allegation in its entirety and state that the paraphrase of the Zoning Resolution is not accurate and is misleading and that Z.R. §72-21(a) actually states: "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 further state that decisions interpreting zoning regulations in other municipalities which do not have requirements of a "physical" condition are not precedent for the BSA, and further state that there is no evidence cited or citable in the record to show that the alleged hardships arise out of strict application of the zoning regulations, and further state that the alleged conditions are not physical as required by the zoning resolution, and further state that the BSA cannot not identify what it means by obsolescence other than by citing to a conclusory claim that something is obsolete.

BSA Answer ¶ 242. Moreover, the BSA pointed out that the cases relied upon by the Opposition in support of their argument that the Congregation must establish a physical hardship [e.g. Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710 (2d Dept. 1988) and Bright Horizon House. Inc. v. Zng. Bd. Of Appeals of

> Henrietta, 121 Misc.2d 703 (Sup. Ct. 1983)] are inapposite here because both of the cases concerned situations where the zoning boards determined that the variance requests were not related to religious uses and were not ancillary uses to a religious institution in which the principal use was a house of worship [R. 4 (¶ 53-4)].

242. As a reply to BSA Answer ¶ 242, deny that any opponent cited these cases for these points and state that one opponent cited these cases correctly for the proposition that zoning boards are to scrutinize the factual basis of assertions by the religious applicants and further state that these cases were not cited by the Petitioners in their initial memorandum of law.

> BSA Answer ¶ 243. [1]In contrast, here the BSA concluded that "the proposed Synagogue lobby space, expanded toddler program, Hebrew school and adult education program, caretaker's apartment and accommodation of Beit Rabban day school constitute religious uses in furtherance of the Synagogue's program and mission" [R. 4 (¶ 55)]. [2]Indeed, it is well-settled that day care centers and preschools have been found to constitute uses reasonably associated with the overall purpose of a religious institution [R. 5 (¶ 64), citing, Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)]. [3] The BSA also properly concluded that the operation of the Beit Rabban school constitutes a religious activity [R. 5 (¶ 66), citin , Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971)]. [4] Thus, the BSA rationally rejected the Opposition's argument because: 1) the Congregation established that there are physical hardships in developing the site with a conforming building; and 2) it was not necessary for the Congregation to establish such physical hardship in order for the Congregation to satisfy the (a) finding.

243. As a reply to BSA Answer ¶ 243, state that Petitioners and other opponents did not in any way assert anything contrary to the statements in sentences 1, 2, and 3, and inclusion of said statements is intended to confuse the Court and disparage the Petitioners, and further state that the City should confine itself to the allegations of the Verified Petition and not to some conjured claims made by unnamed opponents without citation, and therefore deny statements 1, 2, and 3; state that Sentence 4 in no way relates to the first 3 sentences of BSA Answer ¶243 and it is even not clear what argument is being rejected by the BSA — if it is the argument the BSA claims was made in Paragraph 242, then such argument was never made; deny Sentence 4(1) and state that the BSA failed to make a finding as to the "arising out of" part of the Zoning Resolution; deny Sentence 4 (2) and note that the BSA improperly refers to "physical hardship" when the statute says "physical condition" and further that there is no evidence of either a physical condition or a physical hardship which arises in complying strictly with the use or bulk provisions of the Resolution", and that identification of a hardship or condition is not sufficient, and deny Sentence 4(2) and state that this

calls for a legal conclusion, and further state the requirements of the zoning resolution is a "physical condition", not a "physical hardship."

> BSA Answer ¶ 244. Second, the BSA rationally rejected the Opposition's argument that the Congregation's programmatic needs are too speculative to serve as the basis for an (a) finding, [R. 4 (¶ 56)]. The BSA's finding was reasonable because in evaluating the Congregation's programmatic needs for the variance, it required the Congregation to submit documentation regarding the proposed programmatic floor area. Indeed, the Congregation submitted a detailed analysis of the programmatic needs of the Synagogue on a space-by-space, and time allocated basis [R. 4 (¶ 57), 3884-6]. Based upon its review of the Congregation's submission, the BSA properly concluded that "the daily simultaneous use of the overwhelming majority of the spaces requires the proposed floor area and layout and associated waivers" [Id.].

244. As a reply to BSA Answer ¶ 244, deny and further state the City in its answer should confine itself to the allegations of the Verified Petition and not to some conjured claims made by unnamed opponents without citation, as it is not possible to understand what the City is stating without citations to the record, and further state that the Verified Petition is specific as to the absence of a record for the second floor toddler space and any programmatic need to locate the caretaker's apartment on the fourth, rather than fifth or sixth floors, and as to the ability to expand the floor plates on the floors by using the residential common space for programmatic needs.

> BSA Answer ¶ 245. [1]Third, BSA rationally rejected the Opposition's argument that the Congregation's programmatic needs could be accommodated within an as-of-right building, or within the existing parsonage house already on the Congregation's campus [R. 4 (¶ 58-9)]. See also, Petition, ¶¶ 109-10. [2]In this regard, the Board noted that the Congregation represented that an as-of right development would not meet its needs because the narrow width of the existing parsonage house (i.e. 24 feet) would make as-of-right development subject to the "sliver" limitations of Z.R. §23-692 which would limit the height of the as-of-right development.[14] [3]The combination of this limit in height and the need to deduct area for an elevator and stairs would result in an as-of-right development generating little additional floor area [R. 4 (¶ 60)]. [4]Moreover, the Congregation further represented that an as-of-right development would not address the circulation deficiencies of the Synagogue, and would block several dozen windows on the north elevation of 91 Central Park West [R. 4 (¶ 61)].
>
> [14] The "sliver law" generally limits the height of new buildings and enlargements to existing narrow buildings in certain residence zoning districts, including R8 and RIO districts, in situations where the width of the street wall of a new building or the enlarged portion of an existing building is 45 feet or less. See Z.R. §23-692.

245. As a reply to BSA Answer ¶ 245, as to sentence one, admit that the Petition alleges that the Congregation could locate some offices, small classrooms, and caretaker's residence in the multi-floor Parsonage currently being rented by the Congregation as a luxury Central Park townhouse

residence, and deny that the BSA rejection of opposition arguments was rational. As to sentence one, a response is not possible because the paragraph confuses an as-of-right building over the development site (Schemes A and C), with a vague suggestion that it may refer to a hypothetical as-of-right building over the parsonage. As to sentences two, three, and four, deny the accuracy of the representation and state that the BSA may make findings based only on substantial evidence, and not on representations of the applicant, and further state that the sentence confuses the sliver building at the Parsonage on Lot 36 with the 17-foot 10A sliver on the development site on Lot 37, and that there is no citation to the record as to any statements therein. As to sentence 4, to the extent that it is discussing the demolition and construction of the Parsonage or the addition of a tower to the Parsonage, deny the inference that any opponent ever alleged that access and circulation issues could be resolved by changes at the Parsonage.

> BSA Answer ¶ 246. As the BSA correctly recognized, where a nonprofit organization has established the need to place its program in a particular location, it is not appropriate for a zoning board to second guess that decision [R. 4-5 (¶ 62), citing , Guggenheim Neighbors v. Bd. of Estimate, June 10, 1998 N.Y. Sup. Ct., Index No. 29290/87, aff d 145 A.D.2d 998 (1988), lv. to appeal denied, 74 N.Y.2d 603 (1989) and Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)].

246. As a reply to BSA Answer ¶ 246, neither admit nor deny as same calls for a legal conclusion and further deny that this accurately describes the law.

> BSA Answer ¶ 247. Furthermore, a zoning board may not wholly reject a request by a religious institution, but must instead seek to accommodate the planned religious use without causing the institution to incur excessive additional costs [R. 5 (¶ 63), citing, Islamic Soc. of Westchester, supra]. Thus, the Opposition's suggestion that the Congregation's programmatic needs, and access and circulation issues [Petition ¶¶ 247-261] could have been addressed by an as-of-right development, are of no moment.

247. As a reply to BSA Answer ¶ 247, as to sentence one, neither admit nor deny as same calls for a legal conclusion and further deny that this accurately describes the law, and further states that there is no evidence in the record as to any alleged additional costs, so the sentence is a non-sequitur. As to sentence two, deny and state that the BSA may not legally grant a variance based upon a hardship, where the hardship is fully resolved by an as-of-right building. Petitioners further state that the reason that the City now claims that "circulation and access" is of no moment is because, after thousands of words and pages, the City has been unable to find any evidence to cite

in the record to support the false assertion that an as-of-right building does not resolve the access and circulation deficiencies asserted by the Congregation.

> BSA Answer ¶ 248. Fourth, the BSA rationally rejected the Opposition's suggestion that the Beit Rabban School is not a programmatic need of the Congregation because it is not operated for or by the Synagogue [R. 5 (¶ 65)]. See also, Petition, ¶¶ 82-86. As the BSA correctly noted, the operation of an educational facility on the property of a religious institution is construed to be a religious activity, and a valid extension of the religious institution for zoning purposes even if the school is operated by a separate corporate entity [R. 5 (¶ 66), citing, Slevin, supra]. Additionally, the Congregation noted that the siting of the Beit Rabban School on the premises helps the Synagogue to attract congregants and thereby enlarge its congregation. As the BSA correctly recognized, "enlarging, perpetuating and strengthening itself' is a valid religious activity [R. 5 (¶ 67), Kiting, Community Synagogue v. Bates, 1 N.Y.2d 445, 448 (1958)].

248. As a reply to BSA Answer ¶ 248, deny that the Verified Petition or the opponents argued that the Beit Rabban would not be a permitted accessory use or not a programmatic need and state that this paragraph was irrelevant below and irrelevant in the Article 78 proceeding.

> BSA Answer ¶ 249. Regardless, the BSA determined that even without the Beit Rabban school, the Congregation provided sufficient evidence showing that the requested floor area, and the waivers as to lot coverage and rear yard would be necessary to accommodate the Synagogue's other programmatic needs [R. 5 (¶ 68)].

249. As a reply to BSA Answer ¶ 249, deny that the Congregation provided substantial evidence and note that there is no citation to the record, and deny that there is any evidence to show why the caretaker's apartment cannot be moved to the fifth or sixth floor of an as-of-right building, and further state that there is overwhelming evidence of lack of programmatic needs for the second floor.

> BSA Answer ¶ 250. Fifth, the BSA properly rejected the Opposition's unsupported assertion that a finding of "unique physical conditions" is limited solely to the physical conditions of the Zoning Lot itself and that unique conditions of an existing building on the lot or other construction constraints cannot fulfill the requirements of the (a) finding [R. 5 (¶ 75)].

250. As a reply to BSA Answer ¶ 250, neither admit nor deny as same calls for a legal conclusion and further deny that this accurately describes the law, and further state that the Record lacks evidence showing satisfaction of the “arising from” requirement of 72-21(a) and that the record is devoid of any evidence of any construction constraints on Lot 37 created by either (1) the Synagogue building on Lot 36 or (2) the existing building on Lot 37, which constraints create a

hardship arising from the strict application of the zoning regulations and which is not remedied by an as-of-right building.

> BSA Answer ¶ 251. In rejecting this theory, the BSA pointed to a variety of cases in which New York State courts have found that unique physical conditions under Z.R. §72-21(a) can refer to buildings as well as land, and that obsolescence of a building is a proper basis for a finding of uniqueness [R. 5 (¶ 76), citing, Guggenheim, sup ra, UOB Realty (USA) v. Chin, 291 A.D.2d 248 (1St Dept. 2002), Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dept. 1985) and Dwyer v. Polsinello, 160 A.D. 1056, 1058 (3d Dept. 1990)].

251. As a reply to BSA Answer ¶ 251, neither admit nor deny as same calls for a legal conclusion and further deny that this accurately describes the law and further states that the record lacks evidence showing satisfaction of the "arising from" requirement of 72-21(a) and that the record is devoid of any evidence of any obsolescence on Lot 37 created by either the Synagogue on Lot 36 or the existing building on Lot 37 which create a hardship arising from the strict application of the zoning regulations and which is not remedied by an as-of-right building.

> BSA Answer ¶ 252. Finally, the Board rationally found that, contrary to the Opposition's assertions, it was not necessary for the Congregation to establish a financial need for the development project in order to establish its entitlement to the requested variances. Indeed, as the BSA properly noted, "to be entitled to a variance, a religious or educational institution must establish that existing zoning requirements impair its ability to meet its programmatic needs; neither New York State law, nor Z.R. §72-21, require a showing of financial need as a precondition to the granting of a variance to such an organization" [R. 5-6 (¶ 78)].

252. As a reply to BSA Answer ¶ 252, admit that as to legitimate programmatic needs, that financial need is not required, but deny that the variances for the fourth floor are for programmatic need, in that the caretaker's apartment is located there so as to not intrude on revenue-producing condominiums on the fifth and sixth floors of an as-of-right building, and further state that where facilities both meet programmatic needs and generate income, such as rental for a school, then such rental income should be taken into account in reasonable return analysis.

> BSA Answer ¶ 253. Thus, petitioners' assertions that the Congregation should have sought to raise funds from its members instead of seeking the requested variances [Petition, ¶¶ 34, 36, 57 and 58, 60], is simply incorrect. As Vice-Chair Collins explained at the November 27, 2007 hearing, the hardship that is talked about in the context of a variance case is one that is created by the zoning in a given situation, it has nothing to do with the wealth of an individual property owner [R. 1767-68].

253. As a reply to BSA Answer ¶ 253, deny that this is an accurate statement of the Petitioners' position, given that the Congregation has asserted that the proposed condominium variances are intended to provide funds to support the programmatic needs (to which the Respondent Vice-Chair refers), which assertions are at R-5118 (item number (3), R-5157 (last paragraph), R-5168-69, and further state that the assertions of Petitioners relate primarily to the condominium variances (and thus should not be included in the portion of the answer with the heading "Community Facility Variances at para. 235), and further deny that this statement of Respondent Collins is an accurate statement of law in so far as providing a variance to provide relief from hardships allegedly created by landmarking, which requires a showing of financial need under Z.R.§74-711 and approval by LPC and the Department of City Planning.

> BSA Answer ¶ 254. Thus, it is clear that the BSA properly assessed the requirements of Z.R. §72-21(a) by looking at the attributes of the property in the aggregate, including the unique characteristics of the existing building, the limited ability to construct a conforming building and the programmatic needs of the applicant. It is also clear that the BSA properly considered, and rejected, the Opposition's arguments with regard to the Congregation's programmatic needs. The BSA's conclusion that the Congregation satisfied the (a) finding with respect to the community facility variances is neither arbitrary, capricious, nor improper, and should be upheld by this Court.

254. As a reply to BSA Answer ¶ 254, deny and further state that the BSA did not cite to references in the record providing evidence to substantiate its acceptance of conclusory statements.

> BSA Answer - Residential Variances
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> BSA Answer ¶ 255. The BSA also properly determined that the base height, building height and front and rear setback variances requested by the Congregation to permit development of a building that would accommodate its proposed residential use satisfied the requirements of Z.R. §72-21(a).

255. As a reply to BSA Answer ¶ 255, deny that BSA provided findings based upon facts identified in the record which provided substantial evidence in support of each and every element of §72-21(a).

> BSA Answer ¶ 256. In support of its assertion that there are unique physical conditions that create practical difficulties and unnecessary hardship proceeding with an as-of-right development (i.e. a development that complies with all zoning requirements), the Congregation pointed to: 1) the development site's location on a Zoning Lot that is divided by a zoning district boundary (i.e. that is partially in an R8B zoning district and partially in an R10A zoning district; 2) the existence and dominance of a landmarked synagogue on the Zoning Lot; and 3) the limitations on

development imposed by the site's contextual zoning district regulations[15] [R. 6 (¶ 86)].

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

256. As a reply to BSA Answer ¶ 256, admit that the Congregation made many assertions, but deny that substantial evidence supports these assertions, and deny that the BSA may make findings based on assertions, and deny that each of the three items is a physical condition, and refer the Court to the text of Z.R. §72-21 and Z.R. §72-21(a) for an accurate statement of the zoning regulation, including the causation "arising from" requirement.

BSA Answer - i. Lot Division

BSA Answer ¶ 257. As to the development site's location on a zoning lot that is divided by a zoning district boundary, the Congregation explained that this division constrains an as-of-right development by imposing different height limitations on the two respective portions of the lot. In this regard, in the R10A portion of the Zoning Lot (approximately 73% of the lot), a building may have a total height of 185'-0" and a maximum base height of 125'-0",[16] while in the R8B portion of the lot (approximately 27% of the lot) a building is limited to a total height of 75'-0 and a maximum base height of 60'-0" with a required front setback of 15'-0" at the maximum 60'-0" base height and a required rear setback of 10'-0". A complying development would, therefore, be forced to set back from the street line at the mid-point between the fifth and sixth floors [R. 6 (¶¶ 88-92)].

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

257. As a reply to BSA Answer ¶ 257, admit that the Congregation made many assertions, but deny that substantial evidence supports the assertions, and deny that the BSA may make findings based on assertions, and deny that each of the three items is a physical condition, and refer the Court to the text of Z.R. §72-21 and Z.R. §72-21(a) for an accurate statement of the zoning regulation, including the causation "arising from" requirement, and further state that the record is devoid of any evidence as to the alleged constraints, and further state that for the development site of 64 x 100 feet, only 17 feet is in the R10A portion, and further state that a complying building would also be forced to have a 40 foot separation under Z.R. §23-711 and that the limitation is not the split lot, but the 40 foot separation, and further state the limitation of the landmarks law as applied in the Certificate of Appropriateness further prevents the 185’ 0” height on Lot 37, and otherwise deny that which is not admitted.

BSA Answer ¶ 258. In addition, because the frontage of the portion of the development site within the R10A portion of the development site is less than 45 feet, the "sliver law" provisions of Z.R. §23-692 limit the maximum base height of an as-of-right building to 60'-0" [R. 6 (¶ 94)].

258. As a reply to BSA Answer ¶ 258, deny to the extent that the paragraph assumes the development site is other than the 64 x 100 foot Lot 37, neither admit nor deny that sliver law would prevent a sliver building on the 17 x 100 foot portion of Lot 37 and state the Congregation's expert architects were of the opinion that the sliver law did not apply, and deny that the zoning regulation §23-692 is a physical condition under §72-21(a).

BSA Answer ¶ 259. A diagram provided by the Congregation indicates that less than two full stories of residential floor area would be permitted above a four-story community facility if the R8B zoning district front and rear setbacks and height limitations were applied to the development site [R. 7 (¶ 95)]. As detailed above, the proposed development contemplates a total residential floor area of approximately 22,352 square feet, while an as-of-right development would allow for a residential floor area of only approximately 9,638 square feet [R. 6 (¶¶84-5)].

259. As a reply to BSA Answer ¶ 259, deny that the Congregation presented a diagram showing said information and that the City can provide a citation to said diagram, deny that an all residential building would be limited to 9,368 square feet in that all floors of the as-of-right building could be used for residential purposes and suggest that the BSA was simply mistaken as to this figure, and state that every schedule submitted by the Congregation's feasibility study shows on the fifth and sixth floors 5,316 square feet (sellable) (7,594 square feet gross) (R-4869), further state that the BSA mistakenly forgot that the proposed sixth floor requires front and rear setback variances, and that these mistakes result from the failure of the BSA to require the Congregation to provide floor plans showing the location of variances, and further state that an all-residential as-of-right building would allow for far more than 9,368 square feet. See Pet. Ex. M-1.

BSA Answer ¶ 260. In response to the Congregation's assertions of uniqueness, the Opposition argued that the presence of a zoning district boundary within a lot is not a "unique physical condition" under the language of Z.R. §72-21. In addition, the Opposition represented that there are four other properties owned by religious institutions and characterized by the same R10A/R8B zoning district boundary division within the area bounded by Central Park West and Columbus Avenue and 59b Street and 1101h Street [R. 7 (¶ 103)].

260. As a reply to BSA Answer ¶ 260, deny, in that no such assertion is made in the Verified Petition and rather that the Verified Petition alleges that a split lot is not a physical condition and

denies the remainder of the paragraph, having no information as to what other opponents may have stated in the record, but, that the last sentence does not appear in the Petition.

> BSA Answer ¶ 261. In response, the BSA stated that the location of a zoning district boundary, in combination with other factors such as the size and shape of a lot, and the presence of buildings on the site may create an unnecessary hardship in realizing the development potential otherwise permitted by the zoning regulations [R. 7 (¶ 104), citing BSA Cal. No. 358- 05-BZ, applicant WR Group 434 Port Richmond Avenue, LLC; BSA Cal. No. 388-04-BZ, applicant DRD Development, Inc.; BSA Cal. No. 291-03-BZ, applicant 6202 & 6217 Realty Company; and 208-03-BZ, applicant Shell Road, LLC)].

261. As a reply to BSA Answer ¶ 261, neither admits nor denies the allegations as same calls for a legal conclusion, and respectfully refers the Court to the New York City Charter and Zoning Resolution § 72-21 for a full and complete statement of its terms and conditions and to Petitioners' Memoranda of Law, and further states that there is no evidence, and certainly no substantial evidence, in the record cited by the BSA as to "other factors such as the size and shape of a lot, and the presence of buildings on the site" so as to constitute a physical condition creating a hardship arising out of the strict application of the zoning regulation.

> BSA Answer ¶ 262. Moreover, the BSA concluded that the four sites pointed to by the Opposition, which are within a 51-block area of the subject site, would not, in and of themselves, be sufficient to defeat a finding of uniqueness because New York State law does not require that a given parcel be the only property so burdened by the condition(s) giving rise to the hardship in order to conclude that a site has "unique physical conditions" [R. 7 (¶¶ 105) and R. 7 (¶ 106), citing, Douglaston Civ. Assn. v. Klein, 51 N.Y.2d 963, 965 (1980)]. Rather, all that is required is that the condition is not so generally applicable as to dictate that the grant of a variance to all similarly situated properties would effect a material change in the district's zoning [R. 7 (¶¶ 104- 06)].

262. As a reply to BSA Answer ¶ 262, neither admits nor denies the allegations as same calls for a legal conclusion, and respectfully refers the Court to the New York City Charter and Zoning Resolution § 72-21 for a full and complete statement of their terms and conditions and to Petitioners' Memoranda of Law, but further state that the court in Douglaston found the existence of a physical condition, to wit, swampy land.

> BSA Answer - H. Synagogue
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> BSA Answer ¶ 263. The Board properly concluded that "the site is significantly underdeveloped and ... the location of the landmark Synagogue limits the developable portion of the [Zoning Lot] to the development site" [R. 7-8 (¶ 112)].

263. As a reply to BSA Answer ¶ 263, denies and further states that the Board resolution is ambiguous in its reference to "significantly underdeveloped" and provides no citations to the record showing substantial evidence, and states that there are no limitations on development in the "development site" and that the restrictions created by the landmark law are not physical conditions and are not grounds for a variance under §72-21.

BSA Answer ¶ 264. As established by the Congregation, because the landmarked synagogue occupies nearly 63% of the Zoning Lot, only the area currently occupied by the parsonage house, and the proposed development site are available for development [R. 7 (¶¶ 107-09)]. As noted above, the narrow width of the parsonage house makes its development for the required purpose infeasible [R. 7 (¶ 110)].

264. As a reply to BSA Answer ¶ 264, deny, in that the finding is not supported by substantial evidence, and further state that the reference to "required purpose" as to the residential condominiums is ambiguous, and to the extent the "required purpose" relates to religious programmatic needs, these are irrelevant to the residential condominium variances, and further state that the Parsonage is currently rented as a luxury residential townhouse.

BSA Answer ¶ 265. Further, as explained by the Congregation, the site is unique because it is presently the only underdeveloped site overlapping the RI OA/R8B district boundary line within a 20-block area to the north and south of the subject site [R. 7 (¶¶ 100-01)]. Moreover, the Congregation explained that all the properties within the 22-block neighboring area and bisected by the district boundary line are developed to a Floor Area Ratio ("FAR")[17] exceeding 10.0, while the subject zoning lot is currently developed to a FAR of 2.25 [R. 7 (¶ 102)].

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

265. As a reply to BSA Answer ¶ 265, neither admit or deny, and further state that the City now acknowledges that the application does not require the transfer of FAR to the development site, and thus, whether true or not, the statements in the paragraph are irrelevant, and moreover state that the issue is not "uniqueness" but whether there is a physical condition.

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

BSA Answer ¶ 266. As to the limitations on development imposed by the Zoning Lot's location within the R8B contextual zoning district, the Congregation stated that the district's height limits and setback requirements, and the limitations imposed by the sliver law result in an inability to use the Synagogue's substantial surplus development rights [R. 8 (¶ 113)].

266. As a reply to BSA Answer ¶ 266, deny that the sliver law is the sole reason that the Congregation is unable to use the development rights and that the landmark laws and 40-foot separation requirements are the fundamental limitations, and otherwise deny the allegations in this paragraph.

> BSA Answer ¶ 267. In this regard, because the creation of the Zoning Lot predates the adoption of the R8B/RlOA zoning district boundary, the provisions of Z.R. §77-22 permit the Congregation to utilize an average FAR across the entire Zoning Lot. The maximum permissible FAR in an R10A district (73% of the zoning lot) is 10.0 and the maximum permissible FAR in an R8B district (27% of the zoning lot) is 4.0 [R. 2 (¶ 21-2)]. Using the averaging methodology set forth in Z.R. §77-22, the Congregation calculated that due to the percentage of the lot in an RIOA district and the percentage of the lot in an R8B district, the averaged permissible FAR is 8.36. This FAR results in 144,511 square feet of zoning floor area [R. 10 (¶ 115), 5131].

267. As a reply to BSA Answer ¶ 267, neither admit or deny, and further state that the City now acknowledges in ¶268 that this application does not require the transfer of FAR to the development site, and thus, whether true or not, the statements in the paragraph are irrelevant.

> BSA Answer ¶ 268. However, the Congregation represented that because of the existing Synagogue and parsonage house, height limits, setback requirements and sliver limitations, the Congregation would be permitted to use only 28,274 square feet to construct an as-of-right development [R. 8 (¶ 114)]. In addition, the Congregation represented that the averaged permissible FAR should result in 144,511 square feet of zoning floor area; after development of the proposed building the Zoning Lot would only be built to a floor area of 70,166 square feet and a FAR of 4.36, and that approximately 74,345 square feet of floor area will remain unused [R. 8 (¶ 115)].18
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> [18] Contrary to petitioners' allegations, the BSA's discussion and consideration of the Congregation's inability to use all of its development rights is neither wholly irrelevant nor improper. Petition, IT 102, 107, 108. **Indeed, the fact that the Congregation does not need to transfer development rights in order to meet its needs and realize a reasonable return illustrates the reasonable scope and scale of the proposed project**.

268. As a reply to BSA Answer ¶ 268, neither admit or deny, and further state that the City now acknowledges that this application does not require the transfer of FAR to the development site, and thus, whether true or not, the statements in the paragraph are irrelevant and the extensive discussion of irrelevancies serve only to confuse the Court, and further state that the fact that FAR need not be transferred serves to undercut the BSA's use of split lot waivers where relevant zoning regulations only permit transfer of FAR.

> BSA Answer ¶ 269. In response, the Opposition asserted that the Congregation's inability to use its development rights is not a hardship under Z.R. §72-21 because: 1) as recognized in Matter of Soc. for Ethical Cult. v. Spatt, 51 N.Y.2d 449 (1980),

> unlike a private owner, a religious institution does not have a protected property interest in earning a return on its air rights; and 2) there is no fixed entitlement to use air rights contrary to the bulk limitations of a zoning district [R. 8 (¶ 116-17)].

269. As a reply to BSA Answer ¶ 269, neither admit nor deny and state that the record, if cited by the City, would speak for itself, and further refer the Court to the Verified Petition and further note the non sequitur relationship of the citations to the first clause.

> BSA Answer ¶ 270. In response to the Opposition's arguments in this regard, the BSA correctly noted that Spatt concerns the question of whether the landmark designation of a religious property imposes an unconstitutional taking, or an interference with the free exercise of religion, and is inapplicable to a the present case in which a religious institution merely seeks the same entitlement to develop its property as any other private owner [R. 8 (¶ 118)]. Moreover, the BSA noted that Spatt does not stand for the proposition that a land use regulation may impose a greater burden on a religious institution than on a private owner [R. 8 (¶ 119)]. In fact, in Spatt the Court noted that the Ethical Culture Society, like any similarly situated private owner, retained the right to generate a reasonable return from its property by the transfer of its excess development rights [Id., citin Spatt, 51 N.Y.2d at 455, fn. 1].

270. As a reply to BSA Answer ¶ 270, neither admit nor deny and state that the record, if cited by the City, would speak for itself, and further refer the Court to the Verified Petition, and note that at no place do Petitioners make the ridiculous statement and "red herring" that a religious institution may not have the same rights to develop its property as any other institution.

> BSA Answer ¶ 271. Thus, the BSA properly concluded that while a "nonprofit organization is not entitled to special deference for a development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to develop its property than would be imposed on a private owner" [R. 8 (¶ 121)]. Moreover, the BSA properly concluded that "the unique physical conditions of the site, **when considered in the aggregate and in light of the Synagogue's programmatic needs,** creates practical difficulties and unnecessary hardships in developing the site in strict compliance with the applicable zoning regulations, thereby meeting the required finding under Z.R. §72-21(a)" [R. 8 (¶ 122)].

271. As a reply to BSA Answer ¶ 271, deny and specifically deny the implication in the first sentence that the BSA is responding to an assertion of Petitioners and further refer the Court to the Verified Petition and note that at no place do Petitioners make the ridiculous statement and "red herring" that a religious institution may not have the same rights to develop its property as any other institution, and further deny that it was proper for the BSA, in considering a variance for the profit-making condominiums, to take into account the "Synagogue's programmatic needs."

Finding (b)

BSA Answer ¶ 272. Zoning Resolution § 72-21(b) [the "(b) finding"] requires a showing, [t]hat 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 ....

272. As a reply to BSA Answer ¶ 272, admit that Z.R. §72-21(b) contains this language.

BSA Answer ¶ 273. However, the (b) finding explicitly exempts non-profit organizations from this requirement. The section concludes: "[t]his finding shall not be required for the granting of a variance to a non-profit organization." As a result, the BSA correctly determined that it did not need to address the (b) finding with regard to the requested community facility variances.

273. As a reply to BSA Answer ¶ 273, admit that Z.R. §72-21(b) contains this language and further states that this issue was not raised in the Verified Petition.

Residential Variances

BSA Answer ¶ 274. As to the residential development, which was not proposed to meet the Congregation's programmatic needs, the BSA properly determined that it was appropriate to grant the requested variances because the site's unique physical conditions resulted in no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return [R. 8-10 (¶¶ 125-148)]. As a preliminary matter, it is important to note that a reasonable return is not simply any sort of profit whatsoever. Rather, the profit margin must be substantial enough to actually spur development.

274. As a reply to BSA Answer ¶ 274, deny, in that the Congregation asserted that the residential development was intended to support the programmatic needs, and further deny that the BSA determination was properly supported by substantial evidence in the record or was rational.

BSA Answer ¶ 275. Because the residential development was not proposed to meet the Congregation's programmatic needs, the BSA directed the Congregation to perform a financial feasibility study evaluating the ability of the Congregation to realize a reasonable financial return from an as-of-right residential development on the site, just as it would have required of any for- profit applicant [R. 8 (T¶ 125-26)].

275. As a reply to BSA Answer ¶ 275, deny and state that the Congregation at all times during the proceeding improperly asserted that the residential development was needed to provide financial support for the programmatic needs, and admit that the BSA did ask the Congregation to analyze an all residential as-of-right development and a mixed use residential development with two floors of condominiums.

> BSA Answer ¶ 276. The Congregation initially submitted a feasibility study from Freeman Frazier [R. 133-61] that analyzed: 1) an as-of-right community facility/residential building within an R8B envelope (the "as-of-right building"); 2) an as-of-right residential building with a 4.0 FAR; 3) the original proposed building; and 4) a lesser variance community facility/residential building [R. 8 (¶ 127)].

276. As a reply to BSA Answer ¶ 276, admit that such studies were submitted, but deny that such studies were performed as required by the BSA Instructions and were in accord with customary real estate economics.

> BSA Answer ¶ 277. [1]At the November 27, 2007 hearing, the Board questioned why the analysis included the community facility floor area, and asked the Congregation to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of-right development [R. 9 (¶ 128), 1753-56]. [2] In response, the Congregation revised its financial analysis to also include an as-of-right community facility/residential tower building using the modified site value [R. 9 (¶ 129), 1968- 2008]. [3] The feasibility study indicated that the as-of-right scenarios, and lesser variance community facility/residential building would not result in a reasonable financial return, and that, of the five scenarios, only the original proposed building would result in a reasonable return [R. 9 (¶ 130), 1968-2008].

277. As a reply to BSA Answer ¶ 277, as to the first sentence, deny that this fully describes the questioning of the Board and refer the Court to the transcript in the record and state that the Chair specifically noted that the site value would be what a developer would pay for the development rights that can be used by the developer. As to the second sentence, deny that the Congregation ever revised the site value for an as-of-right building to value only the 5,316 square feet (7,594 gross) of condominium development space for which a developer would pay as the Chair's comments would suggest was required. As to the third sentence, deny that the as-of-right buildings would not result in a reasonable return to the Congregation as owner.

> BSA Answer ¶ 278. [1]After this analysis, it was determined that a tower configuration in the RI OA portion on the Zoning Lot was contrary to the sliver law and, as a result, the as-of-right community facility/residential tower building used in the feasibility study did not actually represent an as-of-right development [R. 9 (113 1)]. [2]In addition, at the February 12, 2008 and April 15, 2008 hearings, the Board questioned the basis for the Congregation's valuation of its development rights and requested that the Congregation recalculate the value of the site using only sales in R8 and R8B districts [R. 9 (¶ 131), 3653-758, 4462-515]. [3]Finally, the Board requested that the Congregation evaluate the feasibility of providing a complying court to the rear above the fifth floor of the original proposed building [R. 9 (¶ 132), 3653-758, 4462-515].

278. As a reply to BSA Answer ¶ 278, as to the first sentence, admit that because of the sliver law, an as-of-right building would not permit a tower configuration and further state that as a consequence, valuation of the as-of-right two floor condominium site would require valuation of the 5,316 square feet (7,594 gross) of condominium development space for which a developer would pay. As to the second sentence, respectfully refer the Court to the transcripts in the record. As to the third sentence, admit that this request was made arbitrarily to only consider a courtyard to protect the windows in the rear side of 18 West 70th Street in recognition of §72-21(c), but not for the windows in the front side of 18 West 70th Street, and further state that analysis of the proposed building is irrelevant to an analysis under Z.R. §72-21(b), and properly is a subject of Z.R. §72-21(e) (minimum variances), and inclusion in a discussion of the (b) finding confuses the issues properly before the Court. Petitioners further state that the rate of return accepted by the BSA in the proposed building of 10.93% exceeds by 67% the acceptable rate of return of 6.55% concluded by the Congregation and its financial analyst, Freeman Frazier, and, because the building was larger than needed to create a reasonable return to the Congregation, it was arbitrary and capricious for the BSA not to instruct the Congregation to provide a complying court for the front side windows in 18 West 70th St.

> BSA Answer ¶ 279. In response to these requests, the Congregation revised its feasibility analysis to assess the financial feasibility of. 1) original proposed building, but with a complying court; 2) an eight-story building with a complying court; 3) a seven story building with a penthouse, and a complying court, using the revised site value arrived at based upon R8 and R8B zoning district sales. This revised analysis concluded that of the three scenarios, only the proposed building was feasible [R. 9 (¶ 133), 3847-77].

279. As a reply to BSA Answer ¶ 279, deny as an incomplete description of these studies, in that the feasibility studies at the same time completely altered the methodology of valuing the development site of the two floors of condominiums in Lot 37 (5,316 square feet (7,594 gross)) by using the unused development right over the adjoining parsonage (19,744 square feet), and further refer the Court to the actual studies for a complete description. Petitioners further state that analysis of the proposed buildings is irrelevant to an analysis under Z.R. §72-21(b), and properly is a subject of Z.R. §72-21(e) (minimum variances), and inclusion in a discussion of the (b) finding confuses the issues properly before the BSA and shows the lack of clarity of the BSA's decision making process. Petitioners further state that the rate of return accepted by the BSA in the

proposed building of 10.93% exceeds by 67% the acceptable rate of return of 6.55% concluded by the Congregation and Freeman Frazier.

> BSA Answer ¶ 280. The Board raised questions as to how the space attributable to the building's rear terraces had been treated in the financial feasibility analysis [R. 9 (¶ 134)]. In response, the Congregation submitted a letter from Freeman Frazier, dated July 8, 2008, stating that the rear terraces on the fifth and sixth floors had not originally been considered as accessible open spaces and were, therefore, not included in the sales price as sellable terrace areas of the appertaining units. However, Freeman Frazier also provided an alternative analysis considering the rear terraces as sellable outdoor terrace area and revised the sales prices of the two units accordingly [R. 9 (¶ 135), 5171-81].

280. As a reply to BSA Answer ¶ 280, neither admit nor deny and refer the Court to support in the record if any and further state that this issue was not raised at all by the Opposition or by the Verified Petition. Petitioners further state that analysis of the proposed buildings is irrelevant to an analysis under Z.R. §72-21(b), and properly is a subject of Z.R. §72-21(e) (minimum variances), and inclusion in a discussion of the (b) finding confuses the issues properly before the BSA and shows the lack of clarity of the BSA's decision making process. Petitioners further state that the rate of return accepted by the BSA in the proposed building of 10.93% exceeds by 67% the acceptable rate of return of 6.55% concluded by the Congregation and Freeman Frazier.

> BSA Answer ¶ 281. The Board also asked the Congregation to explain the calculation of the ratio of sellable floor area gross square footage (the "efficiency ratio") for each of the following scenarios: the proposed building, the eight-story building, the seven-story building, and the as- of-right building [R. 9 (¶ 136)].

281. As a reply to BSA Answer ¶ 281, neither admit nor deny and refer the Court to support in the record if any, and further state that this issue was not raised at all by the Opposition or by the Verified Petition, and further state that there was no further analysis of the all-residential as-of-right building. Petitioners further state that analysis of the proposed buildings is irrelevant to an analysis under Z.R. §72-21(b), and properly is a subject of Z.R. §72-21(e) (minimum variances), and inclusion in a discussion of the (b) finding confuses the issues properly before the BSA.

> BSA Answer ¶ 282. In its July 8, 2008 submission, Freeman Frazier provided a chart identifying the efficiency ratios for each respective scenario, and explained that the architects had calculated the sellable area for each by determining the overall area of the building, and then subtracting the exterior walls, the lobby, the elevator core and stairs, hallways, elevator overrun, and terraces from each respective scenario [R. 9 (¶ 137), 5171-81]. Freeman Frazier also submitted a revised analysis of the as-of-right building using the revised estimated value of the

property which showed that the revised as-of-right alternative would result in a substantial loss of return [R. 9 (¶ 138), 5171-81].

282. As a reply to BSA Answer ¶ 282, as to the first sentence, admit that Freeman Frazier provided efficiency ratios but deny that the ratios were computed correctly, and otherwise refer to the July 8, 2008 report cited R5171-81 submitted by Freeman Frazier. Petitioners further state that analysis of the proposed buildings is irrelevant to an analysis under Z.R. §72-21(b), and properly is a subject of Z.R. §72-21(e) (minimum variances), and inclusion in a discussion of the (b) finding confuses the issues properly before the BSA. As to the second sentence, admit that Freeman Frazier supplied a summary sheet of a purported analysis of the Scheme A as-of-right building, but deny that the summary sheet constituted a complete analysis in that the analysis of said scheme involves analysis, conclusion, and assertion in multiple letters and reports and also relies upon an incomplete, spoliated, unsigned construction report that further improperly computed site value based upon 19,755 square feet when the site area of the two condominiums was only 5,316 sq. feet (sellable), and accordingly no rational conclusion as to loss or return could be derived from said analysis. Also as to the second sentence, also deny that, on July 8, 2008, Freeman Frazier provided any analysis of the "not really" all residential as-of-right Scheme C building. The revised as-of-right alternative used as a basis to estimate the market value/acquisition price an arbitrary methodology. The acquisition cost shown (R- 5178) is $12,347,000 for the development of 7,594 sq. ft. of built residential area and 5,3136 of sellable area.

BSA Answer ¶ 283. In response to the Congregation's feasibility analysis, the Opposition questioned: 1) the use of comparable sales prices based on property values established for the period of mid-2006 to mid-2007, rather than using more recent comparable sales prices; 2) the adjustments made by the applicant to those sales prices; 3) the choice of methodology used by the Congregation, which calculated the financial return based on profits, contending that it should have been based instead on the projected return on equity, and further contended that the applicant's treatment of the property acquisition costs distorted the analysis; and 4) the omission of the income from the Beit Rabban school from the feasibility study [R. 9-10 (¶¶ 139, 141, 145)].

283. As a reply to BSA Answer ¶ 283, deny that this is a complete or accurate description of the three most significant issues raised by the opposition and further state that the Verified Petition made no reference to the minor points (1) and (2), and further state that some of these objections were made by BSA staff, and refer the Court to support in the record if any for the accuracy of the summary.

> BSA Answer ¶ 284. The Congregation responded to each of the Opposition's challenges. With respect to the choice of comparable sale prices and the adjustments made thereto, the Congregation explained: 1) that in order to allow for comparison of earlier to later analyses, it is BSA practice to establish sales comparables from the initial feasibility analysis to serve as the baseline, and then to adjust those sales prices in subsequent revisions to reflect intervening changes in the market; and 2) the sales prices indicated for units on higher floors reflected the premium price units generated by such units compared to the average sales price for comparable units on lower floors [R. 9 (¶ 140)].

284. As a reply to BSA Answer ¶ 284, deny that this is a complete or accurate description of tissues raised by the opposition and further state that the Verified Petition made no reference to the minor points and is thus not relevant to this proceeding.

> BSA Answer ¶ 285. [1]With respect to the method used to calculate the reasonable financial return, the Congregation stated that it used a return on profit model which considered the profit or loss from net sales proceeds less the total project development cost on an unleveraged basis, rather than evaluating the project's return on equity on a leveraged basis [R. 9 (¶ 142)]. [2]In support of its chosen method, the Congregation explained that a return on equity methodology is characteristically used for income producing residential or commercial rental projects, whereas the calculation of a rate of return based on profits is typically used on an unleveraged basis for condominium or home sale analyses and would therefore be more appropriate for a residential project, such as that proposed by the subject application [R. 9-10 (¶ 143)]. [3[Indeed, the BSA noted in its Resolution that a return on profit model which evaluates profit or loss on an unleveraged basis is the customary model used to evaluate the feasibility of market-rate residential condominium developments [R. 10 (¶ 144)].

285. As a reply to BSA Answer ¶ 285, deny that the economic assumptions and assertions were properly selected, described and used; as to the first sentence, admit that the Congregation made similar statements and refer the Court to the record, and state that the term "unleveraged basis" as used by Freeman Frazier, refers to "Annualized Return on Total Investment" and that the term "leveraged basis" is used elsewhere to mean "return on equity." As to the second and third sentence, admit that the Congregation and the BSA made such statements, but such statements were unsupported by any rationale from Freeman Frazier of an expert in real estate economics with an understanding of reasonable return based on constitutional takings and eminent domain principles, and that neither Respondent provided any explanation as to why they departed from the clear language of the guidelines requiring a return on equity analysis, and further note that nothing in the Board’s decision prevents the Congregation from renting the condominium space as rental apartments, and thus alternative analysis of both return on investment and return on equity is in

order, nor did the Congregation or the BSA considered whether annualized return or total return was the appropriate measure, or consider the time period used in annualized return.

> BSA Answer ¶ 286. With respect to the income from the Beit Rabban school, the Congregation explained that it had in fact provided the BSA with the projected market rent for a community facility use, and that the cost of development far exceeded the potential rental income from the community facility portion of the development [R. 10 (¶ 146)]. Moreover, the Board specifically requested that costs, value and revenue attributable to the community facility be eliminated from the financial feasibility analysis to allow a clearer description of the feasibility of the proposed residential development, and of lesser variance and as-of-right alternatives.

286. As a reply to BSA Answer ¶ 286, deny, except admit that the Congregation, in response to opposition requests for the "actual rent" being paid by the Beit Rabban school responded that it had provided "projected market rent," and state further that the Board was in error in not considering rental income received from the rental of the school in evaluating reasonable return of the mixed use facility.

> BSA Answer ¶ 287. There is no question that the BSA adequately assessed the feasibility studies provided by the Congregation as well as the responses provided to the Opposition's questions, and petitioners' suggestion that the BSA did not fully consider the Freeman Frazier submissions, and any flaws in the submissions in rendering its decision is incorrect. For example, at the November 27, 2007 hearing, BSA Chair Srinivasan specifically explained that the Board read through the Freeman Frazier financials, and may disagree with some of the assumptions. In response to those concerns, Chair Srinivasan asked the Congregation to provide an analysis of the property without the 20,000 square feet that's being used for the synagogue. Specifically, the BSA wanted to see a valuation analysis that did not include a proposed developer having to pay for that portion of the site that is not going to be used by the developer because it is already being used by the synagogue [R. 1753-54]. This type of in-depth discussion of the Freeman Frazier assumptions and conclusions continued throughout the February, April and June public hearings [R. 3653-758, 4462-515, 4937-74].

287. As a reply to BSA Answer ¶ 287, deny and further state that the BSA decision makes no reference at all to the multiple reports by the opposition valuation expert Levine (*See* reports critiquing Freeman Frazier studies by opposition certified real estate appraiser Martin Levine of Metropolitan Valuation Services November 2, 2007 (R-1631); January 25, 2008 (R-02506); February 8, 2008 (R-3630); March 20, 2008 (R-4093); April 15, 2008 (R-4254); June 10, 2008 (R-4800); June 23, 2008 (R-4932); July 29, 2008 (R-5210), which reports demonstrate the substantial deficiencies in methodology in the Freeman Frazier reports.) and indeed did not question Levine at the hearings that he attended, and further state that the BSA never required the Congregation and

Freeman Frazier to provide a true as-of-right Scheme C analysis, and further state the BSA refused to ask the Congregation to compute the site value based upon the portion of the site (two condominium floors) that the developer was going to use in the as-of-right Scheme A building — thereby concealing that information from the decision, that the BSA concealed from the decision the rate of return for the approved building, that the BSA concealed in the decision that the site area used in site value was the area over the parsonage, and that the BSA accepted spoliated incomplete construction estimates as a basis for accepting the reasonable return analysis of the as-of-right buildings.

> BSA Answer ¶ 288. Moreover, the fact that the BSA did not specifically mention these issues in its Resolution is of no moment, because the BSA clearly stated: "[t]he Opposition may have raised other issues that are not specifically addressed herein, the Board has determined that all cognizable issues with respect to the required variance findings or CEQR review are addressed by the record" [R. 13 (¶ 216)]. Therefore, there is no question that after considering the feasibility analysis presented by the Congregation and the questions raised by the Opposition, the BSA properly determined that there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return [R. 10 (¶¶ 147-8)].

288. As a reply to BSA Answer ¶ 288, admit that the quoted provision is found in the Resolution, and deny the remainder of the paragraph, and deny that the BSA in good faith considered the arguments of opponents in the proceeding, and state that many if not all of the arguments in the Verified Petition were made in the proceeding below, but ignored or mischaracterized in the BSA Resolution.

> BSA Answer ¶ 289. Finally, in the instant proceeding, in addition to reasserting the arguments asserted by the Opposition during the BSA's review, petitioners argue that the BSA's improperly concluded that the Congregation satisfied the (b) finding with respect to the residential variance for several reasons.

289. As a reply to BSA Answer ¶ 289, deny that the Petition is a reassertion of arguments made by the opposition or that the BSA correctly characterized the arguments of the opposition, and refer the Court to the Verified Petition for the exact claims of Petitioners.

> BSA Answer ¶ 290. First, petitioners argue that the BSA acted arbitrarily and capriciously because it did not require the Congregation to submit a complete copy of its construction cost estimate for Scheme A. To this end, petitioners claim that the Congregation's failure to submit a complete copy of its construction cost estimate is evident because the second page of the two page document submitted was numbered "Page 2 of 15." Petition ¶ 190. Based on the Congregation's alleged failure to submit

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

290. As a reply to BSA Answer ¶ 290, refer the Court to the Verified Petition for the exact claims of Petitioners and deny the inference in said paragraph that failure to provide the documents is "alleged" in that it is not in dispute and indeed in the following paragraph, the City admits that the documents were not provided, and further refer to Petitioners' reply to paragraph 291, and deny the last sentence.

> BSA Answer ¶ 291. [1]BSA properly did not require the Congregation to submit the alleged additional pages because they were not necessary for its review. [2] BSA, in examining whether construction prices are reasonable, reviews the base unit price, i.e., the construction cost divided by the square footage. [3] Here, since the Congregation submitted the construction cost and the square footage, BSA had the necessary elements to calculate and review the base unit price [R. 1997, 5178-79]. [4]Accordingly, the additional pages were irrelevant because they were not needed for BSA's review. [5] Moreover, as admitted by petitioners, strict rules of evidence do not apply to an administrative hearing. Petition ¶ 193. [6]Thus, there was no requirement for the alleged additional pages to be submitted.

291. As a reply to BSA Answer ¶ 291, as to sentence 1, deny and state that the missing pages were necessary for a proper BSA review and state that the complete 15-page reports were submitted to the BSA for the proposed schemes, but not for the as-of-right schemes, and state that the complete reports for the as-of-right schemes were in the possession of the Congregation. As to sentence 2, deny and state that there is no evidence that the BSA made such computation of base unit price, and further state that the City meant to state here "base unit cost." As to sentence 3, admit that base unit cost is a relevant consideration but deny that a computation is sufficient for a complete evaluation., and further deny that any such computation appears at R-1997 or R-5178-79, and further state that the citations are misleading. As to sentences 2, 3 and 4, deny, and state that if the computations referred to had been made by the BSA, it would have shown that the as-of-right construction costs per sq. ft. are 44% higher than the proposed/approved construction costs per sq. ft., accordingly establishing that the as-of-right construction costs had been exaggerated, thereby reducing profit, return, and rate of return. As to sentence 5, this is true, but, even under any relaxed application of the rules of evidence, it is arbitrary and capricious for a tribunal to accept spoliated documents when such documents are available in complete form and are material and relevant to the central issues of the proceeding, and had the BSA performed the calculations it admits could have been

performed, the relevance and materiality would have been apparent to any impartial tribunal. As to sentence 6, deny.

> BSA Answer ¶ 292. [1] Second, petitioners argue that, prior to adopting the Resolution, BSA should have required the Congregation to revise its December 21, 2007 Scheme C study (all residential scheme). [2] Specifically, petitioners claim that the Congregation should have been required to recalculate its estimated financial return for an all residential scheme utilizing the $12,347,000 acquisition value set forth in the Congregation's final July 2008 report because doing so would have shown a profit of approximately $5 million. [3] Petitioners' argument is flawed. [4] As set forth above, under Z.R. §72-21(b), BSA examines whether an applicant can realize a reasonable return, not merely a profit. [5] While utilizing the revised acquisition value, i.e., $12,347,000, would have resulted in a profit of approximately $5 million, the rate of return would have only been increased to 6.7%. [6] As established by the Congregation's experts, a reasonable rate of return for the subject premises was approximately 11% [R. 4652-3, 4656, 4868-69, 5172, 51781. [7] Accordingly, since petitioners' proposed calculation would not have resulted in a reasonable return, petitioners' argument fails.[19]
>
> 19 Notably, the rate of return for the proposed development as approved by BSA is 10.93%.

292. As a reply to BSA Answer ¶ 292, refer the Court to the Verified Petition for the exact claims of Petitioners and deny the allegations in said paragraph except: As to sentence [1], admit that Petitioners asserted that the December 21, 2007 Scheme C "not-really" all residential study should have been revised, not only to update the site value, but also to include the value of 11,000 square feet of space omitted from the study and to make other revisions. As to sentence [2], admit that revising the site value was one of the revisions requested and further state that the Congregation stated that it did not make this revision because "the BSA did not request a submission of an analysis of a revised Scheme C." R-5177, July 8, 2008. As to sentences 3 and 4, deny. The argument is not flawed. Profit and return are equivalents; what is different in concept and meaning is "return" and "rate of return." As to sentence [5] admit that by just utilizing the revised site value of $12,347,000, the "not-really" all residential Scheme C would have yielded a profit of at least $5 million and an annualized rate of return on investment of at least 6.7%, without adding in the value of the 11,000 missing square feet and without making the other adjustments required, and further stating that the annualized rate of return on equity with the same correction would have been substantially greater. As to sentence 6, deny, and state that the Congregation's consultant Freeman Frazier on March 28, 2007 with the initial application concluded that a 6.55% Annualized Return on Total Investment was "acceptable for this project" (R-140) and on September 6, 2007, similarly concluded that a 6.59% return was "adequate." (R-287), and further state that there is a difference

between the statement "a reasonable return" and "the minimum reasonable return". As to sentence [7], deny and state that to the contrary, the BSA's computation establishes beyond a reasonable doubt that the Congregation can earn a reasonable return from its property, and therefore the BSA is prohibited from granting a variance to the Congregation for the construction of the residential condominiums. As to footnote 19, admit that the proposed development had an annualized rate of return on total investment of 10.93%, and further state that the BSA failed in its decision to candidly state the rate of return in the approved project, and further that the variances approved are not the minimum needed by the Congregation under 72-21(e), because a rate of return of 6.59% is adequate as agreed to by the Congregation.

> BSA Answer ¶ 293. [1]Third, petitioners argue that Freeman Frazier and BSA improperly interchanged the phrases "acquisition cost" "`market value' of the land," and "site value." Petition ¶ 132. [2]Petitioners further argue that "[t]he inconsistent use of terms is intended to create complexity and make it difficult for courts to review the assertion of the Congregation or the findings of the BSA." Petition ¶ 133. [3]Petitioners' argument does not merit serious consideration. [4]As is common with the English language, various words and phrases are used interchangeably. [5]Terms utilized by the BSA are no different. [6]The terms "acquisition cost," "market value," and "site value" are used interchangeably for no other reason than that they each designate the as-is fair market value of a property and are all in common usage.

293. As a reply to BSA Answer ¶ 293, as to sentence 1 and 2, refer to the Petition for the argument of the Petitioners. As to sentence 3, deny. As to sentence 4, admit that if words have the same meaning, then they can be used interchangeably. As to sentence 5, deny that the BSA can alter and create its own secret meaning or words used in constitutional, zoning and land use law and used in real estate finance and economics. As to sentence 6, “acquisition cost” as used in land use cases as cited in Petitioners' memorandum of law refers to the price paid by the owner of the land from a third party. It may or may not be the same as market value. Even then, BSA's own guidelines distinguish between "acquisition cost" and "market value." The BSA does not use site value to mean market value unfortunately, for, had it done so, it would have appropriately valued the market value of the two floors of condominium space, rather than use the unused development space over the Parsonage.

> BSA Answer ¶ 294. [1] Fourth, petitioners argue that the Congregation violated BSA's written guidelines, i.e., BSA's Detailed Instructions For Completing BZ Application Item M(5), because it "failed to provide both the market value of the property or the acquisition cost and date of acquisition as required by Item M." Petition ¶ 232. [2]Petitioners are incorrect in several respects. [3]First, contrary to

petitioners' argument, the Congregation submitted both the market value of the property, and acquisition costs and date of acquisition. [4]The dates of acquisition were provided in the deeds [R. 168-181, 1918-1926]. [5]The market value of the property which, as stated above, is synonymous with the acquisition cost, was also provided as part of the Congregation's Economic Analysis Summary [R. 5178].[20] [6]Accordingly, petitioners' argument fails. [7]Second, contrary to petitioners' suggestion, BSA's Detailed Instructions For Completing BZ Application Item M(5) does not set forth absolute requirements. [8]Rather, it sets forth general guidelines for financial submissions. [9]It provides, [g]enerally, for cooperative or condominium development proposals, the following information is required: market value of the property, acquisition costs and date of acquisition; hard and soft costs (if applicable); total development costs; construction/rehabilitation financing (if applicable); equity; breakdown of projected sellout by square footage, floor and unit mix; sales/marketing expenses; net sellout value; net profit (net sellout value less total development costs); and percentage return on equity (net profit divided by equity). [10]Thus, there was no requirement to submit the information and petitioners' argument fails.

20 [1]Notably, the market value/acquisition cost, which the BSA rationally found to be proper, was calculated by the Congregation based upon an analysis of comparable vacant land sales, taking into consideration adjustments required by the BSA [R. 9 (¶¶ 128-129, 131, 133, 139-140), R. 4651]. [2]This type of calculation, i.e., using comparable property sale prices, is standard BSA practice because it provides an accurate property valuation based upon the market. [3]Indeed, strict application of actual acquisition costs, as petitioners argue should be applied, would be useless. [4]Not only could applicants artificially inflate acquisition costs, but for properties such as the subject premises, which were acquired in different stages between 1895 and 1965, the actual acquisition costs would be irrelevant since due to the passage of time and change in the real estate marketplace, they do not reflect a property's current market value [R. 168-181, 1918-1926, 4654, 4866, 4867-68].

294. As a reply to BSA Answer ¶ 294, as to sentence 1, admit that the quoted language is contained in the Verified Petition and refer to the ¶¶ 231-232 of the Verified Petition for the argument of the Petitioners and as stated in ¶ 231, which is that the guidelines state that "the following information is required: market value of the property, acquisition costs and date of acquisition". As to sentences 2 and 6, deny. As to sentences 3 and 5, deny — if the Congregation has submitted each of "market value of the property, acquisition costs and date of acquisition ", then it would be able to separately identify a citation in the record to "market value" on one hand and "acquisition costs" on the other, which the BSA and the City are unable to do. The case law provided by Petitioners distinguishes between current market value and initial acquisition cost, as does clearly the language of Item M as quoted. Admit as to sentence 4. Deny that Petitioners claimed that the guidelines were absolute, but state that the BSA is obligated to provide a reasoned and non-arbitrary explanation as to why it ignores its own and only written guidelines. Deny as to sentence 8 in that the guidelines are in many respects relevant here, specific and not general. As to

9, admit the quoted language, but state that the BSA must provide a reason to depart from the general requirement. As to 10, deny, in that the plain language shows that the Congregation neither supplied both market value and acquisition costs nor supplied "percentage return on equity (net profit divided by equity)" and that this was a condominium development proposal. As to footnote 20, sentences 1 and 2, admit that the described standard practice is a general standard practice, but deny that the BSA rationally found market value, and state that had it applied the method stated, it would have multiplied the market value per square foot of condominium development space ($450) x the number of square feet (5316 sellable) to arrive at the market value of the condominium. As to footnote 20, sentences 3 and 4, deny that Petitioners' argument is accurately stated, and state that the acquisition price is factor not to be ignored under applicable case law, and that acquisition price needs to be known so as to evaluate the return on investment upon the initial acquisition price paid by the Congregation and the price to be received by the Congregation as the market value, ($12.4 million) after factoring back in the use of the land by the Congregation for over 60 and 40 years, imputing rent or value and actual rent received from tenants like Beit Rabban, to show the return the Congregation is receiving from its land investment alone. As to footnote 20 sentences 3 and 4, state further that the City here uses the phrase "acquisition cost" in the commonly understood usage of the price paid to acquire the property.

> BSA Answer ¶ 295. [1]Fifth, petitioners argue that the Congregation improperly included the "allowable floor area" over the Parsonage in Lot 36 in calculating the land valuation set forth in the May 13, 2008 Freeman Frazier Report. Petition ¶¶182-185. [2]Petitioners are incorrect. [3]The parsonage area was properly counted as part of the "allowable floor area" in calculating the land valuation because it exists on the zoning lot and could be developed for residential use. [4]As set forth in the Resolution, 144,511 square feet of available floor area existed for development, of that only 42,406 square feet was utilized for the proposed construction at issue in this case. [5]Thus 102,105 square feet of undeveloped floor area remains on the zoning lot [R. 2 (¶22, 26)]. [6]That the Congregation retains the rights to develop the remaining available floor area, including for future school space, is hardly improper, as the Z.R. permits such development. [7] Accordingly, petitioners' argument fails.

295. As a reply to BSA Answer ¶ 295, deny and refer to the ¶¶ 182-185 of the Verified Petition for the argument of the Petitioners, which included other matters ignored by Respondents, including the last sentence of ¶ 182 of the Petition, but admit that the BSA not only irrationally used the allowable floor area over the Parsonage while at the same time ignoring income from the Parsonage and relating the actual site area to the theoretical site area, and state that at no place in the Resolution did the BSA acknowledge what it was doing surreptitiously. Deny sentences 2-5 and 7.

As to sentence 6, deny that the floor area can be transferred to Lot 37 to exaggerate the site value of two floors of condominiums from $2.4 million to $12.3 million, and then permit the Congregation to retain the right to fully develop the Parsonage. The two floors of condominiums have a site area of 5,320 square feet (sellable) and 7,594 square feet (built). The site area used from the parsonage was 19,775 sq. ft. R-4651-2, R-4869. *See* Pet. Ex. N-6.

> BSA Answer ¶ 296. [1]Sixth, petitioners argue that Freeman Frazier purposefully altered the value/square foot, lot size, and lot value in calculating the Congregation's Scheme A in order to manipulate the return. Petitioner ¶¶ 144-174.[2] Petitioners' argument is without merit. [3]As outlined above, the Congregation implemented the changes in response to questions and issues specifically raised by the BSA.[4] In implementing these changes, the value/square foot, lot size, and lot value changed because the scope of the site to be developed and/or evaluated changed. [5]For example, as provided above, at the November 27, 2007 hearing the BSA "questioned why the analysis included the community facility floor area and asked the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of-right development" [R. 9 (¶ 128)]. [6]Further, contrary to petitioners' allegation, it was rational for BSA to find that the Congregation satisfied the Z.R. §72.21(b) finding because the final value/square foot, lot size, and lot value were based on comparable property sales and limited to the area which could be developed for residential purposes. [R. 9 (¶¶ 128- 129, 131, 133, 139-140), R. 4651-52, 5173-74].

296. As a reply to BSA Answer ¶ 296, admit sentence one generally that Freeman Frazier with the cooperation of the BSA manipulated the site valuation, but refer to the Petition ¶¶. 144-177 for the exact allegations made and see Pet. Ex. N-3 showing varying site area and value approaches used by Freemnan. As to sentence 2, deny. As to sentence 3, deny and state that changes requested by the BSA were not always made and that the responsibility for the changes is blurred and joint between the Congregation and the BSA and neither wishes to be held responsible for what the other did and said, and that Freeman Frazier is reluctant to take responsibility for its own work but ultimately the BSA is responsible for its own findings. As to sentence 4, deny. There were no changes whatsoever in Scheme A as it relates to the feasibility study from the first filing with the application to the end. The only thing that changed was the wildly varying approaches to the facts. As to sentence 5, deny that this represents a complete in-context representation of what was said, but, in any event, the Scheme A building remained the same from start to finish and also deny that this represented any changes in the proposed scheme. As to sentence 6, deny and state that there was no justification for the wildly varying site areas and site value, and the final approach was flawed as discussed elsewhere.

> BSA Answer ¶ 297. [1]Seventh, petitioners argue that BSA improperly rejected the need for a return on equity analysis. Petition ¶¶ 201-203. [2]Petitioners are incorrect. [3]As set forth above, the "return on equity methodology is characteristically used for income producing residential or commercial rental projects, whereas the calculation of a rate of return based on profits is typically used on an unleveraged basis for condominium or home sale analyses and would therefore be more appropriate for a residential project, such as that proposed by the subject application" [R. 9-10 (¶ 143)]. "[A] return on profit model which evaluates profit or loss on an unleveraged basis is the customary model used to evaluate the feasibility of market-rate residential condominium developments" [R. 10 (¶ 144)]. [4]Regardless, there is no requirement for an applicant to submit a return on equity analysis. Supra ¶ 279.

297. As a reply to BSA Answer ¶ 297, as to sentence 1, admit generally that the Petitioners asserted that BSA should have required a return on equity "leveraged analysis," but refer to the Petition para. 144-177 for the exact allegations made. As to sentence 2, deny. As to sentences 3 and 4, deny and further state that the BSA guidelines Item 5.5. specifically require an analysis of "percentage return on equity (net profit divided by equity)" for "cooperative and condominium development proposals," and the BSA has provided no explanation as to why it departed from the crystal clear requirements of the Guidelines, and merely regurgitated the Resolution which itself is regurgitating the self-serving statements of Freeman Frazier and is no rational explanation, and, further, the BSA did not prohibit the Congregation from renting the condominium apartments upon completion of the project.

> BSA Answer ¶ 298. [1]Eighth, petitioners argue that BSA improperly used the term "financial return based on profits" in the Resolution because "[t]here is no such concept." [2]Petition ¶ 205. Petitioners' argument runs contrary to basic economics and is of no moment. [3]It is understood that a financial return on an investment is based on profit. [4]Regardless, even assuming arguendo that the BSA did use an incorrect term, such an error does not result in the nullification of an entire Resolution, especially whereas here, the alleged error has no bearing on the BSA's rationale. [5]The issue before the BSA was whether the methodology utilized by the Congregation in calculating its estimated return was proper. [6]As provided above, the BSA rationally found that the methodology used was proper. Supra ¶ 282. [7]Thus, petitioners' argument fails.

298. As a reply to BSA Answer ¶ 298, as to sentences 1, 2, 3, and 4, deny, and state that words have the meaning commonly attributed to the words, and is illustrative of the approach as to distinguishing relevant economic concepts and principles. As to sentence 5, admit. As to sentence 6, deny, but also state that it is unclear whether the BSA is stating that the methodology it used was a BSA methodology or a Freeman Frazier methodology. As to sentence 7, deny.

BSA Answer ¶ 299.[1]Finally, petitioners argue that if the Congregation acted as its own developer, it would earn a greater profit because it would pay itself the acquisition cost of $12,347,000. [2]While it is unclear, it appears that petitioners are arguing that the BSA should have required the Congregation to eliminate the acquisition cost in calculating its rate of return. [3]Petitioners' argument fails because it disregards BSA's standard practices. [4]The standard procedure in developing a rate of return analysis is to include the acquisition cost. [5]By arguing for its elimination, petitioner seeks to have the Congregation held to a different standard than all other BSA variance applicants. Such is impermissible under an Article 78 review standard.

299. As a reply to BSA Answer ¶ 299,

As to sentences 1 and 2, deny that the City has accurately characterized the Petition and note that the Answer does not identify any relevant paragraphs of the Petition, but in any event Petitioners refer to the Petition for a complete description of the position of Petitioners, but state generally that the BSA error is that it creates a hypothetical situation with a hypothetical developer, which ignores the law that what is to be considered is the return to the owner, and that the payment to the owner of market value aka acquisition cost may include a return to the owner, and that in the hypothetical scenario, the Congregation owner receives additional returns in the form of interest and other payments, all as noted by the opposition expert Martin Levine. As to sentence 3, deny in that this calls for a legal conclusion, and further state that the determination of reasonable return is governed not by internal BSA practices which ignore its own written guidelines, but is governed by the case law of variances and takings including constitutional law and by generally accepted economic and valuation principles. As to sentence 4, deny, but admit that market value of the actual site being developed is material, but that the Congregation and the BSA used the value of another separate site as the value of the two floors of condominiums, and further that any valuation that concludes that this ideal site in an ideal neighborhood in one of the most desirable areas in the City would not yield a reasonable return is proof that the methodology and application of the methodology is flawed. As to sentences 5 and 6, deny and state that the BSA standard practices, if followed, are irrational methodologies systematically biased in favor of reducing return and granting variances and state that it is not relevant if irrational methodologies were used without objection in other proceedings to benefit the applicant, where the facts may have been different and not as egregious as the facts in the present case.

BSA Answer - **Finding (c)**

BSA Answer ¶ 300. The Record also supports the finding that the issuance of the variance would not "alter the essential character of the neighborhood or district in which the zoning lot is located," "impair the appropriate use or development of adjacent property," or be "detriment[al] to the public welfare" [the "(c) finding"]. Z.R. §72-21(c).

300. As a reply to BSA Answer ¶ 300, deny, and further note the absence of citations to the record, and that citation to the Resolution is not citation to substantial evidence in the record.

BSA Answer - Community Facility Variances

BSA Answer ¶ 301. With regard to the community facility variances (i.e. the lot coverage and rear yard variances), the BSA properly concluded that the proposed rear yard, and lot coverage variances will not negatively affect the character of the neighborhood or adjacent uses [R. 10-11 (¶ 151- 169)]. As set forth in its Resolution, to reach this conclusion, the BSA conducted an environmental review of the proposed development, and found that it would not have significant adverse impacts on the surrounding neighborhood [R. 10 (¶ 15 5)].[21]

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

301. As a reply to BSA Answer ¶301, deny and specifically deny that the Petitioners made these assertions as part of this proceeding and also deny that the rear yard and lot coverage variances would not negatively affect the neighborhood and further state that as a community facility, the zoning regulations permit full lot coverage up to 23 feet above the street level, providing a substantial valuable accommodation to the Congregation and that the addition 10 feet on upper floors is excessive since it is in addition to the full lot coverage at grade.

BSA Answer ¶ 302. In reaching its conclusion, the BSA properly considered, and rejected, arguments raised by the Opposition with respect to the anticipated impact from the proposed variances [R. 10-11 (¶¶ 156-69)]. Specifically, during the course of the proceedings before the BSA, the Opposition contended that the expanded toddler program and additional 22 to 30 life cycle events and weddings anticipated to be held in the multi-purpose room of the lower cellar of the proposed community facility would produce significant adverse traffic, solid waste and noise impacts [R. 10 (1156)]. However, the Opposition presented no evidence to the Board supporting these alleged negative impacts [R. 11 (¶ 168)]. Notwithstanding the lack of evidence presented by the Opposition, the BSA considered the arguments raised by the Opposition, and correctly determined they lacked merit.

302. As a reply to BSA Answer ¶ 302, deny and deny that the BSA in its resolution accurately characterizes the objections of opponents, and further state these issues cited in Paragraph 302 were

not raised in the Verified Petition, and, further, in its decision the BSA exaggerated objections by opponents so that it could ignore certain other objections.

> BSA Answer ¶ 303. With respect to the expanded toddler program, the BSA noted in its Resolution that any additional traffic and noise created by expanding the toddler program from 20 children to 60 children daily, falls below the threshold for potential environmental impacts set forth in the CEQR statue because the expansion is not expected to result in an additional 200 transit trips during peak hours [R. 10 (¶ 157)]. See also, March 11, 2008 Letter from AKRF Environmental Planning Consultants [R. 3878-83] discussing CEQR requirements as well as Sections 0, P and R of the CEQR Technical Manual available online at http://www.nyc.gov/html/oec/html/ceqr/ceqrpub.shtml.

303. As a reply to BSA Answer ¶ 303, deny and deny that the BSA in its resolution accurately characterizes the objections of opponents, and further state these issues cited in Paragraph 303 were not raised in the Verified Petition, and, further, in its decision the BSA exaggerated objections by opponents so that it could ignore certain other objections.

> BSA Answer ¶ 304. With respect to the use of the multi-purpose room in the lower cellar for life cycle events and weddings, the BSA noted that the sub-cellar multi-purpose room represents an as-of-right use, and that the requested rear yard and lot coverage variances are requested to meet the Congregation's need for additional classroom space [R. 10 (¶ 158)]. Thus, any complaints about the use of the multi-purpose room do not factor into the BSA's consideration of the Congregation's variance application.

304. As a reply to BSA Answer ¶ 304, deny and state these issues as cited in were not raised in the Verified Petition and further state that the BSA in its resolution did not accurately characterize the objections of opponents, and, further state that in its decision, the BSA exaggerated objections by opponents so that it could ignore certain other objections, but further state that the Petitioners had pointed out that many uses that the Congregation asserted must take place on the second, third, and fourth floors could be accommodated in the 6400 square foot banquet hall, and, that it was not for lack of space, since the Congregation also has available the 10,000 square feet below the Sanctuary and the Parsonage.

> BSA Answer ¶ 305. In any event, in response to the substance of the Opposition's concerns regarding traffic impacts, the Congregation explained: 1) the life cycle events will have no impact on traffic because they are held on the Sabbath and, as Congregation Shearith Israel is an Orthodox Synagogue, members and guests would not drive or ride to these events in motor vehicles; 2) significant traffic impacts are not expected from the increased number of weddings because they are generally held on weekends during off-peak periods when traffic is typically lighter; and 3)

> significant traffic impacts are not expected from the expanded toddler program because it is not expected to result in a substantial number of new vehicle trips during peak hours [R. 10 (¶¶ 159-161)].

305. As a reply to BSA Answer ¶ 305, deny and refer the court to the statement in reply to paragraph 304.

> BSA Answer ¶ 306. Similarly, the Congregation explained the proposed community facility use would not have an adverse impact on solid waste collection because: 1) the EAS analyzed the impact of increased solid waste and concluded that the amount of projected additional solid waste represented a small amount, relative to the amount of solid waste collected weekly on a given route by the Department of Sanitation, and would not affect the City's ability to provide trash collection services; and 2) trash from the multi-purpose room events will be stored within a refrigerated area within the proposed building and, if necessary, will be removed by a private carter on the morning following each event [R. 10-11 (¶ 162-65)].

306. As a reply to BSA Answer ¶ 306, deny and refer the court to the statement in reply to paragraph 304.

> BSA Answer ¶ 307. With respect to noise, as the multi-purpose room is proposed for the sub- cellar of the proposed building, even at maximum capacity (360 persons), it is not anticipated to cause significant noise impacts [R. 11 (¶ 166).

307. As a reply to BSA Answer ¶ 307, deny and refer the court to the statement in reply to paragraph 304.

> BSA Answer ¶ 308. [1]As correctly stated by the BSA in its Resolution, a religious institution's application is entitled to deference unless significant adverse effects upon the health, safety or welfare of the community are documented [R. 11 (¶ 167), citing, Westchester Reform Temple, supra and Jewish Recons. Syn. of No. Shore, s_pra]. Here, the Opposition did not document any potential adverse effects that would result from granting the requested variances [R. 11 (¶ 168)], nor were any ascertained by the BSA. Consequently, the BSA properly concluded that the requested community facility variances will not have negative impacts on the neighborhood or adjacent uses.

308. As a reply to BSA Answer ¶ 308, deny and refer the Court to the statement in reply to paragraph 304 and note that each of the five findings must be satisfied for each variance.

> Residential Variances
>
> BSA Answer ¶ 309. The BSA also properly concluded that proposed variances to height and setback permitting the residential use will not negatively affect the character of the neighborhood, nor affect adjacent uses.

309. As a reply to BSA Answer ¶ 309, deny and state that the variances for height and setback create the specific negative effect for which the zoning regulation was enacted to protect.

BSA Answer ¶ 310. As detailed above, the height and setback variances requested by the Congregation would result in a building that rises to a height of approximately 94'-10" along West 70th Street before setting back by 12'-0" and continuing to a total height of 105"-10'. A compliant building in an R8B zone would have a maximum height of 60'-0" before being required to set back 15'-0" and could rise to a total height of 75'-0". In addition, the requested variances would result in a rear setback of 6'-8" instead of the required 10'-0" [R. 11 (¶¶ 171- 74)].

310. As a reply to BSA Answer ¶ 310, admit.

BSA Answer ¶ 311. Because the building is located in a landmarked district, the Congregation was required to obtain approval for its proposed project from the Landmarks Preservation Commission. See Administrative Code § 25-307. The result of that process was the Landmarks Preservation Commission's issuance of a Certificate of Appropriateness dated March 14, 2006 approving the design for the proposed building [R. 11 (¶ 177), 350-2].

311. As a reply to BSA Answer ¶ 311, admit but further state that the LPC had no jurisdiction to consider issues such as bulk, light, and impact on the neighborhood, and further, that said LPC proceeding was initiated by the Congregation in 2001 and the Congregation withdrew its application under §74-711 with the LPC for relief from alleged hardships from the landmarks laws.

BSA Answer ¶ 312. Contrary to arguments advanced by the Opposition during the course of the proceedings before the BSA, the BSA correctly determined that the proposed height and setback of the building is compatible with neighborhood character. In this regard, the bulk of the proposed building is consistent with the bulk of neighboring buildings. Specifically, the subject site is flanked by a nine-story building at 18 West 70th Street which has approximately the same base height as the proposed building and no setback. That building also has a FAR of 7.23 while the proposed building will have a FAR of 4.36 [R. 8 (¶ 115)].

312. As a reply to BSA Answer ¶312, deny and state that the description of the neighborhood is totally inaccurate: to the east, the Synagogue building has substantially the same height and setback as an as-of-right building; to the south, a portion of the lot is unimproved and another portion contains a low-scale brownstone; to the north, part of the site partially is an unimproved driveway and a brownstone, and the other buildings on the mid-block, with one exception, are brownstones, all as is depicted clearly in the shadow studies as prepared by the Congregation consultant AKRF.

BSA Answer ¶ 313. Moreover, the bulk of the proposed building is less than that of the buildings immediately to its north and south. The building located at 101 Central Park West, directly to the north of the proposed building has a height of 15 stories, and a FAR of 12.92, while the building located directly to the south of the proposed building (i.e. at 91 Central Park West) has a height of 13 stories and a FAR of 13.03 [R. 11 (¶¶ 176, 180-81)].

313. As a reply to BSA Answer ¶ 313, deny and see the reply to ¶312.

> BSA Answer ¶ 314. Similarly, the BSA properly concluded that the Opposition's assertion that the proposed building disrupts the mid-block character of West 70th Street, and thereby diminishes the visual distraction between the low-rise mid-block area, and the higher scale along Central Park West missed the mark [R. 11 (¶ 182)]. Indeed, the Congregation submitted a streetscape of West 70th Street indicating that the street wall of the proposed building matches that of the adjacent building at 18 West 70th Street, and that, as a result, the proposed building would not disrupt midblock character [R. 11 (¶ 183), 2022].

314. As a reply to BSA Answer ¶ 314, deny and state that the BSA ignored the entire block and also ignored all the buildings on the north side of the street and see the reply to ¶312.

> BSA Answer ¶ 315. The BSA also properly rejected the Opposition's argument that approval of the requested height waiver would create a precedent for the construction of more mid-block high-rise buildings because an analysis submitted by the Congregation in response to this assertion found that none of the potential development sites identified by the Opposition share the same potential for mid-block development as the subject site [R. 11 (¶¶ 184-86), 1910-13].

315. As a reply to BSA Answer ¶ 315, deny and state, although this issue was not raised specifically in the Petition, that the BSA misconstrued opposition precedent issues — one precedent being that the methodology applied to the residential condominiums would mean that any mid-block site could meet the variance conditions, since this is a more favorable site, and the other precedents of using landmark hardship as a hardship to supplant the requirement of physical condition, and the dispensing of the causation requirement, among others.

> BSA Answer ¶ 316. Next, with respect to light and air, the BSA properly addressed the Opposition's argument that the proposed building will significantly diminish the ability of adjacent buildings to access light and air. Indeed, the BSA was quite concerned with the issue of the lot line windows at the November 27, 2007 hearing, and specifically asked the Congregation to attempt to figure out whether there are any apartments that have their only source of air though the lot line windows [R. 1807-08]. That discussion was continued at the February 12, 2008 hearing [R. 3655-63].

316. As a reply to BSA Answer ¶ 316, deny and state that light and air also is an issue as to shadows on surrounding streets and buildings, and further state that this answer does not describe the allegations of the Petition at ¶ 316.

> BSA Answer ¶ 317. Specifically, the Opposition asserted that: 1) unlike an as-of-right building, because the proposed building abuts the easterly wall and court of the building located at 18 West 70th Street it will eliminate natural light and views from

> seven eastern facing apartments; and 2) the proposed building will cut off natural light to apartments in the building located at 91 Central Park West, and diminish light to apartments in the rear of the building located at 9 West 69''' Street which will result in reducing the market values for the affected apartments [R. 11-12 (¶f 187-89)].

317. As a reply to BSA Answer ¶ 317, deny and further state the Petition makes no reference to 91 Central Park West as to windows and that the diminishment is only as to quality of life and further that the BSA should have balanced, and did not, the fact that the sole purpose of the condominium variances is to provide money so as to create an indirect subsidy of members of the Congregation, but did not consider such issue.

> BSA Answer ¶ 318. In response, the BSA noted that the Congregation correctly explained that as to the lot-line windows at 18 West 70th Street, the Opposition's arguments are of no moment because lot line windows cannot be used to satisfy light and air requirements. [22] As a result, rooms which depend solely on lot line windows for light and air were necessarily created illegally and the occupants lack a legally protected right to their maintenance [R. 12 (¶ 190)]. Likewise, the Congregation correctly explained that a property owner has no protected right in a view [R. 12 (¶ 191)].

> [22] Lot line windows are not protected and, therefore, a occupant takes a risk in occupying an apartment with one because developers do not have a duty to ensure that lot line windows of adjoining buildings will not be blocked. Lot line windows are not "illegal," per se, but they are not a legal source of light and air and the DOB will not approve floor plans that show that the only source of light and air to a room is a lot line window. In most instances, if the only source of light and air to a room were a lot line window, that room would have been created illegally.

318. As a reply to BSA Answer ¶ 318, admit as to the footnote 22 and deny the remainder of said paragraph and further deny that the other opponents or the Petitioners in the Petition ever made the argument that the there was a legal right to the lot line windows in the absence of a restrictive easement from the Congregation, and that the footnote is required to clarify that the statements in BSA Res. ¶190 were gross distortions, which show the inherent bias of the BSA, the parroting by the BSA of assertions of the Congregation, and the red herrings used by the BSA to denigrate the positions of opponents, and the diversions created by the BSA of addressing at length arguments not made.

> BSA Answer ¶ 319. However, notwithstanding these arguments, the BSA nonetheless directed the Congregation to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows than originally proposed [R. 12 (¶¶192-93)]. The BSA directed the Congregation to do so, not because the Congregation had a legal obligation to avoid blocking adjoining lot line windows but, rather, as a compromise to lessen the

> impact of the project. Thus, contrary to petitioners' argument [Petition, ¶ 280-82], there was absolutely nothing improper about the BSA not requiring the Congregation to salvage the four lot line windows in the front of the adjoining lot.

319. As a reply to BSA Answer ¶ 319, admit the allegations of the first sentence and deny the remainder of said paragraph and further state that by so doing, the BSA acknowledged that (1) matters not covered by SEQR are cognizable under 72-21(c); (2) that the proposed building as compared to an as-of-right building do negatively impact adjoining properties; (3) that the so-called compromise does nothing to ameliorate the damage to Petitioner Lepow; and (4) that accordingly, the BSA acceptance of this compromise was arbitrary and capricious and irrational, and further that the BSA refuses to balance the damage to property owners against the plain fact that the extra income to the Congregation merely reduces the need of members to provide financial support to the Congregation, and further note that under §72-21(e), the not requiring a courtyard in the front was a failure to require the minimum variance since the return to the Congregation far exceeded the necessary reasonable return, and further state that the BSA did not make a specific finding at to the variance for the front setback for the floors blocking the windows as to §72-21(e).

> BSA Answer ¶ 320. Finally, the BSA properly considered and rejected the Opposition's assertion that the proposed building will cast shadows on the midblock of West 70`" Street [R. 12 (¶ 194)].

320. As a reply to BSA Answer ¶ 320, deny.

> BSA Answer ¶ 321. As explained in the BSA's Resolution, CEQR regulations provide that shadows on streets and sidewalks or on other buildings are not considered significant under CEQR. Rather, an adverse shadow impact is only considered to occur when the shadow from a proposed project falls upon a publicly accessible open space, a historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation. Here, however, a submission by the Congregation states that no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street. As a result, any incremental shadows in this area would not constitute a significant impact on the surrounding community [R. 12 (¶¶ 195-196)].

321. As a reply to BSA Answer ¶ 321, deny and state that the BSA, in addition to reviewing CEQR is required to collect the facts and make the proper findings as to 72-21(c) and it is also required to take into account the purposes of contextual zoning, which is to protect the exact sunlight which the BSA ignored in its decision making, and further that citing to a Congregation submission is not

citing to substantial evidence, and that the BSA is to make its own conclusions, and not parrot the submissions of the applicant.

> BSA Answer ¶ 322. Moreover, the Congregation conducted a shadow study over the course of a full year and determined that the proposed building casts few incremental shadows, and that those cast are insignificant in size [R. 12 (¶ 197), 372-81, 4624-4643]. As required by CEQR guidelines, the Congregation considered the effects of incremental shadows for four representative days, December 21, March 21, May 6, and June 21. Id. In addition, the Congregation's EAS analyzed the potential shadow impacts on publicly accessible open space and historic resources and found that no significant impacts would occur [R. 12 (¶ 198)]. Specifically, the shadow study of the EAS found that the building would cast a small incremental shadow on Central Park in the late afternoon in the spring and summer that would fall onto a grassy area and path where no benches or other recreational equipment are present [R. 12 (¶ 199)].

322. As a reply to BSA Answer ¶ 322, deny and refer to the reply to ¶321 and state that the analysis of the shadows in Central Park was not a part of any opposition objections and are not a part of the Petition herein and that there is no finding as to shadows on the mid-block cited here, and further state that the shadow studies of West 70th Street do not include a study of the as-of-right building, so that there is no way to intelligently analyze the studies and that the studies are not intelligible nor reflective of the actual conditions..

> BSA Answer ¶ 323. As a result the Board correctly stated as follows in its Resolution:
>
> WHEREAS, based upon the above, the Board finds that neither the proposed community facility use, nor the proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare [R. 12 (¶ 200)].

323. As a reply to BSA Answer ¶ 323, admit that the Resolution contains such statement, but deny that it is correct and deny that substantial evidence exists in support thereof and further state that the Answer does not refer to any finding of the BSA as to shadows on the mid-block, as opposed to Central Park, and that the only statement as to mid-block in ¶321 merely parrots a submission by the Congregation.

> BSA Answer - **Finding (d)**
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> BSA Answer ¶ 324. Zoning Resolution §72-21(d) [the "(d) finding"] requires a showing 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.

324. As a reply to BSA Answer ¶ 324, deny and refer to the full text of Z.R. §72-21(e) and state that there is no relevance in this proceeding as to the last clause stated.

BSA Answer ¶ 325. The Record before the BSA demonstrated that the hardship in developing the Zoning Lot with a complying building was not created by the Congregation, but originated from the landmarking of the Synagogue and the 1984 rezoning of the site. Specifically, the conditions that create an unnecessary hardship in complying with zoning requirements are: 1) the existence and dominance of a landmarked Synagogue on the Zoning Lot; 2) the site's location on a Zoning Lot that is divided by a district boundary; and 3) the limitations on development imposed by the site's contextual zoning district [R. 12 (¶¶ 203-04)].

325. As a reply to BSA Answer ¶ 325, deny and specifically deny that the hardships described are recognizable under §72-21(a) as discussed elsewhere and further state that any hardship as to Lot 37 standing alone, and created by the combination of Lot 37 and Lot 36 into a single zoning lot, was a hardship created by the Congregation.

BSA Answer ¶ 326. As a result, the BSA properly concluded that the Congregation satisfied the (d) finding because the hardship was not created by the owner or a predecessor in title [R. 12 (¶ 205)].

326. As a reply to BSA Answer ¶ 326, deny.

BSA Answer - **Finding (e)**

BSA Answer ¶ 327. To support the grant of a variance, Z.R. §72-21(e) [the "(e) finding"] requires that the evidence establish that the variance granted was the minimum necessary to afford relief from the hardship claimed by the applicant. The Record before the BSA demonstrates that the variance, as granted, is the minimum variance necessary to afford the Congregation relief from the development hardships detailed above.

327. As a reply to BSA Answer ¶ 327, deny and refer to the full text of Z.R. §72-21(e) and further deny that the BSA has cited to substantial evidence in the record to support its assertion, or that any such evidence exists.

BSA Answer ¶ 328. As a preliminary matter, it should be noted that in response to concerns about access to light and air raised by residents of buildings adjacent to the proposed development, the BSA directed the Congregation to amend its initial proposal to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining access to light and air for three additional lot line windows [R. 12-13 (¶¶ 207-09)]. The inclusion of the compliant outer court reduced the floor plates of the sixth, seventh and eighth floors of the building by

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

328. As a reply to BSA Answer ¶ 328, deny that the BSA responded to the concerns of light and air of all affected residents, and further state that as stated in the Reply to paragraph 292 of the Answer, the BSA approved a building with an Annualized Rate of Return on Investment of 10.93%, but the Congregation had stated that a rate of return of 6.55% was acceptable for this project (R-140, R-287), and that the BSA acted irrationally, arbitrarily, and capriciously by not directing a courtyard for the front windows, which front courtyard would not have reduced the rate of return below 6.55%.

> BSA Answer ¶ 329. Moreover, the Record before the BSA establishes that lesser variance scenarios are not economically feasible for the Congregation. In this regard, during the course of its review, the BSA directed the Congregation to assess the financial feasibility of several lesser variance scenarios. The results of this analysis established that none of the alternative lesser variance scenarios yielded a reasonable financial return [R. 13 (¶ 210-11)].

329. As a reply to BSA Answer ¶ 329, deny and further state that as stated in the Reply to paragraph 292 of the Answer, the BSA approved a building with an Annualized Rate of Return on Investment of 10.93%, but the Congregation had stated that a rate of return of 6.55% was acceptable for this project. R-140, R-287.

> BSA Answer ¶ 330. However, as petitioners argue herein [Petition, ¶¶ 12-15], during the BSA's review of the Congregation's application, those opposed to the BSA's issuance of the variance argued that the minimum variance necessary to afford relief to the Synagogue was in fact no variance at all because the existing community house could be developed into a smaller as-of-right mixed-use community facility/residential building that would achieve its programmatic mission, improve the circulation of its worship space and produce some residential units [R. 13 (¶ 212)].

330. As a reply to BSA Answer ¶ 330, admit generally, but refer to the Verified Petition for the exact allegations made by Petitioners.

> BSA Answer ¶ 331. [1]In response to this assertion, the BSA concluded that "the Synagogue has fully established its programmatic need for the proposed building and the nexus of the proposed uses within its religious mission" [R. 13 (¶ 213)]. [2]Moreover, in accordance with the decisions in Westchester Ref. Temple, supra, Islamic Soc. of Westchester, supra, and Jewish Recons. Synagogue of No. Shore, supra, zoning boards must accommodate proposals by religious and educational institutions for projects in furtherance of their mission, unless the proposed project is

shown to have significant and measurable detrimental impacts on surrounding residents. [3]Here, the BSA properly concluded that "the Opposition has not established such impacts" [R. 13 (¶¶ 214-15)].

331. As a reply to BSA Answer ¶ 331, deny sentences 1 and 3 and further state that the phrase "programmatic need" as it applies to the Congregation is used in conflicting and varying manners, and it is not possible to determine based on the Resolution what are all the elements of the asserted programmatic needs, and then to identify where there is substantial evidence — other than conclusory statements — to support such statements and then to determine whether each said identifiable programmatic need could be resolved in an as-of-right building. Deny as to sentence 2 as being not only an inaccurate and overbroad statement of the law, but calling for a conclusion of law and refer to the Memoranda of Law submitted herewith.

BSA Answer ¶ 332. After considering the Congregation's submissions and the Opposition's arguments against the variance, the BSA concluded that the requested variance was in fact the minimum necessary. In this regard, the BSA stated in its Resolution:

WHEREAS, the Board finds that the requested lot coverage and rear yard waivers are the minimum necessary to allow the applicant to fulfill its programmatic needs and that the front setback, rear setback, base height and building height waivers are the minimum necessary to allow it to achieve a reasonable financial return [R. 13 (¶ 217)].

332. As a reply to BSA Answer ¶ 332, admit that the BSA made such statement in its Resolution, but deny the BSA considered the arguments of opponents, and deny that the requested variances were the minimum necessary.

BSA Answer ¶ 333. In conclusion, the Record amply supports the BSA's granting of a variance. All of the criteria set forth in Z.R. §72-21 have been met and the BSA's findings are supported by substantial evidence in the Record as to each of the five necessary findings.[23] Indeed, contrary to petitioners' allegations [Petition, ¶¶ 325-37] the BSA made specific findings with regard to each of the Z.R. §72-21 criteria.

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

333. As a reply to BSA Answer ¶ 333, deny and as to the footnote, state that it is a fact that the Congregation's counsel made these statements to the Community Board at a proceeding held to make a determination as to the variance application as authorized under the Zoning Resolution and

related regulations. Because the BSA refuses to include in the record ex parte communications, it is not known what communication may have taken place between the Bloomberg administration and individual Commissioners, and that it appears that any and all other assertions made by said counsel for the Congregation was taken as fact by the BSA in making the findings hereunder.

> BSA Answer ¶ 334. Contrary to petitioners' allegations [Petition, ¶ 321], the BSA did not run afoul of City Charter Section 663 in voting on the Congregation's variance application on August 26, 2008. Indeed, that section simply requires that the BSA keep minutes of its proceedings and record the vote of each member upon the questions presented. Here the BSA recorded the minutes of its proceedings in the transcripts provided herewith [R. 1726-1823, 3653-758, 4462-515, 4937-74] and recorded the vote of each member of the Board on the question presented to it which was whether to grant the Congregation's application for the requested variances [R 5784-95]. That the vote did not break out each specific variance request is simply of no moment because the Resolution adopted by the Board set out the Board's specific findings on each variance request [R. 1-14]. That the Resolution was not presented to the public at the August 26, 2008 hearing is also of no moment because, as required by 2 RCNY § 1-02(d), following the August 26, 2008 vote, the Board's determination was "incorporated in a resolution formally adopted and filed at the office of the Board," and was "made available to the public" within several days thereafter.

334. As a reply to BSA Answer ¶ 334, deny that the BSA Board made the separate five findings on each of the variances, and state that there was a single vote taken on a resolution yet to be presented to the Board, and, if in fact the Board met to consider the language and findings of the Resolution in private meetings, then said meetings violated the Open Meetings Law.

> BSA Answer - AS AND FOR A SECOND AFFIRMATIVE DEFENSE
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> BSA Answer ¶ 335. Petitioners argue that the BSA improperly considered the Congregation's variance application because CSI did not exhaust its administrative remedies prior to applying to BSA for a variance. Specifically, petitioners argue that the Congregation was required to apply to the Landmarks Preservation Commission for a Z.R. §74-711 special permit before it could apply to the BSA for a variance. Petitioners are incorrect.

335. As a reply to BSA Answer ¶ 335, deny that said paragraph accurately describes the position stated in the Verified Petition, and further state that the BSA has no authority to grant variances based upon landmark hardships, that Z.R. §74-711 provides the exclusive remedy for said hardships, and that the Congregation initially applied for but withdrew its application for such relief to the LPC because it could not prove a financial hardship.

> BSA Answer ¶ 336. First, petitioners misapply the law surrounding exhaustion of administrative remedies. Under the theory of exhaustion, a party is required to exhaust their available administrative remedies before seeking relief from the Courts. Since BSA is not a Court, but rather an administrative agency itself, the law is inapplicable. Second, there is no legal requirement that a party seek a Z.R. §74-711 special permit before seeking a variance from BSA. Rather, a BSA variance and Landmarks Preservation Commission special permit are two separate forms of administrative remedies available to parties. A party may, at its choice, seek a Z.R. §74-711 special permit from Landmarks Preservation Commission, or seek a variance from BSA pursuant to Z.R. §72-21(a). The only pre-requisite the Congregation had to satisfy in order to seek a variance was to apply for, and obtain a Certificate of Appropriateness from the Landmarks Preservation Commission. As admitted by petitioners, the Congregation obtained the requisite Certificate of Appropriateness. Thus, petitioners' argument fails.

336. As a reply to BSA Answer ¶ 336, deny the allegations contained in said paragraph as same calls for a legal conclusion and refer to Petitioners' Memoranda of Law, and further state that the BSA has provided no authority whatsoever that it can grant variances under §72-21 based upon landmarking hardships, and, further state that Petitioners were merely stating an undisputed fact, that the Congregation initially sought a Z.R. §74-711 before the LPC, and, by withdrawing its application, was on its face not exhausting this remedy.

> BSA Answer - AS AND FOR A THIRD AFFIRMATIVE DEFENSE
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> BSA Answer ¶ 337. We turn next to petitioners' suggestion that it was improper for the BSA to meet with representatives of the Congregation in November 2006, six months in advance of their filing their application before the BSA.[24] In this regard, in their petition, petitioners complaint that "[o]n November 8, 2006 Respondents Srinivasan and Collins held an ex parte meeting with the Congregation's lawyers and consultants at BSA headquarters, did not notify opponents of the project, and has since refused to provide information to opponents as to what occurred at said meeting." Petition, ¶¶ 27, 289-303. Contrary to petitioners' allegations, there was absolutely nothing improper about this meeting.

> [24] To the extent petitioners allege that BSA attempted to improperly exclude the documents regarding the meeting from the administrative record, petitioners are incorrect. The BSA properly did not produce the documents regarding the meeting as part of the administrative record because the documents were not considered by the Board in rendering its final agency determination, and thus was not part of the administrative record. Further, it was always BSA's intent to annex the documents to its Answer, as it has.

337. As a reply to BSA Answer ¶ 337, admit that an improper ex-parte meeting was held with the Chair and Vice Chair of the BSA and admit that the Petition makes said averment but deny the statement that it was not improper, and further state that the BSA, although providing documents previously sent to Petitioners, has yet to provide any notes or other documents as to what transpired at the meeting, and further state that the subject of the meeting was the exact variance

request filed, and that the lapse of time is irrelevant, and that the BSA has failed to produce all related records, and, simply, that the BSA's refusal to turn over records of such a meeting as part of the Record has no basis in law or logic.

> BSA Answer ¶ 338. Pre-application meetings are a routine part of practice before the BSA, and the procedures for the conduct of such meetings are clearly outlined in a publication entitled "Procedures for Pre-Application Meetings and Draft Applications" which is available on the Board's website (and provided herewith as Exhibit E). As explained in that document, pre- application meetings, are designed to facilitate discussion between potential applicants and the BSA of development proposals that may require discretionary relief.
>
> Such meetings are conducted on an informal basis, and have no bearing on the ultimate outcome of the case if subsequently filed. Draft applications, which are adjunct to the Pre-application Meeting process, are submitted for staff-level review prior to formal filings. This review is designed to reduce the number of comments on the Notice of Objections, and to ensure that filed applications, which are later sent to community boards, elected officials and neighbors, have fewer deficiencies.

338. As a reply to BSA Answer ¶ 338, admit the Procedures so describe such meetings with BSA staff at "staff-level", but deny that the Procedures describe a meeting between the applicant and applicant's counsel, feasibility consultants, and architects and the Chair and Vice Chair as weel as the staff of the BSA and where the same buildings and substantially the same drawings subsequently submitted as a formal application were reviewed. See Pet. Ex. Q and S,

> BSA Answer ¶ 339. The point of these meetings is not to pre judge or improperly influence potential applications, but, rather to streamline the BSA's review process. In this regard, the Procedures document further explains as follows:
>
> [t]he BSA historically has offered some form of pre-application meeting process to potential applicants. However, many major cases have been filed without any pre-application review. Some of these cases have been poorly presented, and were deficient in both substance and form. This causes unnecessarily protracted technical review and undue delay in calendaring. When such cases come to public hearing, the Board often is compelled to remedy problems that could have been easily avoided prior to filing. Additionally, the Board must guide the applicant through the process of meeting the findings required for the grant, which usually necessitates numerous continued hearings. Through the Pre-application meeting process, the BSA seeks to: Facilitate a more efficient and expeditious technical and public review process; Provide technical and procedural advice to both inexperienced and experienced applicants on the formulation and execution of potential applications; Provide substantive feedback on the merits of the proposal; Ensure better quality of submissions, and reduce or eliminate the review of unnecessary or poor quality submissions; Establish case-to-case consistency in materials submitted for review; Identify early in the process the need for additional analyses, technical data,

> modifications, substantive discussion, and corrections; and Suggest alternative routes to achieve the desired outcome.

339. As a reply to BSA Answer ¶ 339, admit that the BSA document does so state, but deny the introductory clause, and further state that nothing in the BSA Procedures indicate that the Board through the Chair and Vice Chair would attend such meetings as opposed to the BSA professional staff, and that the Procedures distinguish between the Board and the BSA Staff.

> BSA Answer ¶ 340. At the start of the November 27, 2007 public hearing, Chair Srinivasan explained the routine nature and propriety of the pre-application meeting. Specifically, the Chair stated: [b]efore we discuss the application, I'd like to address the request made by a community resident that the Vice-Chair and myself recluse ourselves based on a meeting we had with the synagogue prior to the application being filed. Just for the record, the Board routinely holds meetings with potential applicants and the rationale and procedures of these meetings are described on our web site. Since the meeting occurred outside a hearing context and any proceedings, indeed, it was six months before the application was filed. That meeting is not considered an ex parte communication under Section [1046] of the City's Administrative Procedure Act and, therefore, is not the basis for a recusal by the Board members who attended it. Furthermore, we did offer a similar meeting to the community resident by he declined to take advantage of that offer [R. 1727].

340. As a reply to BSA Answer ¶ 340, admit that such statements were made by the Chair but deny the accuracy of the law and facts stated therein.

> BSA Answer ¶ 341. Indeed, contrary to petitioners' allegations, the Citywide Administrative Procedures Act ("CAPA") simply does not apply to proceedings before the BSA. Unlike an adjudicatory hearing, the purpose of these public hearings is not to make "evidentiary finding," as that terms is understood in the context of an adjudication, but rather to permit comment and the submission of documents upon which the BSA commissioners base their exercise of discretion within the regulatory framework. See 2 RCNY §§ 1-01 (6); 1-01.1 (b), (k). A BSA hearing also differs from an adjudicatory hearing in that there is neither a judge nor a standard of proof. Rather, a determination is made by means of a vote by members of the Board. See NYCRR § 1-10(a) ("Any appeal... must receive the three affirmative votes to be granted. If an application fails to receive the three affirmative votes, the action will be denied); City Charter §663 ("a concurring vote of at least three members shall be necessary to grant ...an appeal).

341. As a reply to BSA Answer ¶ 341, deny and state that City Charter established the BSA as part of the Office of Administrative Trials and Hearings and otherwise refer to the Petitioners' Memoranda of Law as to the applicable law.

> BSA Answer ¶ 342. Even if CAPA did apply, at the time of the pre-application meeting there is simply no "adjudication" before the BSA such that it is in any way

> improper for the Board to meet with an applicant outside the presence of anyone who may be opposed to such an application.[25] Indeed, potential applicants who attend pre-application hearings may elect to either not file applications with the Board, or substantially modify that which they initially contemplate filing. Thus, in many instances that which the Board looks at during the pre- application meeting never even becomes the subject of an actual application.
>
> 25 As defined in Section 1041 of the Citywide Administrative Procedures Act, an "adjudication" is a "proceeding in which the legal rights, duties or privileges of named parties are required by law to be determined by an agency on a record and after an opportunity for a hearing."

342. As a reply to BSA Answer ¶ 342, deny and further state that this is in the hypothetical, that in fact what was presented to the BSA Chair and Vice Chair on November 8, 2006 were drawings that were the same or essentially the same as those approved by the LPC (which they must have been), that the City did not include those drawings in the BSA Record — even though specifically requested to do so — and that the position that in effect a party may properly meet with a judge in an ex-parte meeting prior to filing the complaint the judge will hear, but not afterward, is ludicrous.

> BSA Answer ¶ 343. Further, here, petitioners' were in no way prejudiced by the BSA's pre- meeting with the Congregation. First, petitioners' counsel did not object to the pre-meeting in advance of it taking place. In this regard, on September 1, 2006 (before the BSA's meeting with the Congregation) petitioners' counsel sent Chair Srinivasan a letter regarding the Congregation's anticipated application and pre-filing meeting. In this letter, petitioners' counsel simply requested copies of documents submitted by the Congregation, but did not request the opportunity to be present at any meetings. A copy of this letter is provided as Exhibit A.

343. As a reply to BSA Answer ¶ 343, deny and state that any time that an opposing party has a private meeting with a judge or other adjudicator to discuss the case prior to filing the case it is prejudicial to opposing parties, and further state that the BSA could have notified Petitioners' counsel of the meeting which had been scheduled weeks in advance and that said counsel could not ask to attend a meeting when the BSA was concealing the meeting from said counsel, and further state that Petitioners' counsel never assumed that the meeting would be with the Chair and Vice-Chair, but only with the BSA staff.

> BSA Answer ¶ 344. Second, following the BSA's November 2006 meeting with the Congregation petitioners' counsel sent BSA FOIL requests seeking information about this meeting, to which the BSA responded and provided petitioners' counsel with copies of documents that had been submitted by the Congregation. Copies of this correspondence are provided herewith as Exhibits C-I.26. Third, upon learning that petitioners' counsel was upset about this pre-meeting, the BSA offered petitioners' counsel the opportunity for his own pre- meeting, he refused. Fourth, all those opposed to the Congregation's application were given ample time to submit

documents and testimony during the course of the Board's lengthy review of the Congregation's application.

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

344. As a reply to BSA Answer ¶ 344, deny that the documents referred to are accurately characterized, and further state that the BSA did not provide copies of the actual drawings submitted at said meeting, and further state that the BSA refused to provide information about what occurred at the meeting, and further state that counsel for Petitioners' would not engage in an improper ex parte meeting with the Chair and Vice-Chair, and further state that regardless of whether the FOIL requests may be time barred, all documents requested in the FOIL requests should have been provided as part of the record in this Article 78 proceeding, but were not provided.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

BSA Answer ¶ 345. Finally, the procedures used by the BSA in conducting its review of the Congregation's variance application were proper in all respects. In an effort to discredit the BSA's determination, petitioners assert a myriad of baseless complaints about the procedural aspects of the BSA's review process. As detailed below, each of petitioners' arguments in this regard should be easily dismissed by this Court.

345. As a reply to BSA Answer ¶ 345, deny, and state further that not mentioned in this part of the answer is the improper ex parte meeting and refusal to provide notes or any narrative of what was discussed.

BSA Answer ¶ 346. First, contrary to petitioners' allegations, there was nothing improper about BSA going ahead with the November 27, 2007 hearing [Petition, ¶¶ 94-96]. In support of its argument in this regard, petitioners assert that the BSA should not have held a hearing on November 27, 2007 because it provided the Congregation with only 29 days (rather than 30 days) notice of this hearing, and because the application was not substantially complete because the Community Board had not yet opined on the application.[27] As a preliminary matter, petitioners do not have standing to assert an objection to the notice given by the BSA to the Congregation as they are not suggesting that they were not provided with the required 20 days notice of the BSA's first hearing. Moreover, the application was substantially complete at the time the hearing was scheduled, and the fact that the

> Community Board had not yet voted on the application is simply irrelevant as there is no dispute that they provided their recommendation to the BSA in December 2007, well in advance of the August 2008 decision [R. 1886-92].[28]

[27] 2 RCNY 1-06(g) provides as follows: "after examiner(s) have determined the application to be substantially complete, the applicant shall be notified by the Executive Director, on the appropriate form, of the date set for the public hearing, which shall be at least thirty (30) days after the mailing of said notice. With this notice, the applicant shall be supplied with an official copy of the appropriate forms, which he or she is required to send not less than twenty (20) days prior to the date of such hearing to: (1) The affected Community Board(s) (or Borough Board); (2) The affected City Councilmember; (3) The affected Borough President; (4) The City Planning Commission; and (5) Affected property owners.

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

346. As a reply to BSA Answer ¶ 346, deny and state that the BSA on its face did not conform to the statutorily defined time period, and held it hearing prior to providing the Community Board determination, and thus the first BSA hearing was held without being informed of the subsequent vote of the Community Board against the proposal, and that the BSA hearing was scheduled without f a written determination by the BSA "examiner."

> BSA Answer ¶ 347. Second, contrary to petitioners' allegations, there is nothing improper about the fact that applicants and witnesses on behalf of applicants are given greater amount of time to speak at a public hearing than those who are opposed to an application [Petition, ¶ 306]. Indeed, as it is the applicant's burden to make out the case for the each of the five findings required by Z.R. §72-21, there is nothing improper about giving them the opportunity to make out their case. Moreover, here, it simply cannot be said that those opposed to the application were strictly kept to the 3-minute time limit, or that those opposed to the opposition were not given ample time in which to speak at each of the Board's four public hearings on the Congregation's application. For the same reason, petitioners' assertion that it was in any way improper for the BSA to permit the Congregation to make supplemental submissions to address issues raised by the Board and the Opposition during the course of the public hearings [Petition, ¶ 311], is unfounded. The Opposition was given the opportunity to (and did in fact) submit voluminous documents in opposition to the application.

347. As a reply to BSA Answer ¶ 347, deny, and specifically deny the assertion that the BSA acted properly in conducting the proceeding, and state that the BSA improperly shaped the facts in the proceedings by not asking questions of the Congregation and by not considering significant elements related to relevant decisions; for example, the BSA just would not ask the Congregation to provide any specificity as to its repeated false assertion that an as-of-right building would not resolve the claimed access and circulation issues, even though Petitioners' counsel forcefully confronted the Commissioners on this and other unasked questions at the last hearing, R-4950-56,

after which presentation the Commissioners addressed no questions to said counsel, nor made inquiry to the Congregation, e.g., at R-4952:

> 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.

> BSA Answer ¶ 348. Third, it was not improper for the BSA to take testimony without swearing in witnesses [Petition, ¶ 309], or allowing the Opposition to ask direct questions of the Congregation at the hearing [Petition, ¶¶ 308, 312]. As discussed above, the proceedings before the BSA are simply not adversarial proceedings, and those opposed to the application have no due process right to examine the applicant. In any event, here, the Opposition did effectively "examine" the Congregation in its written submissions to which the Congregation responded.

348. As a reply to BSA Answer ¶ 348, admit that the BSA did not and does not swear in witnesses or allow opponents to ask questions as authorized and granted to it by statute as a quasi-judicial agency engaged in adjudicatory proceedings on appeals from the DOB, but that the BSA has the statutory power to do so and otherwise deny, and state that the BSA refused to request and require the Congregation to provide relevant information and respond to many questions which opponents asked the BSA to ask of the Congregation.

> BSA Answer ¶ 349. Finally, petitioners' suggestion that the BSA acted improperly by not subpoenaing witnesses to testify regarding this application [Petition, ¶ 308] is simply irrelevant as there is no indication that subpoenas were requested, or denied, during the course of this proceeding.

349. As a reply to BSA Answer ¶ 349, admit that the BSA did not and does not exercise its power of subpoena granted to it by statute as a quasi-judicial agency engaged in adjudicatory proceedings on appeals from the DOB and otherwise deny.

Dated: March 18, 2009
New York, New York

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