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| SUPREME COURT STATE OF NEW YORK , COUNTY OF MANHATTAN | | INDEX No 113227/08 (LOBIS) |
| NIZAM PETER KETTANEH and HOWARD LEPOW, | | |
| Petitioners | | |
| <i>against</i> | | |
| BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK, | | |
| Respondents | | |
| PETITIONERS' VERIFIED REPLY | | |
| <p> Law Offices Of ALAN D. SUGARMAN 17 West 70th Street Suite 4 New York, NY 10023 212-873-1371 </p> <p> Attorney for Petitioners </p> | | |
| To: | | Signature (rule 130-1.1-a) |
| Jeffrey Friedlander First Assistant Corporation counsel of the City of New York Christina L. Hoggan CHoggan@law.nyc.gov Assistant Corporation Counsel 100 Church Street, Room 5-153 New York, New York 10007 Phone: (212) 788-0790 Attorneys for City Respondents | | <hr/> Alan D. Sugarman March 23, 2009 |
| Louis M.. Solomon Lsolomon@proskauer.com Claude M. Millman cmillman@proskauer.com PROSKAUER ROSE 1585 Broadway New York, New York 10036 (212) 969-3000 Attorneys for Respondent Congregation Shearith Israel aka Trustees of Congregation Shearith Israel in the City of New York | | <hr/> Alan D. Sugarman I affirm that I am counsel for Petitioners and that the within Reply and Petitioners' Exhibits and Reply Memorandum of Law, were served by e-mail upon counsel for Respondents on March 23, 2009, with hard copy to follow, in accordance with the stipulation between the parties. |

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.

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Petitioners Nizam Peter Kettaneh and Howard Lepow, by their attorney Alan D. Sugarman, for their Verified Reply to the Answers of the BSA Respondents dated February 6, 2009, herein allege as follows:¹

¹ Accompanying this Reply and a part hereof are two attachments. In the first Attachment A, Petitioners provide a response to each of the averments in the Statement of Facts and Affirmative Defenses appearing at pages 29-87, ¶¶ 196- 394 of the Answer of the City Respondents and interpolating those averments. The second Attachment B is a marked copy of the Petition interpolated with the answers of the respondents and additional citations to the record.

The Verified Answer of the City Respondents, served February 9, 2009, (City Answer) consisted of 86 pages, of which 57 pages consisted of a Statement of Material Facts. The Congregation Verified Answer contained no Statement of Facts. Respondents Srinivasan and Collins did not submit separate Verified Answers.

On December 5, 2008, the City served the BSA Record consisting of 5795 pages. Citations to R-00000 are to the BSA Record.

Pet. shall mean Petitioners' Verified Petition as revised January 2, 2009.

With the Petition dated September 29, 2008, Petitioners served Appendix A, which consists of 4199 pages. Certain BSA documents are in Appendix A, but not included in the BSA Record.

Citations to P-00000 are to Petitioners' Appendix A.

On January 2, 2009 Petitioner served a revised version of its Memorandum of Law and the Petition dated January 2, 2009.

Citations to BSA Res. "¶ " are to the paragraph numbered version of the BSA Resolution (aka Decision) at Exhibit A to the Petition and at P-00001 and P-00019. The parties by stipulation have agreed to cite to these paragraph numbers.

1. Respondents have now conceded that a development of the Congregation's site would earn a reasonable return to the Congregation. In their Answers, the BSA acknowledged that the return to the Congregation for its version of a residential as-of-right scheme was greater than, as stated by the Congregation, a reasonable and adequate return for such a development.² Accordingly, and without regard to the other reasons described herein, the BSA's finding under Z.R. §72-21(b) must be annulled.³ See discussion at ¶43 below. Without a (b) finding by the BSA, the condominium variances must be annulled.⁴

2. Moreover, the failure of the BSA to consider use of the fifth and sixth floors of the as-of-right building to support programmatic needs is a sufficient reason to annul the lower floor community house variances. A six floor structure conforming as-of-right structure will allow the Congregation to meet all of its programmatic needs - the full lot coverage on the first floor resolves all the access and circulation needs of the Congregation.

Reply Exhibits

3. In order to reply to the Answers of Respondents, Petitioners supply herewith Petitioners' Exhibits M through S. Frustrating the Petitioners' efforts to clarify the facts, Respondents in their Answers deny nearly everything. The BSA Resolution itself is opaque and non-transparent, not reciting basic facts needed to understand the project and the factors utilized by the BSA in its finding-deficient Resolution.

4. Because the Respondents deny that 90% of the variances relate to the condominiums, Petitioners were forced to compile information from the record to establish this relevant fact, a fact not at all apparent from the Resolution. See Respondents answer to Pet. ¶21 et. seq. Pet. Ex. M-1 visually

² See City Answer, ¶292.

³ See BSA Res ¶149.

⁴ See R-140 and R-287. See Pet. Ex. N-1, N-1-A to C.

shows each variance on the floor plans of each of the eleven levels of the proposed building (the BSA never required the Congregation to provide this most basic of drawings.) Merely glancing at Pet-Ex. M-1 shows that the blue community house variances are a small percentage of the red condominium variances. Furthermore, obviously the blue community house variances are a very small percentage of the as-of-right space in the lower six floors and basement space available for programmatic needs. All of this information is derived from the drawings filed with the BSA at R-4695 and R-4701-4711. Pet. Ex. M-2 and M-3 merely reformat and present clearly the exact same facts shown confusingly in the Congregation's tables at R-4967 and R-594.

5. Pet. Ex. N-1-A are excerpts concerning rate of return contrasting the BSA's Answer at ¶292 with the statement of the Congregation as to the acceptable rate of return. Pet. Ex. N-3 is in reply to the false denial by the Respondents to the Petition's averment that Freeman Frazier's site area and site value per square foot varied wildly, and contains excerpts from the Freeman Frazier reports. Pet. Ex. N-6 shows the irrationality of using the Parsonage "development rights" to define the number of square feet for the two floors of condominiums, in reply to the denials of Respondents.

6. Pet. Ex. N-2 computes base unit construction costs as was invited by the BSA in its answer at ¶291 and shows that the construction costs for the as-of-right condominiums indeed were exaggerated. Pet. Ex. N-8 is in reply to the false claim by Respondents that revised drawings to the DOB resulted in removal of the eighth objection requiring a 40 foot separation between building when there is no evidence of revisions. Pet. Ex. N-9 graphically displays the 40 foot zone. Pet. Ex. O-2 and O-3 are in reply to the false denial by the Respondents that the Congregation building envelope is substantially the same as an a conforming as-of-right building on Site 37, making the BSA description of the neighborhood context a gross misrepresentation.

7. In reply to the Respondents denial of Petitioners' averments as to floors 2-4 that the Congregation had first designed the building, and then contrived the programmatic need, Pet. Ex. S are

excerpts from the LPC drawings submitted by the Congregation to the BSA at the November 8, 2006 ex parte meeting. *See* Pet. Ex, Q. These show that the space on the second floor, for example, was programmed for offices and meeting rooms, not the post facto "critical" toddler facility contrived to support the variances.

8. The reply exhibits are based entirely on source documents in the record and merely excerpt and reformat documents in the record. No new information is provided that is not already in the record, For the convenience of the Court, the initial exhibits and the reply exhibits are bound into a separate single volume.

Overview

9. The variances for the proposed building allow approximately 14,204 additional square feet of area over that allowed by an as-of-right building — approximately 10% of the area relates to the Congregation's community space, and the other 90% to luxury condominiums. Because the Answers deny this basic fact, Petitioners have prepared a compilation exhibit at Pet. Ex. M-1 showing all eleven levels of the proposed building with the location of the variances highlighted.

10. Because the site is in a landmarked district and the Synagogue is an individual landmark, the Congregation first sought (in 2001) and obtained a certificate of appropriateness (in 2006) from the Landmarks Preservation Commission (LPC) for a building with reduced height, but only as to the appropriateness of the building for design reasons. The LPC did not pass upon (and had no authority to pass upon) zoning matters, issues of height and scale, and impact on the area such as shadows on the mid-block streets. factors considered by the LPC in issuing a certificate of appropriateness:

"architectural features" and "aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color."

11. The LPC in conjunction with the City Planning Commission may consider relief from hardships caused by landmarking under Z.R. §74-41. Initially, in 2001, the Congregation had sought

relief from the LPC under Z.R. §74-41, but did not pursue such relief, withdrawing its request. The BSA has no role at all in providing relief from landmark hardships; the BSA provides variances on appeal from denials of permits by the Department of Buildings for violations of the Zoning Regulations; if Respondents argue contrary to the BSA can grant relief from landmark hardships not provided by the LPC, then it would seem that the Congregation did not avail itself of its remedies from the LPC.

Summary of Significant Issues

12. First, Respondents in their Answer have now established that the Congregation can obtain a reasonable and adequate return from an as-of-right building. Thus, there is no basis whatsoever for the so-called Z.R. 72-21(b) finding for the condominium variances. Thus, the condominium variances must be annulled. See discussion at ¶43 below.

13. Second, Respondents have been unable to show any rationality at all in assigning a site area of 19,775 square feet (oddly derived from unused air rights over the adjoining Parsonage) as the site area for computing reasonable return for the two condominiums in the mixed use Scheme A conforming as-of-right building. The Congregation claims that having satisfied its programmatic needs in floors 1-4 of the mixed use building, it is entitled to earn a reasonable return from two condominiums on the remaining floors five and six. But, these two floors do not contain 19,775 square feet, but only 5,316 square feet. By using this bizarre approach, the Congregation inflated cost and thereby eliminated the return.

14. Third, Respondents have been unable to cite to even a scintilla of evidence that an as-of-right building does not fully satisfy the Congregation's asserted programmatic needs of access and circulation.

15. Fourth, Respondents have been unable to identify a single "physical" condition, such as swampy land or an L-shaped lot, to create a hardship arising out of the strict application of the zoning regulations and preventing the development of the 64x100 foot development site. Under the BSA usage of "obsolete", any building that an applicant asserts, correctly or not, has outlived its usefulness satisfies the physical condition requirement of finding Z.R. §72-21(a).

16. Because of the possibility of appeal, it is necessary to fully discuss all the significant issues.

17. Review of the BSA Resolution is made complex because the BSA Resolution does not include findings of important material facts. Important feasibility studies are not presented as single integral studies; but rather require reviewing reports scattered throughout the record. The lengthy BSA Resolution contains substantial discussions of little or no relevance.

18. As just one example, the Congregation must establish that an "as-of-right building" would not earn a reasonable financial return to the owner. But, the BSA paid scant attention to the financial return of an as-of-right building, but rather focused on financial analysis of multiple and repetitive submissions of various proposed schemes requiring variances. The LCP had already limited the height of the building, so the BSA exercise of analyzing the proposed building was a meaningless exercise, more for "show" than substance. So, the BSA reviewed the complete construction estimates (all 15 pages) for the approved building where the estimates had no significance (R-4872 to R-4916), but looked the other way and accepted only 2 of 15 pages for the important constitutionally mandated analysis of reasonable return for the as-of-right scenarios where the full report would show the allocations between the two components of the building. (R-1996-1997). At hearings, the BSA engaged in dialogue and questioning with Mr. Freeman of Freeman Frazier, but asked nary a question of the even more experienced and certified opposition expert, Martin Levine, who was questioning the as-of-right analysis by Mr. Freeman. See Transcript R-4485-4488. The Chair rushed and dismissed Mr. Levine after he spoke for 3 minutes. Mr. Freeman, though, was questioned by Commissioners in

the same hearing. R-4463-4483, yet not one Commissioner asked Mr. Freeman why the proper site value for an as-of-right scheme A would not be the area of the two condominium floors times the value per square foot. *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.

19. The BSA Resolution relies largely on conclusory assertions, and the Answers largely cite to the Resolution of the Record as a whole. The BSA Resolution and Answers mischaracterize opposition positions. The Answers attribute to Petitioners claims of "opponents" not made in the Petition and in general ignore even assertions by opponents supported by detailed expert reports. In making its findings, the BSA erroneously relied on factors in approving the variances not permitted by law: asserting landmarking hardships, asserting religious programmatic needs to justify the condominiums, asserting hardships not physical in nature, and asserting hardships lacking causation — *i.e.*, not arising out of the strict application of the zoning laws.

20. As to the (b) findings for the as-of-right residential condominiums. the BSA discussion is found at BSA. Res. ¶123 to ¶149 of the resolution. The BSA confuses the discussion by addressing in this section the feasibility analysis of the proposed building at ¶129-30, ¶132-36, ¶140, an issue that should have been addressed under the (e) finding, minimum variance.

Summary of Basic Facts Not In Dispute

21. The Answers of Respondents attempt to thwart all effort to describe the basic facts. The BSA Resolution on the whole resorts to either conclusory findings or findings that merely parrot the words of the Zoning Regulation and fails to make findings of specific facts., and also resulting in an non-transparent decision. Notwithstanding, the following critical facts, as to which the BSA did not make

factual findings in the BSA Resolution, are material to understanding the Resolution, yet appear not to be in dispute.

- 6.55%. The minimum acceptable rate of return for a finding under §72-21(b). Pet. Ex. N-1-B.
- 10.93%. The Annualized Rate of Return on Investment for the proposed development project as approved by the BSA. BSA Answer ¶292. Pet. Ex. N-1-A.
- 6.7%. The Annualized Rate of Return on Investment for the threshold as-of-right Scheme C. *Id.*
- 5,316 square feet (sellable) 7,594 square feet (gross). The Site Area of the Two Floors of Condominiums in the Mixed Use As-of-Right Building Scheme A. Pet. Ex. N-4.
- 19,775 square feet. The Site Area Used by the BSA to Compute Site Value. Pet. Ex. N-6 and N-7.
- 12,704 square feet. The Additional Area Provided for the Variances for the Condominiums. Pet. Ex. M-2 and M-3.
- 10%. The Proportion of the Variances That Relate to the Resolution Discussion as to Religious Programmatic Need and Deference to Religious Institutions. Pet. Ex. M-2 and M-3.
- 4%. The Proportion of the Community House Variances Area to the Area Available for Programmatic Needs in an As-of-Right Community House. Pet. Ex. M-2 and M-3.
- No Evidence Cited. Evidence that access and circulation issues are not completely addressed by an as-of-right building.
- No Evidence Cited. Evidence that the Congregation Provided Revisions of Drawings to the DOB so that the Eighth Variance Would Be Removed.
- No Evidence Cited. Citation to the Record Showing the Actual Rent Paid by the Parsonage Tenant and the Beit Rabban Tenant.
- No Evidence Cited. Citation to the Record Showing Evidence of Obsolescence.
- Non-Issues in This Proceeding.

Discussion of Basic Facts not in Dispute.

22. The minimum acceptable rate of return for a finding under §72-21(b): 6.55%. A threshold issue for the condominium variances is whether the Congregation can earn a reasonable return on an as-of-right buildings. The Resolution is silent as to what was considered to be the minimum acceptable return. The Congregation's initial application states without equivocation that a reasonable "acceptable" "Annualized Return on Total Investment⁵" is 6.55%. R-140, Freeman Frazier Report of March 28, 2007 . See Pet. Ex. N-1-B.

⁵ In the proceeding, two methods of assessing return were discussed; return on investment (referred to by the Congregation as above) and return on equity. There are also different ways of computing these returns - one on an annualized basis and the other on the total return. The annualized return is always a smaller amount than the total return figure - and, extending the construction period lowers the annualized return. The BSA Guidelines refer to total return, not annualized return, but the BSA ignores this.

23. The Annualized Rate Of Return On Investment for the proposed development project as approved by the BSA: **10.93%**. The BSA Resolution was silent as to the rate of return for the approved building - it was in fact a 10.93% Rate Of Return On Investment, far in excess of the acceptable reasonable return. See BSA Answer - Statement of Facts at ¶ 292, n. 19 including this "detail." See, BSA Res. at ¶130 which omits this "detail."

24. The Annualized Rate Of Return On Investment for the threshold as-of-right Scheme C: **6.7%**. Computation of the financial return for an all residential/income producing building on the development site is a threshold issue under §72-21(b), which resulted in the Congregation submitting AOR Scheme C aka FAR 4.0. Although not truly all-residential, the BSA Answer now confirms that the Annualized Rate Of Return On Investment is 6.7%, in excess of a reasonable return. See BSA Answer - Statement of Facts at ¶ 292. See, BSA Res. at ¶127, ¶129.⁶

25. The Site Area of the Two Floors of Condominiums in the Mixed Use As-of-Right Building Scheme A: **5,316 square feet** (sellable) **7,594 square feet** (gross.) Although disclosed prominently in every Freeman Frazier Scheme A analysis, the site area/building area for the two floors of condominium was never stated anywhere in the BSA Resolution. R-5178. The feasibility analysis was represented as evaluating whether the two floor condominiums would provide to the Congregation a reasonable rate of return for the purposes for the §72-21(b) finding, a second level threshold analysis. See BSA Res. ¶138.

26. The Site Area Used By the BSA to Compute Site Value: **19,775 square feet**. Not only did the BSA Resolution not disclose that the BSA was relying upon the unused development rights over the adjacent Parsonage to compute site area, but the Resolution did not disclose square feet of the site area it was using for the analysis of reasonable return of the two floors of condominiums was 19,775 square feet. R-4651-2, Freeman Frazier May 13, 2008.

⁶ At Resolution ¶138, the BSA only considered a recomputation of the Scheme A, but not Scheme C.

27. The Additional Area Provided for the Variances for the Condominiums: **12,704 square feet.**

Although the Resolution mentions that the lower floor rear yard variances for the community space would provide an additional 1500 square feet (BSA Res. at ¶46), the Resolution does not describe the area being provided by the proposed/approved condominium variances. This 12,704 square 49feet. See Pet. Ex. M-2, 2, and 3..

28. The Proportion of the Variances That Relate to the Resolution Discussion as to Religious Programmatic Need and Deference to Religious Institutions: **10%.** The Resolution extensively

addresses the BSA perceived need to defer to religious institutions - those discussions concern only 10% of the variance area at issue in this Article 78 proceeding. See Pet. Ex.M-1, 2, and 3.

29. The Proportion of the Community House Variances Area to the Total Area in an As-of Right Community House: **4%.** Although the BSA Res. at ¶ 26 states the total area of the proposed

building, it oddly does not state anywhere the total area of an as-of-right building. The Community House variances total 1500 sq ft. (BSA Res., ¶46). This represent 4% of the total area of 34,048 of square feet available for programmatic needs in an as-of -right community house: 20,054 sq. ft. above ground (BSA Res., ¶46), 6400 sq ft. in basement and 7,594 sq. ft on floors 5 and 6. The Congregation also has for programmatic need space in the Parsonage and 10,000 square feet under the Sanctuary.

30. Evidence that access and circulation issues are not completely addressed by an as-of-right building: **No Evidence Cited.** The Resolution directly refers to access and circulation as a

hardship/programmatic need at ¶41, ¶48, ¶61, ¶72, ¶73, and ¶213 and indirectly refers to the access and circulation issues whenever it used the words hardship or programmatic need or obsolescence.

When put to the test, neither the BSA nor the Congregation could provide a single citation to evidence in the record that these issues were not fully resolved by an as-of-right building. The Congregation could cite only to the Resolution's repetition of the conclusory assertions of the Congregation as to the heart of its case.. The BSA could only lamely respond that the lack of the connection between the

access hardship and the proposed building and variance was of "no moment", essentially saying that an essential element of variance law was of "no moment."

31. Evidence that the Congregation Provided Revisions of Drawings To the DOB so that the Eighth Variance Would be Removed. **None.** Respondents could provide no evidence, and, this means that the split zoning lot argument is of not merit, since the building separation zoning regulation would have prohibited a tall building on the R10A portion of the lot.

32. Citation to the Record Showing the Actual Rent Paid by the Parsonage Tenant and the Beit Rabban Tenant: **No Citation.** Respondents claim that the Congregation provided this information - when put to the test, they could not show where these rent figure appear in the record.

33. Citation to the Record Showing Evidence of Obsolescence. **None.** There are many claims of obsolescence, but facts are obscure. It is not even sure when Respondents refer to the Synagogue as being obsolete, or to the Community House. In any event. obsolescence cured by an as-of-right building is no grounds for a variance.

Non-Issues in This Proceeding

34. The BSA Resolution and Answers raise issues and engage in extensive discussion of issues of no relevance to this proceeding. But Respondents seem now to agree that:

- No floor area (FAR) is required to be transferred to the development site on Lot 37 from Lot 36 where the Synagogue and Parsonage are located. Thus, all discussion of this issue in the Resolution and in the Answers is irrelevant to issues before this proceeding. BSA Answer ¶ 248.
- No use variances are required; Petitioners do not challenge the uses proposed by the Congregation as proper programmatic accessory uses, and all discussion in the Resolution and Answers as to these issues are irrelevant to this proceeding. BSA Answer ¶ 239.
- All discussion in the Resolution as to religious deference applies only to the community house variances, which constitute 10% of the variance area in dispute.
- Because access and circulation may be resolved by an as-of-right building, no hardship or claims of obsolescence or programmatic needs are relevant to this proceeding.
- Compliance with SEQR and CEQR are non-issues in the Article 78 proceeding. The only related relevant issue is compliance with Z.R. §72-21(c).

Abusive Answers

35. The BSA absolves itself from answering any averment in the Petition if it "can be construed as alleging that the BSA acted improperly or contrary to law." (The Congregation, rather than provide specific citations, refers the Court to the entire record.)
36. Where the Petition alleges that some fact or document did not exist in the record, Respondents simply deny these averments, and then refer the Court to the entire Record and ask the Court to find the non-existent information in the record.
37. Thus, Respondents as well were simply unwilling to admit to even the most basic facts, which should not be in dispute -- thus throwing mud in the water to obscure the many other problems with their positions and to force Petitioners to burden themselves and the Court to prove and dwell on incontrovertible facts.
38. Just as an example, Respondents would not admit these averments. Other example may be easily identified in the attached marked Petition showing answers of Respondents.:

- ¶22. According to the studies submitted by the Congregation for Scheme A, floors 5 and 6 contained approximately 5022 square feet of sellable area and 7594 square feet of built area. This fact is not mentioned in the Decision.
- ¶23. In the last of the many studies of Scheme A, the Congregation used in its computation of site value, a site area of 19,094 square feet. This fact is not mentioned in the Decision.
- ¶51. Using floor area as a measure, 90% of the variances floor area is provided by the four variances for the luxury condominiums, with the other 10% relating to three rear yard variances allowing an additional area of 1500 square feet of school space. But see R-3228.
- ¶77. The development site, Tax Lot 37, currently is occupied by a to-be-demolished, four-story community house and vacant lot. It is a perfectly rectangular site, 64 by 100 feet. The site is located adjacent to the Congregation's historic 1896 synagogue sanctuary at Central Park West and 70th Street.
- ¶80. The Congregation does claim a programmatic need/hardship to construct an elevator to access the sanctuary, but admits that such an elevator would require only 100 square feet on each of the 5000 to 6400 square foot first four floors of a conforming building.
- ¶88. Importantly, in all of its five versions of its statements in support submitted to the BSA, the Congregation states that the three lots (now comprising the single Lot 37) were acquired to meet the development needs of the synagogue and the community

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

- ¶156. The multiplication of value per square foot times the number of square feet does not require any expertise beyond the use of arithmetic.
- ¶158. The March 28, 2007 Freeman Frazier study concluded that the vacant land sale price was \$500 per square foot based upon comparable vacant properties.
- ¶236. Under the final Scheme C scenario of December 21, 2007, the \$14,816,000 for the "acquisition cost" would result in a cash payment to the Congregation of \$14,816,000.
- ¶214. Although purporting to be an all residential Scheme, the Scheme C aka All Residential F.A.R. 4.0 scheme was in fact not an all residential scheme.
- ¶215. This report used a new acquisition value of \$14,816,000 and found an estimated profit of \$2,894,000.

The BSA Resolution Frustrates Court Review

39. The BSA conducts its hearing and prepares its resolutions in a manner which, by intent or effect, frustrates and avoids review by a court, and preserves for the BSA the ability to act arbitrarily and capriciously. The applicants are not asked questions that would elicit inconvenient facts in conflict with the BSA's predilection to grant variances, especially to religious applicants. Disproportionate attention is paid to certain issues. The BSA seemingly writes its resolution not as an unbiased adjudicator but as an advocate to prevent later review.

40. The result is that the BSA resolutions seem to attempt to frustrate, if not foreclose, the ability of courts to provide judicial review. Notwithstanding, the Court is empowered to conduct hearings as described below. Even so, the record establishes that the Congregation had the opportunity to make a record, chose not to, and the variances thus should be annulled.

41. In an Article 78 proceeding, if the agency or other party baldly denies facts, the court is not required to accept those bare denials. Otherwise, agencies could defeat all Article 78 proceedings, especially where the record is lengthy, by referring in answers broadly to the entire record or by generally "denying" matters. This would place the burden on the court and the applicant to identify parts of the record that show the agency denials are false. If this were allowed, the agency could also

create a complex record for the simple reason of thwarting court review — or permeate its decision and the record with irrelevant matters. It is for exactly these reasons that the CPLR and the City Administrative Code are clear that a hearing is required if there is a question of substantial evidence.

42. Simple facts such as stating how many square feet of additional area are being granted by the variances are simply left out, and the BSA does not ask that they be supplied by the Congregation. The Congregation was not required to show floor plans that illustrate the portion of the floor for which variances are sought. (See R-514.) See Pet. Ex. M-1.

Citations In The Answers to the Entire Record Rather Than Specific Parts of the Record

Examples of Respondents intent lies in reference in their Answers to non-existent facts, stating that a fact exists in the record but without actually identifying the citation to the BSA Record. Thus, Respondents claim that the following is in the record, but can provide no citation to the record:

- The dollars and cents estimate to renovate or retrofit the existing elevator in the existing community house to address access issues.
- The costs to the Congregation paid for the acquisition of the three lots that are part of Lot 37. See BSA Answer ¶ 294.
- A Scheme C as-of-right reasonable return analysis which is all residential on all seven floors and includes the income/value of the two basements.
- The exact ways in which an as-of-right building does not resolve the asserted access and circulation issues.
- The exact ways in which the approved building resolves access and circulation issues in ways that are different from the as-of-right building.
- The explanation of how construction cost allocations were made between the residential and community building for the as-of-right scheme C.
- The market site value of the two floors of condominiums in the as-of-right Scheme C.
- The rationale why the caretaker's floor may not be moved to the fifth or sixth floors of the as-of-right building.
- A single integrated report from Freeman Frazier including in a single document all information and analysis used in the Scheme A analysis.
- A complete construction estimate with all 15 pages for the Scheme A building.
- Changes in the building drawings submitted to the DOB in August 2007 which resulted in the elimination of the requirement for the building separation of 40 feet on the upper floors and allowing the BSA to assert that the split lot is the limiting factor in developing the 17 foot slice of Lot 37.
- Differences in the building drawings reviewed by the Chair and Vice-Chair at the November 8, 2006 improper ex parte meeting and the drawings submitted several months later to the BSA in April, 2007 as part of the application.

That the BSA asked the Congregation to provide the actual rent paid for the school by Beit Rabban and by the residential town house tenant for the Parsonage.
The actual number in dollars of the rent paid by Beit Rabban and the Parsonage tenant.
That the Congregation currently makes any use of the classroom on the second floor of the community house, which classrooms are rented to Beit Rabban.
That the Congregation mentioned a second floor 60 toddler program earlier than 6 months after the application was filed (7 years after the LPC application was filed.)

Respondents Admit that the Congregation Is Able to Earn a Reasonable Return from an All Residential As-of-Right Building

43. It is now clear that the Congregation is able to earn a reasonable return for an as-of-right residential Scheme C building on its development site of at least 6.7% (BSA Answer, ¶292), which is in excess of the 6.55% the Congregation deemed adequate in its initial application to the BSA. (R-140, R-287.) Thus, the condominium variances must be annulled, since the essential §72-21(b) finding cannot be made. *See* Pet. Ex. N-1.

44. The Scheme C analysis is required under applicable precedent requiring that the entire site be analyzed for reasonable return, not merely analyzing the slice of the property the owner wishes to develop. In this discussion, we ignore the 10% of variances for the Community House and assume for argument's sake that the 2nd, 3rd, and 4th floor variances are proper.

45. In their Answering Memoranda Respondents ignore, and apparently concede, the assertion by Petitioners that, under §72-21(b) and case law, a religious organization proposing a mixed-use building may not bifurcate its property — meeting its programmatic needs in one slice of the property, and then claiming that it cannot earn a reasonable return as to the remaining portion. *See* Pet. Mem. of Law at page 74.

46. The Congregation admits in its Statement in Support that the lots were purchased specifically for development of the Community House; the proposed Community House without the variances responds to the needs of the Congregation. Pet. at 88.

47. The BSA has not only failed to require the Congregation to analyze a truly all-residential scheme, but opponents claimed, and the Petition stated, that the "not-really" all-residential scheme of December 2007 had not been updated to utilize a reduced site value computed by the Congregation in April 2007, which reduced site value would have boosted the rate of return in the Scheme C analysis. The BSA ignored opponents' request, and would not ask the Congregation to update Scheme C, and the Congregation did not volunteer. *See* BSA Answer to ¶ 292 of Petition, reproduced at Pet. Ex. N-1-A.

48. Yet the BSA did not completely ignore this assertion in its Answer. After all, it was the BSA itself that initially requested that the Congregation provide an all-residential analysis. The professional staff of BSA, after it received the initial application, asked the Congregation for a "reasonable return (aka "feasibility") study" for an all-residential project (Pet. at ¶ 210).⁷ (The "all residential" analysis was not in fact all-residential. Petition ¶ 207 to ¶ 228, also reducing the financial return.⁸)

49. The BSA, when pressed by the Petition, felt compelled to complete the analysis by using the new reduced site value, computing a rate of return of 6.7%. As stated in Paragraph 292 of the BSA Answer (reproduced as Pet. Ex. N-1)⁹:

292. Second, petitioners argue that, prior to adopting the Resolution, BSA should have required the Congregation to revise its December 21, 2007 Scheme C study (all residential scheme). Specifically, petitioners claim that the

⁷ BSA Notice of Objections to Congregation June 15, 2007. R-253 at 257, 258:

31. Please provide a full plan set for a complying, 4.0 FAR residential building on Lot 36 (sic) that includes a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings).

"37. Provided that the alleged hardship claim for the development site (Lot 36) (sic) is an inability to accommodate CSI's programmatic needs on Lot 37 (sic), please analyze a complying, fully residential development on Lot 36 (sic) as requested within Objection # 31. This analysis is requested for the purposes of gauging what the economic potential of the development site would be without the alleged hardship."

BSA Second Notice of Objections to Congregation, October 12, 2007. R-512 at 514.

⁸ The Congregation supplied an analysis known as "Scheme C" or "F.A.R. 4" and labeled it an "all residential" analysis. In fact, the Scheme C proposal was not all-residential, and failed to consider the value of 11,000 square feet of valuable rentable space. Even without the 11,000 missing square feet, the Scheme C analysis showed a positive return. The opposition contended that a properly conducted analysis of Scheme C, which fully utilized all available space in an as-of-right building would yield a return on investment of 31%, an annualized return on investment of 16.4%, and a return on equity of 63%. R-3464. MVS-Martin Levine, February 8, 2008.

⁹ The City Answer was verified by Respondent Srinivasan, the Chair of the BSA.

Congregation should have been required to recalculate its estimated financial return for an all residential scheme utilizing the \$12,347,000 acquisition value set forth in the Congregation's final July 2008 report because doing so would have shown a profit of approximately \$5 million. Petitioners' argument is flawed. As set forth above, under Z.R. §72-21(b), BSA examines whether an applicant can realize a reasonable return, not merely a profit. While utilizing the revised acquisition value, i.e., \$12,347,000, would have resulted in a profit of approximately \$5 million, the rate of return would have only been increased to 6.7%. As established by the Congregation's experts, a reasonable rate of return for the subject premises was approximately 11% [R. 4652-3, 4656, 4868-69, 5172, 51781. Accordingly, since petitioners' proposed calculation would not have resulted in a reasonable return, petitioners' argument fails.¹⁹

¹⁹ Notably, the rate of return for the proposed development as approved by BSA is 10.93%.

50. The BSA has now confirmed the key assertion of the Petitioners: a reasonable return, of at least 6.7%, to the Congregation would be provided to the Congregation even by this "not-really" all residential building. How can we be so sure that 6.7% is a reasonable return? Simply because the Congregation and Freeman Frazier so said in the initial feasibility study accompanying the Congregation's application in April, 2007 (R-140)? Freeman Frazier, March 28, 2007 (Pet. Ex. N-1-B):

5.00 Conclusion 7.4 0.7.

The Proposed Development provides a 6.55% Annualized Return on Total Investment. This return is at the low end of the range that typical Investors would consider as an investment opportunity, taking into account the potential risks inherent in this type of development project, and few, if any, investment options. The returns provided by the Proposed Development alternative, in this case would, therefore, be considered acceptable for this project. (emphasis added)

51. Because the Congregation can earn, without doubt, a reasonable return on the entire development site used for residential purposes, it is not necessary to analyzing whether a mixed use facility could earn a reasonable return from the two floors of condominiums on the fifth and sixth floors, The Congregation cannot have its cake and eat it too — satisfy its programmatic needs as a religious entity in the lower floors, and then claim it cannot earn a reasonable return for the upper two floors.

The Congregation Can Earn A Reasonable Return from the Two Condominiums in the As-of-Right Scheme A Building

52. A bifurcated analysis can work to exclude a variance to the Congregation for the revenue-generating component, if it is shown that the revenue-producing component can indeed earn a profit. A

proper analysis of the Scheme A two-condominium project - correcting site area, site value, construction costs, and other elements, would yield a reasonable return.

53. The reports critiquing Freeman Frazier studies by opposition certified real estate appraiser Martin Levine of Metropolitan Valuation Services are found at: 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).¹⁰

54. Thus, finding (b) could not be properly made either for the all-residential scheme or the mixed use scheme,

55. In the Petition, Petitioners show that the BSA had no basis on which to make the finding under §72-21(b) that the Congregation could not earn a reasonable return from Scheme C. In answer, Respondents continue to inaccurately portray improperly Petitioners' objections to the Congregation's reasonable return/feasibility study as being based on a single flaw: that a return on equity analysis should have been used as specifically required in the Board's written guidelines.

The Market Value of the Site for the Two Floors of Condominium Development Rights Is \$2.6 Million, Not \$12.3 Million

56. The BSA continued to ignore largest single flaw in its (b) finding for the as-of-right Scheme A building — the computation of site value — the largest cost component in the financial analysis. Correcting this single error (and there are others) would establish a satisfactory return to the owner, whether the return on equity or return on investment approach is used. See generally Pet. Ex. N-4 to N-7.

57. The proper computation of site value is simple — multiply site area times the site value per square foot. The two condominium floors in the as-of-right building contain 5316 sq. ft. (7594 gross),

¹⁰ In his reports, Freeman stated that the proper method of allocating costs for Scheme A would first be to cost out a complete four story community house with all necessary features including elevators and the roof. Then one would cost out the complete Scheme A structure and subtract one from the other.

as stated in the Freeman Frazier analyses. R-4869. Freeman Frazier estimated a value of \$450 per sq. ft. for condominium development space. R-520. Thus, the site value for the two condominiums would be the product of 5316 sq. ft. x \$450 per sq. ft. or \$2.6 million. *Id.*

58. Yet, for this site area, two floors of space with an area of 5,316 sq. ft., the Congregation used a site value of \$12,347,000 (R-4869), based upon a site area of 19,975 square feet (R-4651-4652), and in the process boosted the site value per square foot from \$450 to \$675. To achieve this alchemy, the BSA allowed the Congregation to use the unused development rights over the adjoining Parsonage, and to value the space as if it overlooked Central Park. Pet. Ex. N-6. Although the BSA is required to make findings of fact, it did not include findings as to any of these facts in its lengthy Resolution.

59. Clearly, the Congregation was exaggerating site value in a way to guarantee that any analysis of an as-of-right building would show a loss. An inflated site value is the cornerstone of the Congregation's strategy to satisfy the (b) finding, and, initially, the Congregation attempted to include the Community House space as part of site area.

The Chair observed at the November 27, 2007 hearing:

CHAIR SRINIVASAN

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

597 So, it's almost like you should take that out of the equation and then you have this
598 value on this property without that 20,000 square feet that's being used for the
599 synagogue.

Transcript of November 27, 2007 at R-1753.

60. At this juncture in the proceeding, Freeman Frazier was computing site value based upon a site area/building size of 37,889 sq. ft., a number apparently made up by Freeman Frazier. Pet. Ex. N-3.

The as-of-right building was not 37,889 sq. ft., but 27,771.61 sq. ft. *See As of Right Floor Area*

Schedule, October 22, 2007, AOR-A-2 at R-594 (the amount 27,771.61 is in the lower right corner of

the table). Most of the 27,271.61 sq. ft. was occupied for community purposes. See Pet. Ex. M-1, M-2. The actual site area was closer to this figure minus 20,000 sq. ft., *i.e.*, 7,771.61 sq. ft.

61. When Freeman Frazier next submitted a Scheme A Analysis, the site area was reduced from 37,889 to 19,775, but the site value per square foot was raised from \$450 per sq. ft. to \$750 per sq. ft. This was a transparent manipulation of the numbers. Compare R-133 with R-516. See Pet. Ex. N-3.

62. The BSA Res. at ¶ 114 states that the Congregation represented that a 28,274 sq. ft. would be permitted in an as-of-right building. The BSA Answer repeats this figure citation to the BSA Record. The source of this figure is not known.

63. Whether the Chair understood that the correct size of the building was 27,761 sq. ft., and not 37,889 sq. ft., was not clear. It is clear that if 20,000 square feet were subtracted from 27,761 sq. ft. to yield site area, then the condominium variances were doomed. The Congregation could only satisfy the (b) finding by exaggerating site value. (In reply to Respondents denial of Pet. ¶206 that Freeman Frazier provided a number of inconsistent reports, Petitioners compiled the varying methods of computing site value at Pet. Ex. N-3.)

64. The actual amount of space for the two floors of condominiums shown on all of the Scheme A studies is 5316 sq. ft. "sellable" (7594 sq. ft. "built"). R-4869. The Answers of Respondents completely ignore this issue. It was this site area that a "developer would use and pay for," in the words of the Chair, which was to be used for the computation of site value in the Scheme A as-of-right building. See Pet. Ex. N-1 *et seq.* The failure to present the site value of the two floors of condominiums alone should give great pause to both this Court and to anyone considering the feasibility study of Freeman Frazier taken as whole. This should call into question the entirety of the Freeman presentations. And the refusal of the BSA to discuss the computation, since the issue was fully raised by opponents, raises questions as to the candor and impartiality of the BSA itself.

65. Ultimately, when it was clear that the standard method would doom the (b) finding, the Congregation concocted the method of using unused development space over the adjoining Parsonage to define site area for the condominiums atop the Community House.

66. Petitioners contend that it is within the purview of the Court to make this computation and that remand is not required. *See Pantelidis v. New York City Bd. of Stds. & Appeals*, 43 A.D.3d 314 at 317 (1st Dep't 2007), *aff'd* 10 N.Y.3d 846 (2008), *aff'g* 10 Misc. 3d 1077A (Sup. Ct. N.Y. Co.), *infra*. The irrationality is apparent. Because the computation by the BSA was clearly erroneous, the variances granted below must be annulled.

Market Value and Acquisition Cost Are Not One and the Same

67. The BSA Respondents contend in their answer that "market value" and "acquisition cost" are one and the same, and, that the use of the phrase "Acquisition Cost" in the various Freeman Frazier studies is supposed to mean market value.

As is common with the English language, various words and phrases are used interchangeably. Terms utilized by the BSA are no different. The terms "acquisition cost," "market value," and "site value" are used interchangeably for no other reason than that they each designate the as-is fair market value of a property and are all in common usage. ... The market value of the property which, as stated above, is synonymous with the acquisition cost.

BSA Mem. at 42. BSA Answer at ¶ 294. The BSA is attempting to distract the Court's attention from the fact that the reasonable return analysis failed to consider the amount paid by the owner for the property. Item M of the BSA Instructions clearly distinguishes between market value and the cost of acquisition of the site by the owner "market value of the property, acquisition costs and date of acquisition." R-4267 at R-4273. Pet. Ex. R.

68. Acquisition price is a factor not to be ignored under applicable case law (Pet. Mem. of Law Page 70 at page 69 and 80 *et seq.*) The price paid by an owner for his property is needed to show the return on investment upon the owners original investment in the property. Under the feasibility studies, the Congregation is to receive \$12.4 million of cash as the market value of the site. However, during the time the Congregation owned the property, it received value in the form of use and rent.

Thus, a return on investment for the Congregation would include factoring in the original acquisition cost, the value of the use and the rent received, and the amount received as the market value on the hypothetical sale to the hypothetical developer.

Value of the Development Rights over the Adjoining Parsonage as Site Value

69. The BSA then argues that market value of the space available to the developer is the measure of site acquisition cost. But it then departed from that measure when it chose to use the value of the development space over the adjoining parsonage as the site value of the two floors of condominiums. Pet. ¶¶ 182-185. Pet. Ex. N-5. BSA Answer at ¶¶295 and Pet. Reply thereto. Although the two floors of condominiums have a site area of 5,320 square feet (sellable) and 5,316 square feet (built), the BSA and Congregation approach was to use a site area of 19,775 sq. ft. See Pet. Ex. N-4 to N-7.

70. By so doing the BSA and the Congregation inflated the site value for the two condominiums from \$2.4 million to \$12.3 million.

71. The irrationality of this approach is addressed in the Pet. Mem. of Law at 53 *et seq.* Apart from the departure from the common sense approach, discussed above, the Petition notes:

- The Parsonage approach ignores the unused development space in the 64' x 100' construction site.
- Under the Parsonage approach, the Congregation essentially transfers air rights, but retains them at the same time - since, under the sleight of hand, the Congregation could still claim the air rights that were in effect transferred.
- The Parsonage approach ignores the unused development space over the Synagogue.
- Although using the development rights over the Parsonage, the feasibility study ignores the residential rental income from the Parsonage.

- The Parsonage approach measures the site value without regard to the actual development — the same value would be used whether the Congregation chose to use two floors for condominiums or four floors.

72. It also seems clear that further development over the Parsonage is limited by the landmark laws. As noted by the Congregation's architect while discussing the Parsonage in his letter to the BSA of (February 4, 2008, R-3611 at R-3613, Pet. Ex. Ex. G):

Additional floors would block the historic leaded glass windows that provide southern light to the main sanctuary. In any case, its designation as a contributing building for landmarks would make these additional floors unlikely.

Not mentioned by the architect, but obvious from observation of the Parsonage is that large and architecturally integral cornices of the landmarked Synagogue actually extend over the Parsonage. See Pet. Ex. O-3. Development of the Parsonage would mean defacing the landmarked Synagogue. Thus, "assigning" the value of air rights over the Parsonage to the separate development, is nothing more than using the landmarking of the Synagogue as a basis for a variance.

73. The assignment of air rights value is effectively assigning FAR from Lot 36 Lot 37, not to increase the FAR on Lot 37, but to obtain waivers for height and setback requirements. But, it is already seen that moving air rights from one part of a zoning lot to another can transfer FAR, but cannot waive height and setback requirements.

74. The BSA attempts in vain to respond to this illogical approach — and was unable to even attempt to rationalize the last point — that the site value is the same whether the Congregation chose to develop as condominiums 1, 2, 3 or 4 floors of the as-of-right building. BSA Answer at ¶295 and Pet. Reply.

75. Tellingly, the BSA Resolution is silent as to all of these facts: it did not mention that use of the site area of the adjoining Parsonage or that the site area was being applied to the two condominiums. By so doing, the BSA disguised the shocking fact that it was engaged in an exercise that in effect involved the transfer of FAR from the Parsonage to Lot 37, where no FAR, as admitted by the BSA,

needs to be transferred, and without then restricting the available air rights for future development over the Parsonage.

The Missing 15-Page Construction Cost Estimate

76. The BSA was arbitrary and capricious in refusing to consider the demonstrated over-allocation of construction costs in the as-of-right schemes, thereby increasing the construction costs for the as-of-right condominiums. Even the analysis suggested by the BSA in its Answer at ¶ 291 (computing base unit costs) shows that overstatement occurred. *See* discussion of Pet. Ex. N-2, below. The overstatement had the effect of reducing the rate of return for the as-of-right scenario. If not for this and other errors, the as-of-right condominium projects would earn a reasonable return. Accordingly, the condominium variances must be annulled, because there is no foundation for the (b) finding.

77. Because the schemes analyze a mixed-use building, the methodology for allocating costs is highly important, it is possible to over-allocate costs to the condominiums and thereby reduce the return. Opposition expert Levine states did in fact occur. *See* Pet. ¶ 138, 139, 188. R-5210, Pet. Ex. F.

78. The BSA did not even collect or analyze the basic information or consider the reasoning behind the cost allocations between community house and as-of-right condominiums. Despite repeated requests by opponents, the BSA refused to require the Congregation to provide the complete construction cost reports for the threshold as-of-right buildings (Scheme A and C) (R-4863-5; R-1968 at R-1996), while at the same time considering complete reports for the less relevant proposed schemes. Pet. at ¶ 25, ¶187. (See complete McQuilken reports at R-4865.)

79. The Scheme A construction reports were not included with the earlier May 13, 2008 report at R-4649, but were included in an even earlier report, establishing that no single Freeman Frazier report supplies the complete as-of-right analysis of Pet. ¶ 131. In a July 8, 2008 report, the Freeman excuse was that "the opposition did not specifically request the entire construction cost estimates for each previous scenario." R-5175.

80. In response, the BSA admits that the BSA did not seek these reports — and the Congregation did not provide the reports — because the BSA did not request the reports (R-4863 at 4865). The BSA asserts that it "did not seek the missing pages because they were immaterial" on the reasoning that the BSA could have analyzed the base unit construction costs:

The BSA, in examining whether construction prices are reasonable, reviews the base unit price (sic-cost), i.e., the construction cost divided by the square footage. Here, since the Congregation submitted the construction cost and the square footage, BSA had the necessary elements to calculate and review the base unit price [R. 1997, 5178-79]. Accordingly, the additional pages were irrelevant because they were not needed for BSA's review.

BSA Answer ¶291. Yet, the BSA provides no evidence at all that the BSA conducted such a computation. Nor is there any narrative in the Record to explain how the Congregation allocated construction costs.

81. In reply to the BSA Answer, Petitioners indeed have compared the base unit construction costs for Scheme A with that for the approved project. Using the last schedule provided by Freeman Frazier on July 8, 2008, the simple computation shows base unit construction costs of \$700 a square foot for the as-of-right condominiums of Scheme A, but only \$485 a square foot for the condominiums of the proposed/approved building. Pet. Ex. N-2. Clearly, the Congregation did exactly what the Petitioners always claimed — over-allocated construction costs to the as-of-right condominiums, so as to manipulate the rate of return.

82. It is proper to draw the inference that the "missing" evidence would have shown that the (b) finding could not be made for the as-of-right schemes. Thus, the Court should annul the condominium variances. There is no need for a remand. This was not an oversight by the Congregation — it deliberately withheld information. The Congregation had the opportunity to supply the information and chose not to do so.

The BSA Written Guidelines As to the §72-21(b) Finding

83. An administrative body cannot ignore without justification its own written regulations, yet the BSA did ignore its instructions as to the §72-21(b) Finding: The BSA accepted an unleveraged return

on investment approach where the Instructions require a leveraged return on equity approach. The BSA accepted an annualized return approach when the Instructions require a total return approach. The BSA accepted unsigned incomplete construction cost estimates (which over-estimated AOR construction costs) where the Instructions require signed and sealed estimates. The BSA failed to require an analysis of a return on investment by the Congregation based upon the original acquisition price/cost for the Lot 37 properties, taking into account the value of use and income derived from the property, as a result of the \$12,346,875 to be "received" by the Congregation for the market value of the property.

84. The Instructions at Item M of the BSA guidelines provide detailed and rational instructions for preparing the reasonable return (aka feasibility) studies. R-4273. Pet. Ex. R. These are BSA's only regulations or guidelines, and they are consistent with both real estate economics and precedent. Pet. ¶¶ 121 and 123.

85. The BSA was unable to provide any explanation for ignoring its own material and rational written instructions. The BSA could only claim that its only written instructions were merely guidelines and are not "absolute requirements," and could be ignored on the whim of the BSA. BSA Answer, ¶ 65. Had the Guidelines been followed, the BSA would have been unable to properly make the required (b) finding for the condominium variances.

BSA Consideration of Z.R. 72-21(b) - Irrelevant Issues

86. The BSA Resolution provides the false impression that extended and deliberate attention was paid to the as-of-right feasibility studies, when in fact the BSA glossed over the as-of-right analysis. The (b) Finding concerns whether a reasonable return can be obtained from an as-of-right building; whether the proposed building yields a reasonable return is a matter for the (e) finding of minimum variance. The BSA Resolution at ¶¶125-148 mixes together the analysis of the two separate findings. BSA Res. ¶127, ¶132, ¶133, ¶134, ¶135, ¶136, and ¶137. The Court should not be misled by the

confusing presentation of the BSA: careful reading shows that the BSA paid little attention to the as-of-right findings, and, importantly, failed to articulate the underlying factual assumptions, such as using a site area of 19,975 square feet to value a site of 5,316 square feet. The BSA findings are just conclusory parroting of the language in the zoning regulation: the BSA omits the factual findings required, obscures the facts and prevents meaningful review.

Even If the Leveraged Return on Equity Approach to Reasonable Return Is Not Used, the As-Of-Right Schemes Still Earn a Reasonable Return to the Congregation

87. The Respondents continue to misrepresent the objections to the report as being only an objection to whether they are a return on investment or a return on equity (required by the BSA Guidelines). Whether the return on investment method is used or the return on equity method specified in the BSA guidelines is used, if the site value correction is made and the construction cost allocations are adjusted and other padding of the analysis removed, both the Scheme A and Scheme C as-of-right schemes show an adequate return to the Congregation. In any event, a return on equity analysis was appropriate, because the BSA failed to provide a condition in the Resolution requiring that Congregation's residential units be marketed only as rental, rather than condominium, units. Thus, for that reason alone, not considering the return on equity was capricious.

Reasonable Return Analysis Is Grounded in the Constitutional Principles of Preventing Takings Without Due Process

88. Petitioners had correctly observed in their Initial Memorandum that the necessity of analyzing whether a property owner could obtain a reasonable return is grounded in whether the zoning regulation amounts to a confiscatory taking. Similarly, the hardship issue is based on the concept that a land use regulation cannot create a taking. Although denying this assertion, the BSA Memorandum of Law is peppered with references to the Constitution and zoning regulation. The point is that the BSA is not free to come up with its own idiosyncratic definitions and applications of the concept of economic return. Zoning appeals boards exist to assure that zoning regulations are constitutional and

that owners are able to use their property and/or to earn a reasonable return. Thus, as discussed elsewhere, the BSA is not free to suggest its own interpretation of constitutional requirements, for example, by allowing a religious property owner to fully meet its programmatic needs in half a building and then claim it cannot earn a reasonable return in the other half.

Under Z.R. §72-21 (b), Where a Religious Non-Profit Seeks to Build Revenue Producing Facilities, It Is Indeed Required to Show the Inability to Earn a Reasonable Return

89. If a religious non-profit seeks a variance to construct revenue-producing facilities such as luxury condominiums, then it must satisfy the reasonable return finding of Z.R. §72-21 (b). Petitioners concur with the position stated by the BSA on this issue. The Congregation's position is directly in opposition to the BSA position.

90. The Congregation disagrees and argues that the language of 72-21(b) provides that no reasonable return finding is required for any variances if the property owner is a religious non-profit organization. As noted accompanying Reply Memorandum of Law, the authorities cited by the Congregation in support of this proposition are inapposite.

91. Petitioners contend that in interpreting the application of Z.R. §72-21(b) where a non-profit organization seeks to develop a mixed-use project requiring variances, the constitutional underpinnings of this provision need to be considered, to avoid an unconstitutional taking by the land use regulation.

As Shown in Cases Cited by the Respondents, Z.R. §72-21 (a) Requires that The Unique Condition Be Physical

92. The BSA seeks to divert the Court's attention by incorrectly describing Z.R. §72-21(a) on Page 18 of its Memorandum by heading its discussion of the issue with "(a) Unique Characteristic" when the statute clearly refers to "unique physical conditions." The primary issue presented by Petitioners is not whether the characteristic is "unique," but whether the condition is "physical." Because there is no evidence at all of any physical condition, then there is no substantial evidence for finding (a) and thus the variances must be annulled. Z.R. §72-21(a) not only requires a "physical condition," it then

describes examples of what it meant by a physical condition: "including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions."

Accordingly, cases that describe other difficulties and hardships when addressing a Z.R. §72-21(a) finding still identify some type of a "physical condition."

93. The Congregation admits that "The building site is a rectangular 64 x 100 foot site just off Central Park West on West 70th Street and constitutes the entirety of Tax Lot 37." Cong. Answer to Pet. ¶ 41. In fact, the construction site consists of the combination of three rectangular brownstone lots, of which there are 117 nearby brownstone lots as shown just in the surrounding area diagram the Congregation filed with its application. R-53. The Congregation intends to build deep into the bedrock with two subbasements, one a banquet hall of 6400 square feet. There simply are no physical conditions at all, unique or otherwise, and certainly none within the definition of Z.R. §72-21(a), which would constitute a hardship or practical difficulty. Were the Respondents to argue that the rectangular lots are a physical condition, they are not unique. Judicial notice should be taken of several townhouses in Manhattan that became "lots" in the last year as a result of destruction by construction accidents or explosions.

94. The New York City cases cited in the Respondent Memoranda indeed are all careful to refer to specific physical conditions to justify the finding under Z.R. §72-21(a). The Respondents cite to a number of cases interpreting zoning statutes that do not include a requirement for a "physical" condition as the hardship and thus are inapposite.

95. See New York State Town Law Section 267-b-2-(b) ("that the alleged hardship relating to the property in question is unique" and (c). See P-180-1. It is regrettable that many courts in BSA zoning cases involving statutory interpretation may not have been advised by the parties of the differences between City and State law. Perhaps the Corporation Counsel believes this is of "no matter"; we

would disagree. Many New York City zoning practitioners are not aware of the differences existing outside their own jurisdiction.

96. Additional cases cited by the Congregation are similarly inapposite as to interpretation of the statutes' use of "physical" as they relate to whether a condition must be unique. It is still clear that the perfectly rectangular shape of townhouse lots is hardly unique in the area. *See Cong. Answer ¶ 31* ("The Congregation denies the allegations in paragraph 31 of the Petition, except admits that Lot 37 is a regularly shaped lot, 64 feet by 100 feet.")

The BSA Failed to Identify Any Evidence in the Record As to Obsolescence — It Is Not Even Clear Which Building Is Obsolete and How It Creates a Hardship Arising out of the Zoning Resolution

97. The Respondents expend a great deal of energy in trying to explain that a physical condition can include a physical condition of a building, apparently conceding that a "physical" condition is required under §72-21(a). It seems perhaps that the physical building condition upon which the Respondents rely is "obsolescence." However, there is scant discussion of what is "obsolete" — is the Respondent claiming that the Synagogue is obsolete or the existing community house is obsolete? The Respondents can point to nothing evidentiary as to either, except possibly to a 54-year-old elevator that requires replacement. Nor is there any explanation as to the causation — how the so-called physical obsolescence (*i.e.*, physical condition) creates a hardship "arising out of" the strict enforcement of the zoning resolution.

98. BSA Staff, in its June 15, 2007, R-255, focused on the issue of "causation" and requested:

14. Page 20: Within the first paragraph, one of the elements of the suggested "(a) finding," is "...the dimensions of the zoning lot that preclude the development of floor plans for community facility space required to meet CSI's ...programmatic needs." Please specifically explain in what way the site's "dimensions" hamper CSI's programmatic needs.

No response was provided by the Congregation. The Congregation claims at R-309 that it responded at R-338-39. The response consists of a barrage of conclusory verbiage from counsel for the Congregation, with no evidentiary support.

99. If it is the community house that is "obsolete," then an as-of-right building resolves any obsolescence, but, again, it is not clear upon what particular facts in the Record the Respondents rely. If the Synagogue is "obsolete," again an as-of-right building resolves the issues of egress and circulation. So, the hardship does not "arise out of" the strict application of the zoning regulation.

Obsolescence Is Not an Appropriate Factor in a Bulk Variance Case for a New Building

100. Similarly, the assertion that the existing building that occupies two-thirds of the frontage of the lot is somehow obsolete to a depth of 60 feet is not a basis for the Z.R. §72-21(a) finding because there is no showing that the variances in any way relate to the conditions — there is no showing of "arising from." There is no showing of any difficulty or excess cost in demolishing the existing community house — to the contrary. There is no evidence that the existing building is obsolete — there are only assertions of ultimate fact. This relatively small 4-floor existing building is being rented partially to Beit Rabban for \$500,000 year. The building is no more obsolete than any other brownstone on the block. Nothing is cited in the record. Further, with the cooperation of the BSA, the opposition expert architect was unable to visit the interior of the existing community house (requested over 5 months prior to the close of the hearing), and it was an abuse of discretion for the BSA to consider unspecified claims of obsolescence while not instructing the Congregation to provide access to the building to the opposition's expert. R-3825, R-3877, R-3906, P-166. Without specifying any facts as to the claimed obsolescence, it is not possible to ascertain the relationship between the hardship claimed and the variance - the arising from requirement. [On the return of the Petition — the City failed to fill in the record as to facts Commissioners' may have obtained from their inspection — thus, presumptively, there are no such facts as to the Commissioners' inspections that may be used to support the findings.]

101. Where a new building is to be constructed, and the obsolete building is to be demolished, and where an as-of-right building resolves all hardships associated with the alleged obsolescence, then there is a failure of the causation arising from requirement in §72-21(a). The BSA cites to 97

Columbia Heights contending on page 19 "reinstating a variance and finding that the uniqueness requirement was satisfied by the demolition of a building, resulting in increased costs." There is no showing here of any special increased costs in dollars and cents. The demolition costs are minimal. Were the BSA's view to be accepted, then any building which an owners wishes to replace with a variance requiring structure can be described as obsolete and then a finding (a) obtained to build a larger building, even though an as-of-right building responds to the hardships which the applicant asserted were caused by the obsolescence.

102. Some argue that obsolescence could be an appropriate factor in a case where a building may be too expensive to modify or demolish - but no such evidence exists here, and the "arising from" condition would still be need to be satisfied. The existing community house can be demolished for a nominal amount based upon the construction cost estimates provided by the Congregation. The total hard construction cost of the as-of-right Scheme A building is estimated to be \$19 million, of which only \$100,000 is for demolition. R-4873. Under the BSA logic, almost any building that someone wishes to replace could satisfy finding (a), rendering the requirement of physical condition to be meaningless. The citations by the BSA to non-New York City cases as interpreting whether obsolescence can be a physical condition under New York City Z.R. §72-21(a) are irrelevant.

103. In Homes for Homeless, Inc. v. Bd. of Standards and Appeals, 24 A.D.3d 340 (1st Dep't 2005), *rev'd*, 7 N.Y.3d 822 (2006), the BSA stated in its appellate brief (Brief Available on WestLaw):

The record reflects substantial evidence supporting the BSA's finding that the site does not have unique physical conditions that create an unnecessary hardship, or practical difficulties that require an expansion of the existing use. The Court of Appeals has determined that for entitlement to a variance, a petitioner generally "must show that as a practical matter he cannot utilize his property or a structure located thereon 'without coming into conflict with certain restrictions of the [zoning] ordinance.'"

Not of "No-Moment" - the Causation Requirement of Z.R. §72-21(a)

104. The BSA has ignored the causation "arising out of" requirement in making its hardship findings under §72-21(a). Astonishingly, as to the access and circulation hardship, the BSA states that it is irrelevant that an as-of-right building resolves the hardship; it is of "no-moment."

105. One of the "hard spots" for the BSA (R-1749) was to find a "physical condition" to support the (a) finding or to find a hardship or difficulty or programmatic need, hopefully physical in nature, to shoehorn into the (a) finding. The Congregation settled on the programmatic need of physical access and circulation to and from and within the Synagogue Sanctuary building. See extensive detailed factual averments at Pet. 242 *et seq.*, and the overbroad denials by Respondents. Access and circulation were so important that the Congregation drummed in the issue over and over again in its multiple submissions of its 50-page statement in support, sometimes mentioning the issue 30 times in a single document. The "hardship" had all the elements of drama, including a landmarked sacred site and handicapped and aged people too embarrassed to attend religious services. If the flag could have been used, it would have been. Unfortunately, the facts do not support the claim. An as-of-right building resolves the problems. (The Congregation never even identified a single fact that it could not replace its 55-year-old elevator without erecting a new building.)

106. The Congregation responded in its brief by asserting a scintilla standard, without showing the scintilla. The BSA, realizing that the Petitioners were overwhelming correct on this issue, abruptly announced that this was of "no-moment," something the BSA did not have the gall to assert in its Resolution, so ridiculous is the proposition.

107. Ignoring Z.R. §72-21 and the very purpose of zoning variances, the BSA astonishingly and incorrectly asserts that a variance may be granted even if there are no supporting hardships arising from the strict application of the zoning regulation:

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

BSA Answer at ¶ 247. BSA Memorandum of Law at page 25, with no further explanation. This is an extraordinary proposition: that the BSA would grant a variance to a religious institution asserting a hardship, when the religious institution does not need the variance to resolve the hardship.

108. The record has no substantive evidence as to any "excessive additional costs." One of the questions the BSA never would ask is the cost to the Congregation of replacing the 1954 elevator with a modern elevator. It is as if a \$35 million building must be built to replace a \$100,000 elevator.

109. The BSA was responding to the Petitioners' still unrefuted assertions that the claimed access and circulation hardship of the Congregation would be resolved by an as-of-right building without the need for any variances. Pet. ¶ 247-261. Accordingly, the BSA was not authorized by the zoning resolution to grant a variance based on that hardship.

110. The BSA's position is a fundamental error of law. Any reading of §72-21 and variance law shows that the purpose of variances is to relieve property owners from unreasonable hardships created by the zoning law. Z.R. §72-21(a) is clear in stating that there must be a finding that "practical difficulties or unnecessary hardship arise in complying strictly with the use of bulk provisions of the Resolution."

111. It is clear that if a hardship can be resolved in an as-of-right building with no variances, then it is not a hardship that "arise[s] in complying" with the Resolution.

112. Similarly, Z.R. §72-21(e) makes the purpose of variances more explicit: "(e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief." In other words, the purpose of the variance is to relieve the property owner from a hardship. If the owner can be relieved of the hardship without a variance, then the minimum variance under §72-21(e) is no variance.

113. The BSA incorrectly states that the "arise in complying strictly" and "minimum variance" requirements are not applicable to a variance application by a religious organization. Were the BSA to be correct, there would then be no need for the BSA and hearings when a religious organization applied for a variance.

114. In this proceeding, however, the BSA used the access and circulation hardship to justify the need for a variance for the revenue-generating condominiums, which is clearly outside the argument that the BSA must defer to assertions of fact by religious organizations that are inconsistent with rationality and the real world.

115. If the BSA now states that it is of "no moment" that an as-of-right building resolves the access and circulation hardships, then it needs to explain why the difficulty was mentioned in the decision, why it is included as a programmatic need, and why the BSA did not require the Congregation to remove from its statement in support the repeated references to access and circulation hardships, as the BSA did when it had asked the Congregation to remove the assertion that revenue generation from the condominiums was a legally cognizable basis for the variances.

No Scintilla of Evidence - Access and Circulation Issues

116. The Congregation suggests the scintilla standard, to support its central argument, that only variances would remedy asserted hardships of access and circulation; for the access and circulation finding, the BSA and the Congregation cite not to facts in the record, but only to the BSA references to "representations" by the Congregation and to "indications." Cong. Memo at 12. BSA Res. §60, §72, §73. Indications and representations are not facts. The BSA has not cited to any facts to support the findings based upon "representations."

117. Similarly, the BSA states in its Memorandum at 20:

Moreover, the Congregation represented that the proposed building will provide new horizontal and vertical circulation systems to provide barrier-free access to the Synagogue's sanctuaries and ancillary facilities [R. 5 (¶ 73)].⁸ The BSA, citing to case law, rationally found that the Congregation's programmatic needs constituted an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations" [R. 5 (¶ 64) ...

(See also Congregation Memorandum at 12 "The BSA's reliance on materials indicating that such alternatives would not be workable clearly satisfies the more-than-a-scintilla 'substantial evidence' test" without identifying the scintilla).

118. Clearly the BSA was unable to find any evidentiary facts to support this proposition, since the BSA Resolution could point only to that which "the Congregation represented." Second, the BSA even there sailed right through the causation requirement in §72-21(a). Although the Congregation asserted that the proposed building will provide these systems to make the facilities barrier free, it did not assert that an as-of-right building would NOT do the same thing. Of course, since opponents raised this issue repeatedly, when the BSA made its so-called findings, it was cleverly trying to distort its way around the requirement of causation (while, at the same time illustrating a lack of impartiality by the BSA). For example, see June 20, 2007 Community Objection #30, R-269 (Pet. Ex. E) and references cited in Pet. at ¶¶ 109 *et seq.*

119. The Respondents must identify facts in the record, not conclusory findings by the BSA and not assertions of counsel inconsistent with physical reality and the opinions of the Congregation's own experts, and certainly not to "indications."

120. After scrutinizing the record for months, the Respondents simply have been unable to identify any evidence (even a scintilla) to support the assertion that variances are required to resolve an asserted religious programmatic hardship for access and circulation to its Sanctuary. The existence of a hardship is not a sufficient basis to obtain a variance. What is necessary is that a variance must be granted in order to resolve the hardship.

121. The Congregation described this asserted hardship as central to its variance application and the Respondent relied upon this hardship to find programmatic needs to support the community house and condominium variances. *See* Congregation June 17, 2008 Letter, R-4859 at R-4860 ("significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application."). *See* Pet. Ex. P-1 reproducing R-4860.

122. The Respondents rely upon the asserted access and circulation hardship to underpin all of the variances. First, the Respondents claimed that these access hardships were "physical" in nature and

supported the Z.R. §72-21(a) requirement for a "unique physical condition." Next the Respondents used this hardship to assert that there was "obsolescence" that satisfied the physical condition requirement. Then the Respondents claimed that resolving these access hardships were programmatic needs. Finally, the BSA in its decision used "programmatic needs" as a hardship to support, not just the lower floor religious community house variances, but also the upper floor luxury condominium spaces, which account for 90% of the variances.

123. The BSA, notwithstanding, did use religious programmatic need as a basis for its (a) and (e) finding for the revenue-generating programmatic needs. BSA Res. ¶122, ¶214 and ¶215, and, even the Congregation cannot explain what the BSA had in mind. Cong. Mem. at 13.

124. Yet the Respondents have not been able to identify any evidence in the record to support the claim that variances are needed to resolve this alleged hardship. There is a simple fact that frustrates the Congregation and the BSA in supporting their false assertion. The Zoning Resolution, as a generous accommodation to religious organizations, permits without any variances at all, an as-of-right community building to occupy not 70% but 100% of the entire lot up to 23 feet above street level. For the Congregation, all circulation and access issues are addressed on the first floor, except for a 100 square foot elevator shaft that is in the as-of-right part of the proposed building. It is for this reason that the distinguished architect for the Congregation was unwilling to misrepresent to the BSA that variances were needed to resolve access and circulation issues.

125. The Congregation's architect, in a specific statement in response to contentions by opponents on this specific issue, agreed that no variances were required to meet this programmatic need. The BSA and Congregation did not deign to discuss this probative and conclusive admission by its own expert.

126. In summary, analysis of the circumstances surrounding the false assertions by the BSA and the Congregation as to access and circulation are illustrative of the arbitrary and capricious and irrational conduct of the BSA in the BSA proceeding and its response to the Petition.

- A 6500-page record and 18 months of hearings do not establish that matters were considered by the BSA or found in the record.
- Representations and indications are not facts.
- The BSA accepting facts that conflict with reality is irrational.
- The BSA capriciously shaped the record by being careful not to ask the Congregation expert to explain the claimed relationship between the access and circulation and the variances.
- There must be a causal relationship between an alleged hardship such as access and circulation and the variances sought.

The Proper Remedy for a Property Owner Seeking Relief from Hardships Created by the Landmark Law Is Under Z.R. §74-711: The BSA Has No Role in Providing Relief to Landmarking

127. The BSA improperly used landmarking as a unique physical condition hardship to satisfy Z.R. §72-21(a). Not only is the alleged hardship resulting from landmarking not a physical condition under Z.R. §72-21(a), but Respondents were unable to show how this hardship, especially as to the revenue-generating condominiums, arises out of the strict application of the zoning regulations as required in Z.R. §72-21(a). Thus, the variances as to the condominiums must be annulled for that reason, but another reason is that the BSA is not authorized to consider the hardship of landmarking.

128. The landmarking hardship alleged by the Respondents arises, not out of the strict application of the zoning regulations, but out of the regulation of the New York City landmark laws, which apply generally to the West Side blocks surrounding the Synagogue. The Zoning Regulation clearly removes the BSA from any role in deciding when a hardship from landmarking requires relief. The LPC has a role and the City Planning Commission has a role, but the BSA has absolutely no role.

129. BSA knew that what it was being asked to do, taking into account that the landmark status was improper — this was the "hard place" the Respondent Chair referred to at the first hearing:

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

R-1749. The Congregation acknowledges that the LPC would not provide 74-711 relief to the Congregation, in its letter of June 17, 2008, R-4859 at R-4861: "Its request for Landmarks cooperation on a ZRCNY Sec. 74-711 special permit was denied, thus properly bringing this Application to the Board for relief." Of course, there is nothing at all proper about asking the BSA to do what the LPC would not do under §74-711, when the BSA has no authority under such provision.

130. The Congregation describes its decision to withdraw its §74-711 request at page 15 of its July 9, 2008, its last version of its Statement in Support (R-5129-5128) and outrageously claimed that having been turned down by the LPC for a §74-711 special permit, that the LPC "signaled" that its issuance of a Certificate of Appropriateness (COA) for a smaller building would meet the preservation purposes required. But, if this were so, first of all the LPC would indeed have approved a special permit under §74-711 - and it did not do so. All the LPC said in effect was - "here is your COA - go to the BSA and see if you meet their other standards, because we are not giving you a special permit." The Congregation claimed that "that CSI took every available step to seek the administrative relief provided in the Zoning Resolution for seeking a special permit to modify the bulk regulations for which this variance Application now seeks waivers, thereby exhausting its administrative remedies prior to the filing of this Application." Of course, that is false - the Congregation did not take the "available step" of applying for the special permit.

131. The BSA Memorandum at 55 acknowledges that the BSA took the landmark status of the Synagogue into account in both the 90% upper floor condominium variances and the 10% lower floor community house variances.

The Record before the BSA demonstrated that the hardship in developing the Zoning Lot with a complying building was not created by the Congregation, but originated from the landmarking of the Synagogue and the 1984 rezoning of the site.

Z.R. §74-711 is the exclusive remedy for a party to seek relief from a hardship created by the landmarking of the property. There is nothing in Z.R. §72-21 to suggest that landmarking is a "unique physical condition" under §72-21(a) or a hardship recognized thereunder. Z.R. §74-711 provides in part:

Landmark preservation in all districts

In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by the Landmarks Preservation Commission, the City Planning Commission may permit modification of the use and bulk regulations, except floor area ratio regulations.

132. Allowing a property owner to use landmarking as a hardship constituting a unique physical condition under §72-21 (a) not only flies in the face of the language of Z.R. §72-21 (a) but also renders Z.R. §74-711 meaningless.

133. The Congregation played the same double game with the landmark "hardship" as it did with the "access and accessibility" issue and the "money is needed for programmatic needs" issue. It peppered its submissions with references to these issues, hoping to influence the BSA incorrectly, but then claims that the issue was just provided for context and in passing.

134. The Congregation, knowing that Z.R. §74-711 is the exclusive remedy for landmark hardships, states at page 12-12 of its Congregation Memorandum at 12-13: "In any event, the Resolution does not suggest that the BSA, here, treated the landmarked status of the synagogue as a hardship."

135. But the Congregation is incorrect. The BSA did improperly take the landmark hardship into account in making the (a) finding. The problem with the BSA position is that whenever the LPC landmarks a district or building, then the BSA arrogates to itself the right to grant variances and otherwise ignore the requirements of §72-21(a).

136. Finally, the BSA fails completely to identify any facts that illustrated why the landmark status of the Synagogue or even the landmark status of the entire West Side district prevents the

Congregation from developing the construction site. The BSA's logic merely is "the Synagogue was landmarked so it creates a hardship in developing the development site." Or is the Congregation claiming that it is the application of the landmarks laws on the development site that creates the hardship? The record is silent. Where is the explanation for this logic? How do the variances relate to this hardship? Where is the causation? How do the variances provide relief from the hardship?

Landmarks Law Prevents the Congregation From Building a 17-Foot Wide Tower and the BSA May Not Grant Relief From This Hardship

137. The split lot is a physical condition, according to Respondents, because the sliver law limitations of Z.R. §23-692 allegedly prevent the construction of a narrow 17-foot tower in the R10A portion of Lot 37. See BSA Res. ¶94. Yet, it is the limitations of the landmarking law that prevent the construction of a sliver tower on Lot 37, not the sliver law, and not a result of the split zoning.

Landmarks Preservation Commission made it clear that the maximum height it would allow on any part of Lot 37 was 95 feet in the R10A part of Lot 37. Alleged hardships imposed by application of the landmarks laws are not hardships caused by a physical condition, and, even if they are, they are not hardships for which relief may be provided under Z.R. §72-21(a). For the reasons discussed elsewhere, hardships resulting from the landmark laws are not the basis for a variance under §72-21. The Congregation's Architect, in a letter to the BSA dated March 28, 2008, stated that Section 23-692 is not applicable. R-4332, ¶ 2. This suggests perhaps that the sliver building is a ruse seized upon by the Congregation and the BSA to help contrive the split lot hardship claim.

138. Lot 37 is 64 feet wide; the east portion of the 17 feet is in an R10A district, which permits building to the height of 185 feet. See Resolution ¶93. The R10A portion of the lot is the least restrictive portion of the lot. The rest of Lot 37 is in the more restrictive R8B district, which applies the contextual zoning limit of 75 feet. Under circumstances not applicable here, Z.R. §73-52 (see Resolution at ¶98) and Z.R. §77-00 provide relief from the split lot condition.

139. The Congregation is unable to satisfy the requirements of these provisions, but the BSA ignores this limitation. Both provisions restrict relief to where 50% or more of the lot is less restrictive; here the R10A portion is far less than 50% of the lot. More importantly, however, is that for bulk variances, Z.R. §77-00's only relief is to realize the transfer of air rights from one part of the lot to another; it does not provide relief from height and setback requirements. This is one reason that Petitioners have stressed that this case does not involve the transfer of air rights. The Respondents do not disagree. Without such transfer, then, most of the BSA discussion in the resolution as to split lots as a hardship is irrelevant.

140. Although there is no need for the transfer of air rights from one part of the lot to another in this application, the BSA then states disingenuously in its decision:

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

Not only it there no need to "transfer a small share of its zoning lot area," but the dominant constraint here is the landmark restriction, not just the contextual zoning and the sliver law, so what the board is doing here is considering landmarking as the hardship for which relief is being granted and, most importantly, relying upon a hardship not arising out of the strict application of the zoning laws. Since there is no need to transfer zoning lot area in this matter, then there is no "arising from" as it relates to this claimed hardship.

The Eighth DOB Objection Requiring a 40-Foot Separation Between Upper Floors and the Synagogue Lot Prevents a Tall Building on the R10A 17-Foot Sliver

141. Another constraint against a tall building on the 17-foot wide R10A sliver that was ignored by the Board is Z.R. §23-711, which requires that there be a 40-foot separation between a residential building on a lot on the upper floors. With the initial application, the DOB had required a variance for this 40-foot separation, and the drawings submitted by the Congregation to the DOB and BSA "40 foot standard minimum distance between building" objection. The BSA staff agreed with the DOB and

asked why the separation was not shown on the as-of-right drawings. *See* Pet. N. 13 to ¶ 97. The Congregation's architect agreed with the DOB as well. There was no indication at all that the DOB mistakenly applied Z.R. §23-711.

142. The BSA staff, in its first notice of objection of June 15, 2007, R-253 at R-256, specifically pointed out the need to meet this requirement:

21. Page 24: Please note that ZR § 23-711 prescribes a required minimum distance between a residential building and any other building on the same zoning lot. Therefore, within the first full paragraph, please clarify that the DOB objection for ZR § 23-711 is due to the lack of distance between the residential portion of the new building and the existing community facility building to remain.

25. It appears that the "as-of-right" scenario would still require a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings) given that it contains residential use (see Objection # 21). Please clarify.

143. An opposition expert with extensive planning experience, Simon Bertrang, provided a cogent explanation of Z.R. §23-711 in a letter dated June 28, 2007, R-279 at R-281:

BUILDING SEPARATION AND AS-OF-RIGHT DRAWINGS: ZR §23-711 requires a minimum distance between a residential building and any other building on the same zoning lot — in this case, with both buildings over 50' tall and with blank wall facing blank wall, the minimum distance is 40'. The As-of-Right drawings submitted by CSI in support of their BSA application are not as-of-right since the new building shown there would need a variance. Since As-of-Right drawings are a required part of any BSA submission, CSI's application is currently incomplete. A truly as-of-right building would either show the separation (40' minimum distance) or not include residential so that such a minimum distance was no longer required (a new community facility building would not trigger the requirement). Another way of avoiding the need for a 40' separation between the residential building on Lot 37 and the synagogue on Lot 36 would be to continue to treat them as separate zoning lots (i.e. not combine them in the way that CSI is proposing). Of course, as stated above, this would mean that their as-of-right FAR would be much lower: 5.59 instead of 8.36.

144. The Eighth Objection from DOB created a problem for the BSA — if the zoning resolution required a 40-foot separation in the upper floors, then the entire argument claiming that a split lot was a physical condition under 72-21(a) would not be a valid argument for the simple reason that even if all

of Lot 37 was in the 10A zone, the Congregation still could not build a tall structure on the eastern 40 feet of the 64-foot wide lot.

145. The DOB eighth objection was curiously and mysteriously removed in August 2007, without any changes to plans and without any explanation or curiosity on the part of the BSA. The BSA Statement of Facts at ¶ 205 asserts that:

"After revisions to the application by the Congregation, the Manhattan Borough Commissioner issued a second determination on the Congregation's application which eliminated one of the prior objections."

and again claims, incorrectly, at N. 7 to ¶ 230:

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

146. However, there were no such revisions to the plans, and the Congregation's "direct[ing] the Court to the record" is not at all helpful in identifying that which is non-existent. In light of these denials and factual distortions, Petitioners in reply provide herewith a composite showing that there were no changes in the drawings between April 2007 and August 2007. Pet. Ex. N-8.

The 40 foot separation objection was presented at the improper November 8, 2006 ex parte meeting, and based upon the check mark next to the relevant item 20, appears to have been discussed. Pet. Ex. Q-1, P-4261.

147. The fact is that the DOB initially required the separation and the BSA staff agreed, but then the Congregation and BSA needed to conjure up a physical condition. So without any discernible changes in drawings and with no explanation, the Congregation was able to refile the same building and have the DOB remove the eighth objection, and the BSA asked no questions. These machinations allowed the Congregation to contrive the split lot as a physical condition — if the eighth objection were still in effect, the split lot argument would have been even more baseless. It is also curious, to say the least,

that the BSA in any proceeding would observe that an applicant was violating a provision of the zoning resolution not in the DOB objection, and be silent.

The Board's Findings Under Z.R. §72-21(c) and §72-21(e) as to the Blocked Windows

148. Petitioner Lepow owns two apartments in the adjoining 18 West, which apartments have windows that would be blocked by the proposed building, but would not be blocked by an as-of-right building; thus, variances blocking the window run afoul of Z.R. §72-21(c), as is fully described in the Petition. Pet. at ¶¶ 8, 262-288. The BSA action as to the windows violated Z.R. §72-21(e) as well.

By Instructing the Congregation to Create a Courtyard to Relieve the Adverse Impact Upon Adjoining Property Owners with Lot Line Windows, the BSA Implicitly Invoked Z.R. §72-21(c)

149. The BSA instructed the Congregation to modify its building to create a courtyard in the rear to accommodate the rear side lot line windows in 18 West 70th Street, but acted arbitrarily and capriciously by not so instructing the Congregation to create a courtyard to accommodate the front side lot line windows. According to the Resolution and the BSA Answer at ¶319, the waivers of variance law to the Congregation resulting in the blocking of the lot line windows did not impair the appropriate use of the 18 West 70th Street cooperative apartment owners under Z.R. §72-21(c). The setback requirements in the zoning regulations would have protected these windows. The BSA dismissed the impairment of these cooperative apartments as being of "no moment."

150. The BSA provides no explanation of the distinction drawn between the nearly identical front and rear cooperative apartment. Even so, despite the BSA's "no moment" statement of dismissal of the concerns of the cooperative owners, BSA did in fact realize that there was an impairment under Z.R. §72-21(c). This section requires a BSA finding that the variance, if granted "will not substantially impair the use ... of adjacent property."

151. The BSA falsely claims (BSA Answer ¶ 18) that Petitioners or other opponents asserted that the windows were legally required or that it had a legal right to not have the windows blocked under

the building code or under general property rights and can provide no statement in the record that such assertion was ever made by other opponents.

152. Obviously, the BSA did recognize the impairment, otherwise it was acting upon an arbitrary whim in instructing the Congregation to create the rear courtyard. The BSA just does not have the power to order applicants to modify buildings on a whim. Zwitzer v. Zoning Board of Appeals of the Town of Canandaigua, 74 N.Y.2d 756 (1989).

153. This was a "compromise," but if the cooperative owners had no claim, then what was being "compromised"? BSA Answer at ¶319. Certainly, it was a compromise that in no way benefits owners of the front apartments.

A Front Courtyard Not Blocking the Front Windows Would Have Still Permitted the Congregation to Earn a Reasonable Return — Z.R. §72-21(e) — the Minimum Variance

154. Ultimately, waiving the setback regulation in the front increases income to the Congregation, and thereby reduces the financial burdens borne by members of the Congregation - and the BSA should have expressly balanced the equities, but did not do so, especially where the proposed building so exceed a reasonable return to the Congregation. The BSA did not even make the required specific finding as to the front setback variance which results in the blocking of the windows - and improperly lumped all the condominium variances into one finding.

155. The BSA Answer at ¶292 crystallizes the fact that the rate of return approved by the BSA was nearly 11%, but that this is in excess of the return that the Congregation acknowledges as sufficient. The BSA's failure to require a courtyard for these windows was also in violation of Z.R. §72-21(e) which provides that a variance must be the minimum variance,, since the proposed/approved building earned a rate or return far in excess of the adequate reasonable return of 6.55%, and indeed was 67% in excess of the rate of return (6.55%) the Congregation itself deemed to be adequate. R-140, R-287.

Satisfaction of CEQR and SEQR Is Not Sufficient - Must Satisfy Z.R. §72-21(c) and Act Consistently With the Purposes of the Zoning Regulation

156. The Answers of the Respondents, as well as the BSA Resolution at ¶¶ 194-201, focus almost exclusively, when considering the impact on light and air, upon the provisions of CEQR and SEQR. See BSA Answer at ¶320. Yet, a project could satisfy SEQR and CEQR, but still not satisfy Z.R. §72-21(c). Oddly, Respondents focus on issues never raised by opponents (such as shadows in Central Park) and on issues not raised in the Petition. BSA Memorandum, p. 8-10, 11-13, 40, 48, 53-54. It almost as if the Respondents are responding to another petition in another matter. *See* Pet. ¶ 54.

157. When the Congregation filed its application, it provided no shadow studies. Opponents requested street level shadow studies of West 70th Street; the BSA responded with a non-issue, a request for shadow studies of Central Park (R-198-208), resulting in more community objections. When the BSA did ask for a West 70th Street shadow study, it requested minimalist studies of no value in evaluating the impact in the real world. The street shadow studies were not conducted over a period of a year, but were supplied a year after the variance application was filed. BSA Answer ¶322.

158. The BSA findings at BSA Res. ¶ 197 and ¶200 are wholly conclusory, and in conflict with reality. In its Answer at ¶ 320, the BSA states that "BSA properly considered and rejected the Opposition's assertion that the proposed building will cast shadows on the midblock of West 70th Street [R. 12 (¶ 194)]." The photographs (for example, those at Pet. Ex. L and R-1831-1850) and even the AKRF shadow study show this is not true at all, for they show sun where the studies show shadows.. There also seemed to be a belief that existing shadows from the tall building at 91 West Central Park West were already casting the street into the dark, but the photographs show that this is not the case.

159. It is incumbent upon the BSA to respect the purposes of the zoning regulations: the mid-block contextual zoning regulations establish height and setback requirements to allow light and air into the

narrow streets. Further, satisfaction of CEQR and SEQR requirements in no way means that Z.R §72-21(c) has been satisfied, or that the purposes of the particular zoning regulation are honored.

160. Dr. Elliot Sclar of Columbia University, who helped draft and implement the studies and reports underlying contextual zoning in 1984, submitted a letter in opposition to the Congregation project. Although the purpose of contextual zoning are self-evident from the parameters of the specific height and setback limitations, Dr. Sclar stated that:

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

Letter of Dr. Elliot Sclar, February 12, 2008. R-3762 at 3763.

161. The proposed tower building will have a substantial detrimental impact on the character of West 70th Street and will be detrimental to the public welfare as a consequence of, among other things, the shadows that would be cast upon the mid-blocks by the tower building, and thus runs afoul of Z.R §72-21(c). The impact of shadows from the proposed building on the narrow mid-block streets would be substantial, especially in the winter months, when the sun is low in the sky. At that time, even adding a mere 10 feet to a building height can have a substantial impact. Sunlight in the winter is known to have health and psychological benefits. And sunlight provides heat energy, lowering winter heating costs. What is not of consequence — of "no matter" — to the BSA is of great consequence to Mr. Kettaneh, who owns a historic brownstone across the street from the proposed tower, and to the many members of the community and the public who enjoy historic West 70th Street. Clearly, City residents who live close to the project nearly uniformly oppose the project. The Congregation could only muster 3 or 4 residents in the 400-foot zone to file statements in support of the project. Pet. Ex. K.

162. In analyzing the impacts described in §72-21(c), the BSA is obligated to consider the impact that the zoning regulation sought to protect, and, further, to utilize a methodology that reveals rather than conceals the impact that contextual zoning seeks to protect. Because of the scale of the studies and the absence of street-level analysis, it is simply not possible to use the Congregation studies to

evaluate the street-level impact of shadows. With the availability and wide if not universal use of three-dimensional computer software, there can be no excuse for not considering the impact from a vantage point high in the sky and for limited periods.

163. After the filing of this case, Petitioners had the first opportunity subsequent to the consultant's report to take further photographs in late December 2008 of existing conditions.

164. The BSA, in its misplaced reliance upon CEQR and SEQR, its misunderstanding of its obligations under 72-21(c), its rejection of any consideration of the purposes of the zoning regulation in question, its failure to require meaningful studies for analysis, and then its own reliance upon meaningless studies and the conclusory statements of a paid consultant for the applicant, was in violation of law, was arbitrary and capricious, and was without support in the record in making the finding under Z.R. §72-21(c).

As to 10-Foot Rear Yard Variances for the Second, Third, and Fourth Floors of the Community House, Respondents in Their Answers Were Unable to Show the Programmatic Needs Could Not Be Addressed Elsewhere in an As-of-Right Building

165. Before the BSA considered whether to provide variances to the Congregation for rear yard variance on the second, third, and fourth floors, under the minimum variance requirement of §72-21(e) — as well as the "arising from" requirement of §72-21(a), the BSA should have considered whether the uses could be accommodated on floors five and six of the as-of-right building, where the Congregation wished to have condominiums.

The Caretaker's Apartment and the Adult Classroom Can Be Accommodated on the Fifth Floor of an As-of-Right Building — And Thus There Is No Support for Finding (a) and (e) for the Fourth Floor Variance

166. Respondents could not cite evidence as to why the caretaker's apartment on the fourth floor could not be moved from the fourth floor to the fifth floor. *See* Answers to Pet. ¶ 307, 330. The BSA's conclusory findings lacked any evidence to support findings under (a) or (e). Respondents could only repeat the assertion that the apartment needed to be in the community house rather than the parsonage

(currently rented as a private residence), rather than explain why it could not be on the fifth floor.

BSA Mem. at p. 20, Answer at ¶ 236. *See also*, Congregation Mem. at p. 19. The BSA provided the fourth floor variance to the Congregation for the simple reason of supporting income generation, not programmatic need. The BSA did not impose a condition that the caretaker's apartment must be used for the caretaker. There is nothing in the conditions to the BSA Resolution that would prevent the Congregation from renting this apartment at market rates, in the same way that it has rented the Parsonage at a monthly rent of close to \$20,000.

The Rationale for Second Floor Variances Was Contrived — Even the Last Statement in Support Shows That the Congregation Intends Offices on That Floor

167. The Respondents were unable to cite to any evidence that disputed the assertions in Petition ¶307 that the 60-student toddler program need was a contrivance. From 2001 to December 2007, no plans showed an all-toddler program on this floor. Until late in the game, the 10-foot waiver in the back was always shown to provide larger offices, not to accommodate "toddlers." See Pet. Ex. S, the drawings shown to the Chair and Vice Chair at the November 8, 2006 improper ex parte meeting, which show no reference at all to toddlers on the second floor - only offices and meeting rooms. R-4275-4277. The Congregation's statement of July 8, 2008 is unambiguous: the second floor is for 1,473 sq. ft. of offices, not toddler classrooms. See 4th column, 6th row of table at R-5114 at R-5144.

168. Without specific citation, the Congregation in its Memorandum asserts that "The record confirms that the Congregation described the toddler program to the BSA during the first BSA hearing." The transcript belies this assertion — there is passing testimony to a very small toddler program, which the Congregation wished to expand from 2 to 5 mornings. R-1741, line 332. The 60-toddler "need" was contrived later — 50 toddlers would not justify a variance, but 60 would. *See* Pet. ¶¶331-332. The BSA Resolution does not require the Congregation to use the space for the contrived toddler programs.

Respondents Failed to Provide Any Citations to Evidence As to the Need for the Third Floor Variances

169. Respondents were unable to cite to a pressing programmatic need for the third floor 10-foot rear yard variance. The Congregation claims that the floor is designed to accommodate larger classrooms, but these are easily accommodated on the fifth or sixth floors of the as-of-right building. Respondents are as well unable to respond to the point that, were it not for the common areas on that floor allocated for residential use, the floor plates would be larger to accommodate larger classrooms. Even though a religious entity, the Congregation cannot expect to have the ideal, especially when the ideal is so obviously based upon contrivance and conclusory use of code words, such a floor plates.

The Standard of Review

170. Z.R. §72-21 is clear; a BSA resolution must have "a rational basis and is supported by substantial evidence in the record." Rational basis and substantial evidence are not direct equivalents. Substantial evidence is not a minimal standard, requiring merely some evidence or a scintilla of evidence. And ultimate facts are not evidence at all. BSA findings that merely parrot assertions of the Congregation, themselves based on conclusory statements of counsel, do not constitute substantial evidence absent any actual evidence.¹¹ Nor are citations to the BSA Resolution substantial evidence, or any evidence. A review of the Respondents' Answers show that most "fact" citations are to the BSA Resolution.

171. Yet, on the basis of repetition of assertions unsupported by ANY evidence, the Respondents seem to maintain that the role of the Court in reviewing a BSA variance determination can be nothing more than to rubber stamp the BSA, to be the proverbial potted plant. Their contention is that no review is the "standard of review," even in the many instances in this matter where the BSA cannot

¹¹ The BSA cites to a Court of Appeals case that mandates that proof that a property may not earn a reasonable return must be shown "beyond a reasonable doubt," a standard not met here. See, Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267 (2d Dep't 1983), discussed *supra*. See also, Spears v. Berle, 48 N.Y.2d 254, 263 (N.Y. 1979) *supra*.

point to any facts (much less substantial facts) to support its conclusory findings. The Respondents appear to go so far as to suggest that the BSA may make, rather than only interpret, the law.

Scintilla of Evidence Is Not the Standard

172. Notwithstanding the clear expression in Z.R. § 72-21 as to the requirement of substantial evidence, the Congregation asserts improperly that only a bit more than a scintilla of evidence is needed to support a BSA finding, clearly the standard is one of at least substantial evidence.

173. The Congregation resorts to the scintilla of evidence rule when it is unable to cite to the Record for support of key BSA "findings," findings that:

- are purely conclusory; and/or
- rest entirely on representation and assertions by the Congregation, or by Counsel for the Congregation; and/or,
- rest on assertions by one Congregation representative asserting that another representative had made a statement; and/or
- have no support of substantial evidence; and/or
- have no support even of a scintilla of evidence — example: false assertion that an as-of-right building does not resolve access and circulation.

Court Have Overturned BSA and Other Zoning Board Actions and Have Scrutinized Claims of Religious Programmatic Needs

174. Respondents wish to mislead the Court into accepting that BSA and New York State zoning board decisions essentially are unreviewable and are always affirmed by the courts. Similarly, Respondents wish the Court to believe that courts have rejected applying scrutiny to the assertions of religious and community organizations. Neither do the issues here involve facts so complex and technical that the Court must defer to the BSA in every respect, especially where common sense dictates to the contrary. Nor do the cases cited by Respondents support the view that zoning boards and courts must defer to whatever assertions are made by religious organizations. Cases that support the proposition that there must be some deference at the same time have not accepted the characterizations and wishes of the organization, particularly with regard to "accessory uses." These matter are fully discussed in Petitioner's Reply Memorandum of Law.

175. Thus, while respectful to the wishes of churches and schools, courts have indeed scrutinized requests of religious organizations with greater care. Even Westchester Reform v. Brown, 22 N.Y. 2d 488 (1968), relied upon heavily by the BSA, was a regulation that excluded the religious use (which is not the situation here) and the court clearly stated that even in an exclusion case "the power of regulation has not been obliterated."

176. Nor can the backdoor attempt to use religious programmatic need disguised as a landmark hardship be used to avoid the land use regulation here. In other words a religious institution is not entitled to the "ideal facilities" standard.

Arbitrary and Capricious Blindness to the Facts — Fashioning the Record

177. A BSA decision is to be annulled if it arbitrary and capricious. An example of a zoning board acting in an arbitrary and capricious manner would be deliberate blindness to the most critical facts, as the Second Circuit stated in describing the arbitrary and capricious behavior of a local zoning board in a leading case involving deference to religious organizations:

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

Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 351 (2d Cir. 2007).

178. The BSA repeatedly displayed the same deliberate blindness; the unwillingness to either discuss or make findings regarding such critical facts was apparently deliberate in that opponents, including counsel for Petitioners, repeatedly asked that the BSA inquire as to important facts. By not asking critical questions, the BSA shaped the record. The BSA could then claim to ignore any and all conflicting evidence from opponents. If the BSA had asked and required answers to inconvenient questions, then the BSA would not have been able to ignore as easily the facts disclosed in the answers to the questions.

179. I An example of intentional blindness is the BSA claiming that the drawings provided to the Chair and Vice Chair at the ex parte meeting are not part of the record and need not be considered. These drawings show without doubt that the Congregation's toddler and other programmatic needs are contrivances. Pet. Ex. S.

180. Indeed, the BSA proceeding below should be viewed not as a fair effort to seek the full facts, but as a way for the BSA to elicit just enough from the applicant with or without factual support so as to support a variance, while at the same time keeping the applicant from being forced to respond to questions from the BSA that would elicit an applicant statement that the BSA could not ignore. However, as Westchester Day School makes clear, intentional blindness is every bit as actionable as the record that would have been created. The attempt at "record fashioning" by the BSA is more effective where, as here, the Department of Buildings decides not to send an attorney to oppose an applicants' appeal from the DOB decision denying the building permit.

181. The BSA argues that it did ask questions suggested by opponents. That the BSA refused to request an updated Scheme C analysis, did not ask for the missing construction estimate pages, and did not ask the Congregation to identify its access and circulation issues with specificity shows that the BSA argument here is wrong.

182. Examples of the BSA deliberately blinding itself are as follows:

- Not asking the Congregation to provide an explanation of how it allocated construction costs between the community and residential components of the proposed building, thereby permitting the artificial inflation of construction costs.

- Not requiring the Congregation to provide missing pages from construction cost analysis in the as-of-right schemes, which would reveal the allocations methodology between the condominium and community space. (By allocating, for example, the caretakers apartment as a residential cost as the opposition expert surmised, the condominium construction costs increase, thereby lowering the financial return.)

- Not asking the Congregation why it allocated no part of the costs of construction to a roof for the community spaces, thereby lowering the financial return.

- Not asking the Congregation to respond in a complete manner to the BSA staffs thoughtful request for a reasonable return analysis of an all residential building on the construction site, and letting the Congregation include non-residential space thereby keeping the fact

- from the record that an if the Congregation desired, it could earn a reasonable return on an all residential building.
- Not asking the Congregation to provide a reasonable return analysis based on return on equity, despite the requirement in the BSA's own guidelines that such an analysis be provided for condominium projects.
- Not asking the Congregation to show on its drawings exactly where the proposed building addresses access and circulation in a manner different from an as of right building.
- Not asking the Congregation for the cost of retrofitting the existing elevator so that it would serve the basement floor of the Sanctuary. (This would show that the Congregation proposed a \$24 million building to resolve a \$150,000 problem at most and that that the obsolescence alleged could be resolved by normal repair and modernization of a 50 year old elevator.)
- Not asking the Congregation for the actual rent being paid by the Beit Rabban School (Respondents claims that this was asked and that it is in the record, but were unable to state what the rent in fact is and where such is located in the record.) Based upon inferential information in the IRS forms filed by Beit Rabban, this would show that a so-called obsolete building was yielding a very high rent and would show that the market rents for community space used in the feasibility study was far lower than the rent then being charged to Beit Rabban, establishing the lack of credibility of the Congregation's feasibility consultant.)
- While allowing the Congregation to utilize many floors of unused development space above the Parsonage in Lot 36 in order to value (sic) two floors of condominium development rights in an as of right building on Lot 37, not asking the Congregation how much rent is was charging for renting the Parsonage as a luxury Central Park West townhouse.
- Not asking the Congregation to articulate the reasons why the caretakers apartment or the adult classroom could not be located on the fifth floor of an as-of-right building, rather than the fourth floor.
- Accepting from the Congregation a shadow study of the side streets, which study did not provide a close up meaningful representation of the shadows at street level.

Respondents Srinivasan and Collins Acted Improperly and Should Be Barred From Future Proceedings, if Any

183. The impropriety of the ex parte meeting by Srinivasan and Collins on November 8, 2006 is self-evident. *See* Pet. ¶¶ 289-303. Letter Requesting Recusal, April 10, 2007, R-5527, reproduced at Pet. Ex. I. The BSA now claims that Petitioners' Attorney did not ask to participate in the meeting, notwithstanding that he learned of the meeting only after it was held, and that the BSA offered Petitioners' counsel to have a similar improper ex parte meeting — an offer he immediately refused since he considered that to be unethical, as an attorney.

184. Rules permitting BSA staff to meet in pre-application meetings do not authorize the Chair and Vice-Chair of the BSA to have a full-scale meeting with the Congregation and its attorneys, architects, and financial consultant. Plans submitted at the meeting were substantially identical to those submitted in April 2007 with the Application (copies of these drawings were not provided by the BSA in the Exhibits attached to its Answer).

185. Respondents refuse to provide notes of the meeting as part of the BSA Record herein, yet these notes are not protected from disclosure under The Public Meetings Law, §108. The BSA position is that notes of meetings between the Chair and Vice-Chair (and other documents related to the variance application and in the BSA files) are part of the BSA Record only if the Chair and Vice-Chair deign to designate them as part of the record. The Public Meetings Law, by implication, states that BSA proceedings although quasi-judicial proceedings, are still subject the disclosure requirements under the law. ("Nothing contained in this article shall be construed as extending the provisions hereof to: 1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals.")

186. Until days before the filing of this reply, Petitioner has been unable to obtain the drawings submitted by the Congregation to the BSA, until the BSA provided them on March 16, 2009. See Pet. Ex. S. The drawings show that the proposed building externally is the same as that for which the formal variance application was made and that the zoning calculation show as item 20 the variance requirement relating to the "40 foot standard minimum distance between building", which bears a handwritten checkmark. Pet. Ex. Q-1, P-4261. The drawings for the floorplans, however, are different and provide conclusive evidence of the contrived programmatic needs as to the second, third, and fourth floors. See Pet. Ex. S. The second floor provides meeting rooms and offices, but no toddler facility at all. R-4274, Pet. Ex. Q-15.

187. As stated in the Petition and the Petitioners' Initial Memorandum of Law at 100, the BSA possesses all the powers needed to conduct a quasi-judicial proceeding; it has subpoena power, can order inspection and was established as part of the City's Office of Administrative Trials and Hearings.

188. After the commencement of a variance proceeding, the BSA seems to agree that ex parte meetings involving the Chair and Vice-Chair would be improper, but not improper if the meeting preceded the application. See Letter of Margaret P. Stix, BSA General Counsel to Assemblyman Richard N. Gottfried dated November 7, 2007, page 1, last paragraph, Ex, Z to BSA Answer, P-2323 (making a distinction that the meeting was not an official hearing.) That Respondents held the meeting, did not invite known opponents, and refuse to provide any indication of what took place at the meeting is sufficient to bar these Respondents from future involvement in this case.

Urgency of the Case — Construction Not Stayed

189. The Congregation is not prevented from moving ahead with obtaining demolition and construction permits from the DOB and commencing construction. The Petitioners are not aware of the intentions of the Congregation. Unlike other permitting actions, the DOB web site omits reference to the Congregation's permit application. DOB refuses to release to the public any information as to the Congregation's applications and permits without the permission of the Congregation, and the Congregation will not provide such permission (R-235, R-1626, P-1283, P-1286, P-1293).

Accordingly, Petitioners request that this proceeding move along without delay.

190. A New York City Administrative Code, Title 25, §25-207 provides: "f. Preferences. All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.". See P-159.

191. Because it now appears that there is no basis for the variances for the condominiums because it is clear that as-of-right buildings will yield a reasonable return to the Congregation, Petitioners request that those variances be annulled. As to the Community house variances, the evidence is overwhelming

that the programmatic needs asserted by the Congregation in support of the variances are contrived, and, to the extent not contrived, are readily accommodated in the as-of-right building in floors 5 and 6. Because there is no dispute as to these facts, those variances should be annulled as well. The other issues accordingly would become moot.

Attachments to Verified Reply Incorporated Herein

Attachment A - Verified Reply to BSA Statement of Fact

Attachment B Marked Petition To Show Answers With Reply

Dated: March 18, 2009
New York, New York



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Exhibits Provided With Petitioners' Reply

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| Pet. Ex. O-1 | Elevation Existing Looking South. |
| Pet. Ex. O-2- | Elevation AOR Looking South R-592, Provided To Respond To The False Denial Of The Respondents Of ¶45 And ¶46 Of The Petition. ¶ |
| Pet. Ex. O-3 | Elevation AOR Looking West R-607 |
| Pet. Ex. O-4 | Elevation Approved Looking South R-4694 |
| Pet. Ex. P-1 | Circulation Heart of Application. June 17, 2008. Congregation statement — Egress and Circulation Are Heart of Application. R4860 |
| Pet. Ex. Q | Drawings Submitted By Congregation For BSA Meeting of November 8, 2006 - As Supplied By BSA On March 16, 2009. P-4261-4301 |
| Pet. Ex. R | Item M to BZ Instructions. R-4273-4275. |
| Pet. Ex. S | Second, Third, Fourth Floors Drawings Submitted to BSA November 8, 2006 (Pet. Ex. R.) in Reply to BSA Answer ¶¶ 337-344 and In Reply to False Statement at BSA Answer 202 as to the Intended Use |

VERIFICATION

STATE OF NEW YORK)


: SS :

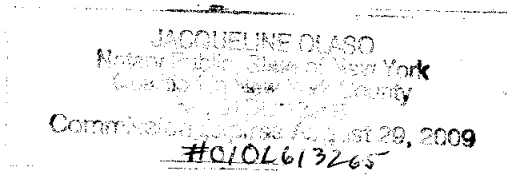
COUNTY OF NEW YORK)

NIZAM PETER KETTANEH, being duly sworn, deposes and says that: I am a petitioner in this proceeding; I have read the foregoing Reply and accompanying documents and know the contents thereof; the same are true to my own knowledge, except as to matters therein stated to be alleged on information and belief; and as to those matters I believe it to be true.


NIZAM PETER KETTANEH

Sworn to before me this on this
18th Day of March, 2009


NOTARY PUBLIC



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
: (LOBIS)
:
:
: **VERIFIED REPLY**
: **TO**
: **BSA STATEMENT OF**
: **FACTS**

Attachment A to Reply

ATTACHMENT A
to
REPLY

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].

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:

WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made under Z.R. §72-21; and WHEREAS, the project is classified as a Type I action pursuant to 6 NYCRR, Part 617; and

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

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

WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment. Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes the required findings under Z.R. §72-21, to permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/ residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to Z.R. §§ 24-11, 77-24, 24-36, 23-66, and 23-633; on condition that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received May 13, 2008" - nineteen (19) sheets and "Received July 8, 2008" - one (1) sheet; and on further condition: THAT the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80; and THAT the applicant shall obtain an updated Certificate of Appropriateness from the Landmarks Preservation Commission prior to any building permit being issued by the Department of Buildings; THAT refuse generated by the Synagogue shall be stored in a refrigerated vault within the building, as shown on the BSA- approved plans;

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

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

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

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. Bangardi*, 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 plates⁹ 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 Opposition¹¹, 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*, 1 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)].

¹⁴The "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

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 regulations¹⁵ [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

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/RIOA 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

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 Freeman. 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 statute because the expansion is not expected to result in an additional 200 transit trips during peak hours [R. 10 (¶ 157)]. See also, March 11, 2008 Letter from AKRF Environmental Planning Consultants [R. 3878-83] discussing CEQR requirements as well as Sections O, P and R of the CEQR Technical Manual available online at <http://www.nyc.gov/html/oec/html/ceqr/ceqrpublish.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, supra]. Here, the Opposition did not document any potential adverse effects that would result from granting the requested variances [R. 11 (§ 168)], nor were any ascertained by the BSA. Consequently, the BSA properly concluded that the requested community facility variances will not have negative impacts on the neighborhood or adjacent uses.

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 through 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 69th Street which will result in reducing the market values for the affected apartments [R. 11-12 (¶¶ 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 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 as 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 70th 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)

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 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

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

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 well 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 reclude 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 term 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 its 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 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 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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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.

Attachment B to Reply

Preliminary Statement

1

Congregation Shearith Israel for a proposed building at 8 West 70th Street, adjacent to the Congregation's sanctuary at 6 West 70th Street and Central Park West. The BSA proceeding was an appeal from the purported denials by the Manhattan Borough Commissioner of DOB on March 27, 2007 and August 28, 2007, 104250481. The initial Verified Petition herein was filed on September 29, 2008. On December 2, 2008, Respondent BSA filed its 5794 page record (the "BSA Record"), cited herein as R-nnnnn. Pursuant to a Stipulation So Ordered on December 17, 2008, Petitioners were permitted, on or before January 2, 2009, to serve an amended petition and memorandum of law to provide corrections and include the citations to the BSA Record.

BSA Answer:

1. Deny the allegations set forth in the first and second sentences of paragraph I of the petition, except admit that petitioners purport to proceed as set forth therein, and that, by Resolution on Calendar No. 74-07-BZ, adopted by the BSA on August 26, 2008 and filed on August 29, 2008 ("Resolution"), the BSA granted variances to respondent Congregation Shearith Israel ("the Congregation" or "the Synagogue") to permit 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 on the property known as 6-10 West 70th Street, New York, New York. Deny the allegations set forth in the third sentence of paragraph 1 of the petition, except admit that in response to a March 27, 2007 decision of the Manhattan Borough Commissioner for the New York City Department of Buildings ("DOB") (which was later superseded by an August 28, 2007 decision), the Congregation applied to the BSA for variances to construct a building that does not comply with several provisions of the New York City Zoning Resolution ("Zoning Resolution") on the property known as 6-10 West 70th Street, New York, New York. Admit the allegations set forth in the fourth sentence of paragraph I of the petition. Deny the allegations set forth in the fifth sentence of paragraph 1 of the petition, and aver that BSA served a 5,795 page administrative record on December 2, 2008. Deny the allegations set forth in the sixth sentence of paragraph I of the petition, and aver that pursuant to the Stipulation So Ordered on December 17, 2008, petitioners were only permitted to amend their papers to include citations to the administrative record produced by BSA on December 2, 2008, and that petitioners exceeded the terms of the Stipulation and made substantive changes to its papers.

Congregation Answer:

1. The Congregation states that no response is required to paragraph 1 of the Petition, which purports to set forth the nature of the action, and that, to the extent a response is required, denies the allegations in paragraph 1.

Jurisdiction and Venue

2. This Court has jurisdiction pursuant to Article 78 of the CPLR to review discretionary actions by zoning boards. See also NYCC Section 669(D).

BSA Answer:

2. Deny the allegations set forth in paragraph 2 of the petition, except admit the Court has jurisdiction in the instant matter

Congregation Answer:

2. The Congregation states that no response is required to paragraph 2 of the Petition, which purports to set forth legal conclusions as to the Court's jurisdiction, and that, to the extent a response is required, denies the allegations in paragraph 2.

3. The decision by the BSA is a final decision from which no appeal lies to any court or administrative body and Petitioners have no right to a rehearing. 2-RCNY 8 1-10.'

BSA Answer:

3. Deny the allegations set forth in paragraph 3 of the petition, except admit that the Resolution is a final administrative determination and that petitioners have no right to a rehearing before the BSA unless they make a motion to the Board requesting a rehearing on the grounds that there is substantial new evidence that was not available at the time of the initial hearing, or that there is a material change in plans or circumstances. See Title 2, Section 1-10(a) and (e) of the Rules of the City of New York ("RCNY").

Congregation Answer:

3. The Congregation admits the allegations in paragraph 3 of the Petition to the extent not inconsistent with the record.

Petitioners' Reply:

City's answer does not identify anything in Petitioners' averment that is not consistent with the "true meaning" of the BSA's resolution it cites.

4. As and when the initial Petition was filed herein, thirty (30) days had not elapsed since the filing on August 29, 2008 of the said determination of the BSA. N.Y. Admin. Code 4 25-207.

BSA Answer:

4. Deny the allegations set forth in paragraph 4 of the petition, except admit that petitioners timely commenced this proceeding in accordance with the provisions of Section 25-207 of the New York City Administrative Code ("Administrative Code").

Congregation Answer:

4. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in paragraph 4 of the Petition.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition, by providing the following further reply:

The Congregation's answer is in bad faith; Congregation knows that it was served within the 30-day period.

5. No previous application for this or any similar relief has been made by or on behalf of Petitioners to this or any other court.

BSA Answer:

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5 of the petition.

Congregation Answer:

5. The Congregation is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the Petition.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition, by providing the following reply:

Respondents' answers are in bad faith in as so far as they do not assert to having notice of any other application.

6. Venue is proper in New York County pursuant to CPLR 506(b) because, among other reasons, the judicial district where the Respondent BSA made the determination complained of is New York County and the property subject to the variances is in New York County.

BSA Answer:

6. Admit the allegations set forth in paragraph 6 of the petition.

Congregation Answer:

6. The Congregation states that no response is required to paragraph 6 of the Petition, which purports to set forth legal conclusions as to the Court's venue, and that, to the extent a response is required, denies the allegations in paragraph 6.

Petitioners' Reply:

Respondents' answers are in bad faith; they are both well aware that New York County is the proper venue.

Parties

7. Petitioner Nizam Peter Kettaneh is a resident of the City of New York and owns and resides in a townhouse at 15 W. 70th St., New York, New York, directly opposite Congregation Shearith Israel and within a 400-foot radius of the site of the proposed building, and is directly affected by the variances granted by the BSA.

BSA Answer:

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 7 of the petition, except admit that 15 West 70th Street, New York, New York is within a 400-foot radius of the site the Congregation proposes to develop.

Congregation Answer:

7. The Congregation is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the Petition.

Petitioners' Reply:

Re: Verified Petition Para. 7

The Congregation served upon the Petitioner Kettaneh a notice as an owner within the 400-foot zone.

See R-109.

See also R-275 - Letter to BSA dated June 26, 2007 from Petitioner Kettaner

8. Petitioner Howard Lepow is a resident of the City of New York with an address at 6 East 79th Street, New York New York 10021. He owns the following cooperative apartments in on the east side of 18 West 70th Street that will be affected by the proposed building: 1B, 1C, 2C, 4B, 4C, 4H, 5B, 6B, 7B, and 8B. The 18 W. 70th St. building adjoins the development site and is within the 400-foot radius of the site of the proposed building, and is directly affected by the variances granted by the BSA. The east facing windows in two cooperative apartment units — 7B and 8B — will be bricked up by the building for which variances were granted, but would not be bricked up by a conforming as-of-right building. The other units face a courtyard, and the proposed non-conforming building will detrimentally affect the light and air in the courtyard that those units face.

BSA Answer:

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first, second and third sentences of paragraph 8 of the petition, except admit that 18 West 70th Street is within a 400-foot radius of the site the Congregation proposes to develop. Deny the allegations set forth in the fourth and fifth sentences of paragraph 8 of the petition, except admit that petitioners made such an argument to the BSA.

Congregation Answer:

8. The Congregation is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of the Petition.

Petitioners' Reply:

Both Respondents well know that these windows will be blocked up and have so admitted.

R-344 - September 7, 2007 Statement in Support of Congregation's Counsel, Friedman and Gottbaum, at page 12;

Compare R- 577 - Congregation architect's drawing dated 10.22.07 (Proposed Building) and R-597 –

Congregation architect's drawing dated 10.22.07 (As of Right (Scheme A) Building) ;

R-4677 March 11, 2008 drawing of Congregation's architect;

R-1631-36 - November 2, 2007 letter from Howard Lepow to Community Board 7;

R-3787-3809 - February 10, 2008 submission by special subcommittee of Board of Trustees of 18 West 70th Street;

9. Respondent BSA is an agency of the City of New York that is empowered under City Charter § 666, among other things, on appeal from decisions of the Department of Buildings, and after a quasi-judicial hearing, to grant zoning variances upon a convincing showing of unique physical conditions resulting in hardship or difficulties arising out of the strict enforcement of the Zoning Resolution and meeting other required standards.

BSA Answer:

9. Deny the allegations set forth in paragraph 9 of the petition and respectfully refer this Court to the New York City Charter ("City Charter"), Chapter 27, Sections 659, et seq., which set forth the powers and duties of the BSA, including, among others, the power to "determine and vary the application of the zoning resolution" See City Charter Sections 666(5) and 668.

Congregation Answer:

9. The Congregation states that no response is required to paragraph 9 of the Petition, which purports to set forth legal conclusions as to the Board of Standards and Appeals' power, and that, to the extent a response is required, denies the allegations in paragraph 9.

10. Respondent Congregation Shearith Israel a/k/a/ The Trustees of Congregation Shearith Israel is a religious entity, the nature of which has not been disclosed.

BSA Answer:

10. Deny the allegations set forth in paragraph 10 of the petition, except admit that the Resolution states that the Congregation is a not-for-profit religious institution. See R. 1 (¶ 3).

Congregation Answer:

10. The Congregation denies the allegations in paragraph 10, and avers that the Congregation is a not-for-profit religious institution.

Petitioners' Reply:

The Respondent Congregation's answer did not aver as to whether the Respondent is an association, corporation, unincorporated association, or some other type of legal entity and is in bad faith in that it does not disclose what type of legal entity it is, a matter peculiarly within its knowledge.

11. Respondents Meenakshi Srinivasan and Christopher Collins are respectively the Chair and Vice Chair of Respondent BSA, and are named in this matter because of the manner in which the BSA proceeding was conducted, including the participation by said Respondents in at least one improper ex parte meeting with Respondent Congregation Shearith Israel and as to other partiality shown in the BSA proceedings below.

BSA Answer:

11. Deny the allegations set forth in paragraph 11 of the petition, except admit that Meenakshi Srinivasan is the Chair of the BSA, that Christopher Collins is the Vice Chair of the BSA, and that petitioners purport to proceed as set forth therein.

Congregation Answer:

11. The Congregation states that no response is required to paragraph 11 of the Petition, which purports to set forth the reason that Petitioners named certain Respondents, and that, to the extent a response is required, denies the allegations in paragraph 11, except admits that Respondents Meenakshi Srinivasan and Christopher Collins are respectively the Chair and Vice Chair of the Respondent Board of Standards and Appeals.

Summary Allegations As To Significant Issues In The Appeal

12. Page 53 of the Congregation's Statement in Support dated July 8, 2008 (P-03876) states falsely that "Without the waivers requested in this Application, CSI will not be able to build a Community House in a manner which addresses the access deficiencies of the Synagogue ..."

BSA Answer:

12. Deny the allegations set forth in paragraph 12 of the petition.

Congregation Answer:

12. The Congregation denies the allegation in paragraph 12 of the Petition.

Petitioners' Reply:

R-3611-12 - February 4, 2008 letter from Congregation architect, carry-over paragraph pages 1-2.

13. The access deficiencies of the Synagogue are fully satisfied in a building that is in strict conformity with the provisions of the New York City zoning resolution.

BSA Answer:

13. Deny the allegations set forth in paragraph 13 of the petition.

Congregation Answer:

13. The Congregation denies the allegation in paragraph 13 of the Petition.

Petitioners' Reply:

R-3611-12 - February 4, 2008 letter from Congregation's architect, carry over paragraph, pages 1-2

14. The building approved by the BSA in the Decision at ¶223 addresses the access deficiencies of the Synagogue in the same manner as a building that is in strict conformity with the provisions of the NYC zoning resolution.

BSA Answer:

14. Deny the allegations set forth in paragraph 14 of the petition to the extent they allege or purport to allege that the BSA acted improperly or contrary to law, and aver that, as the Board noted in its Resolution "a zoning board must accommodate a proposal by a religious or educational institution for a project in furtherance of its mission, unless the proposed project is shown to have significant and measurable detrimental impacts on surrounding residents." See R. 13 (§ 214) and cases cited therein.

Congregation Answer:

14. The Congregation denies the allegation in paragraph 14 of the Petition.

Petitioners' Reply:

R-3611-12 February 4, 2008 letter from Congregation's architect, carry over paragraph, pages 1-2.

The BSA Answer is in bad faith. This is a factual assertion and requires an admission or denial only.

The Congregation's answer is in bad faith.

Neither Answer identifies evidence in the record to the contrary in support of the denial, as there is none.

15. The Decision cited no facts and made no findings that would make the following statement untrue: "The building approved by the BSA in the Decision at ¶223 addresses the access deficiencies of the Synagogue in the same manner as a building that is in strict conformity with the provisions of the NYC zoning resolution."

BSA Answer:

15. Deny the allegations set forth in paragraph 15 of the petition to the extent they allege or purport to allege that the BSA acted improperly or contrary to law, and aver that, as the Board noted in its Resolution "a zoning board must accommodate a proposal by a religious or educational institution for a project in furtherance of its mission, unless the proposed project is shown to have significant and measurable detrimental impacts on surrounding residents." See R. 13 (§ 214) and cases cited therein.

Congregation Answer:

15. With respect to the allegations in paragraph 15 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 15 as an incomplete recitation of the record.

Petitioners' Reply:

R-3611-12 February 4, 2008 letter from Congregation's architect, carry over paragraph, pages 1-2.

The Answer are in bad faith. This is a factual assertion and requires an admission or denial only.

Neither Answer identifies evidence in the record to the contrary in support of the denial.

16. The Decision states the following in ¶ 148:

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

Nowhere in the Decision did the Board make any other finding identifying the particular feasibility analysis upon which the statement in this paragraph is based.

BSA Answer:

16. Deny the allegations set forth in paragraph 16 of the petition, except admit that petitioners accurately quoted paragraph 148 of the Resolution, and respectfully refer the Court to Boards discussion of the (b) finding for the Residential Development, contained on pages 8, 9 and 10 (and paragraphs 123-148) of the Resolution, for its full text and true meaning.

Congregation Answer:

16. With respect to the allegations in paragraph 16 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 16 as an incomplete recitation of the record.

Petitioners' Reply:

Respondents' answers are in bad faith in their failure to point to any particular part of the record to support their position and merely cite the Resolution, rather than the Record.
In effect, they ask the Court to comb a 5800 page record to find something that Petitioners have averred they have been unable to find..

17. In the BSA proceeding, the Congregation through its consultant Freeman Frazier submitted multiple feasibility studies of as-of-right scenarios, using different values per square foot, different site areas, different site values, and different methods to arrive at differing results.

BSA Answer:

17. Deny the allegations set forth in paragraph 17 of the petition, except admit that Freeman Frazier submitted feasibility studies on behalf of the Congregation, and respectfully refer the Court to their submissions [R. 1968-2008, 4648-4671, 4863-4917, 5170- 5181, 5772-5791], for their full text and true meaning.

Congregation Answer:

17. With respect to the allegations in paragraph 17 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 17 as an incomplete recitation of the record.

Petitioners' Reply:

R- 136 - March 28, 2007 letter from Congregation's financial analyst Freeman Frazier at page 3 and R-141 Schedule A1

R- 518 - October 24, 2007 letter from Freeman Frazier at page 5

R- 1974, 1976 – December 21, 2007 letter from Freeman Frazier, pages 6, 8

R-3847, 3849 – March 11, 2008 letter from Freeman Frazer, pages 1, 3

R-4651, 4652 – May 13, 2008 letter from Freeman Frazier, page 3,4

18. The Decision states the following in ¶130:

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

BSA Answer:

18. Admit the allegations set forth in paragraph 18 of the petition.

Congregation Answer:

17. With respect to the allegations in paragraph 17 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 17 as an incomplete recitation of the record.

Petitioners' Reply:

Respondent Congregation's denial is in bad faith either the ¶130 so states or it does not.:

19. The Congregation provided multiple feasibility studies of a scenario described as Scheme A. Scheme A consists of a community house on floors 1-4, a basement and 6400 square foot sub-basement, and two for-profit condominiums on floors 5 and 6.

BSA Answer:

19. Deny the allegations set forth in paragraph 19 of the petition, except admit that the Congregation provided feasibility studies of a scenario described as Scheme A which consisted of an as of right community facility/residential development.

Congregation Answer:

19. With respect to the allegations in paragraph 19 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states

that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 19 as an incomplete recitation of the record.

Petitioners' Reply:

R-69 Drawing dated March 27, 2007.

R-421-436 - Drawings dated August 28, 2007.

R-592. Drawing Dated October 22, 2007.

See following multiple feasibility studies of Scheme A and in some, Scheme C and *see* Pet. Ex. N-3.

| | | |
|-------------------|------------------------|---|
| September 6, 2007 | R-000283- R-000307 | Letter from Jack Freeman (on behalf of Applicant) to BSA Chair Meenakshi Srinivasan, dated September 6, 2007 |
| October 24, 2007 | R-000516- R-000535 | Letter from Jack Freeman (on behalf of Applicant) to BSA Chair Meenakshi Srinivasan, dated October 24, 2007 |
| December 21, 2007 | R-001968- R-002009 | Exhibit C (Freeman Frazier Analysis dated December 21, 2007 |
| January 30, 2008 | R-003608- R-003610 | Letter from Jack Freeman (on behalf of Applicant) to BSA Chair Meenakshi Srinivasan, dated January 30, 2008 |
| March 11, 2008 | R-003847- R-003877 | Letter from Jack Freeman (on behalf of Applicant) to BSA Chair Meenakshi Srinivasan, dated March 11, 2008 (submitted with Applicant letter) |
| April 1, 2008 | R-004223- R-004230 | Letter from Jack Freeman (on behalf of Applicant) to BSA Chair Meenakshi Srinivasan, dated April 1, 2008 |
| May 13, 2008 | R-004648- R-00r4671 | Freeman Frazier Analysis, dated May 13, 2008 (submitted with May 13, 2008 letter) |
| June 17, 2008 | R-004863- R-004916 | Freeman Frazier Analysis, dated June 17, 2008 (submitted with May 13, 2008 letter) |
| July 8, 2008 | R-005170- R-005181 | Freeman Frazier Analysis, dated July 8, 2008 (submitted with July 8, 2008 letter) |
| August 12, 2008 | R-005772- R-005791 | Freeman Frazier Analysis, dated August 12, 2008 (submitted with August 12, 2008 letter) |

20. The Congregation chose in Scheme A not to use the space on floors 5 and 6 to satisfy its programmatic needs. This fact is not mentioned in the Decision.

BSA Answer:

20. Deny the allegations set forth in the first sentence of paragraph 20 of the petition, except admit that Scheme A proposed to use the 5th and 6th floors for two residential condominium units. Deny the allegations set forth in the second sentence of paragraph 20 of the petition to the extent they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

20. With respect to the allegations in paragraph 20 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 20 as an incomplete recitation of the record.

Petitioners' Reply:

Respondents deny yet the Congregation uses floors 5 and 6 for programmatic needs and does not identify where this is discussed in the Decision.

R-4953 – Statement of Petitioners’ Counsel, Alan Sugarman at June 24, 2008 BSA hearing (Transcript, page 16, lines 16-22, reciting history of Opponents’ numerous questions on this subject and BSA’s consistent failure to ask any questions about it.

R-4956 – Response of BSA Chairperson to Attorney Sugarman’s statement on this and numerous other, similar issues at June 24, 2008 BSA hearing:

6 “Any questions for Mr. Sugarman?

7. Thank you. Next speaker.”

(Transcript, page 19, lines 6-7)

21. The Congregation sought, and the BSA approved, variances relating to floors 2, 3, and 4 for a total of approximately 1500 square feet.

BSA Answer:

21. Deny the allegations set forth in paragraph 21 of the petition insofar as they are inconsistent with the Record.

Congregation Answer:

21. With respect to the allegations in paragraph 21 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 21 as an incomplete recitation of the record.

Petitioners' Reply:

See Pet. Ex. M-1, M-2, M-3.

See BSA Resolution at 46 and ¶237 of the BSA Answer, both of which state the 1500 sq. ft. figure.

See R-5152 - July 8, 2008, Congregation Statement in Support at page 38 state" approximately 494 zsf per floor (640 gsf), or 1,482 zsf overall on floors two, three and four."

R-3931 Letter dated March 24, 2008 from Petitioners’ architect, Craig Morrison, AIA at page 2, para.7 and table Compare R-582,583,584 –Drawings of Congregation’s architect dated 10.22.07 (floors 2,3,4 of proposed building) and R-602 , 603, 604 (floors 2, 3, 4 of as-of-right Scheme A building.)

22. According to the studies submitted by the Congregation for Scheme A, floors 5 and 6 contained approximately 5022 square feet of sellable area and 7594 square feet of built area. This fact is not mentioned in the Decision.

BSA Answer:

22. Deny the allegations set forth in the first sentence of paragraph 22 of the petition, except admit that Scheme A proposed to use the 5th and 6th floors for two residential condominium units. Deny the allegations set forth in the second sentence of paragraph 22 of the petition to the extent they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

22. With respect to the allegations in paragraph 22 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 22 as an incomplete recitation of the record.

Petitioners' Reply:

See Pet. Ex. M-1, M-2, M-3, N-4 and N-5 and parts of the Record cited therein.

R-1979, R-1992 – Congregation financial analyst, Freeman Frazier’s December 21, 2007 letter page 11 Exhibit A, Schedule A1 (“Building Area (Sq. Ft.) Revised Residential As of Right Residential Development” and each and every other statement from Freeman Frazier.

23. In the last of the many studies of Scheme A, the Congregation used in its computation of site value, a site area of 19,094 square feet. This fact is not mentioned in the Decision.

BSA Answer:

23. Deny the allegations set forth in paragraphs 23 and 24 of the petition insofar as they are inconsistent with the Record, can be construed as alleging that the BSA acted improperly or contrary to law, or can be construed as alleging that the Congregation improperly conducted its feasibility analysis.

Congregation Answer:

23. The Congregation directs the Court to the record and Resolution, which speak for themselves, and states that no response is required. To the extent that a response is required, the Congregation refers to the record and Resolution for the full and complete contents thereof and denies the allegations in paragraph 23.

Petitioners' Reply:

See Pet. Ex. N-3.

Respondents fail to show where in the decision there is a reference to the number of square feet used in the site value for scheme A.

R-4651 - Letter dated May 13, 2008 to Board Chair Meenakshi_Srinivasan from Respondent Congregation's financial analyst, Freeman Frazier states on page 4 "The available floor area of on the Parsonage portion of the site (19,094 sq. ft.) exceeds the area needed to replace the non-complying area on the 70th Street lot. Therefore, in the current consideration, we have assumed that the 19,755 sq. ft. could be achieved by utilizing the as of right buildable floor area from the parsonage portion of the site..."

24. In the study of Scheme A as submitted by the Congregation, the site cost is the largest single cost. This fact is not mentioned in the Decision.

BSA Answer:

23. Deny the allegations set forth in paragraphs 23 and 24 of the petition insofar as they are inconsistent with the Record, can be construed as alleging that the BSA acted improperly or contrary to law, or can be construed as alleging that the Congregation improperly conducted its feasibility analysis.

Congregation Answer:

24. With respect to the allegations in paragraph 24 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 24 as an incomplete recitation of the record.

Petitioners' Reply:

The Respondents' answers are in bad faith.

See each of the Freeman Frazier studies cited at paragraph 19 above.

For example, R-5178.

Example: R-1980 - Schedule A1 of December 21, 2007.

25. In the study of Scheme A as submitted by the Congregation, the construction cost is a major part of the costs. The Congregation submitted unsigned, undated construction costs reports in support of Scheme A, which reports were all missing 13 of 15 pages. Based upon other complete reports from the same company, the missing pages were highly material. The BSA was advised of this omission for months prior to the close of the hearing, and failed to require the complete reports to be filed. The BSA then relied upon these reports in making its (b) finding, as it were. No mention of this matter, including the objections of opponents, is made in the Decision.

BSA Answer:

Deny the allegations set forth in paragraph 25 of the petition, except admit the Congregation did not submit a complete copy of its Scheme A construction cost report, and aver that BSA did not seek the missing pages because they were immaterial.

Congregation Answer:

25. With respect to the allegations in paragraph 25 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 25 as an incomplete recitation of the record.

Petitioners' Reply:

The Answers are in bad faith. All assertions are discrete. Respondents could only reasonably deny as a conclusion the third sentence. The BSA Answer later admits what is denied here. ¶ 291 admits that the BSA did not require the Congregation to submit the additional pages. The Respondents do not cite to any place in the Decision where the BSA deals with the repeated requests of the opposition for the full reports.

26. In response to the BSA request for an all-residential as-of-right scheme, the Congregation prepared other studies of an as-of-right scheme described initially as Scheme C. This scheme was not all residential. The Scheme C study showed a profit. But the site cost had been reduced in the July 28, 2008, feasibility study. However, Scheme C was never revised to show the even greater profit that would have resulted from using the reduced site cost in the July 28, 2008, feasibility study. The BSA decision makes no reference to any of these facts.

BSA Answer:

25. Deny the allegations set forth in paragraph 26 of the petition insofar as they are inconsistent with the Record, can be construed as alleging that the BSA acted improperly or contrary to law, or can be construed as alleging that the Congregation improperly conducted its feasibility analysis, except admit that the Congregation prepared studies (identified as Scheme C) of an as-of-right residential development.

Congregation Answer:

26. With respect to the allegations in paragraph 26 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 26 as an incomplete recitation of the record.

Petitioners' Reply:

Having denied this allegation, the City then effectively admits the allegation at ¶292 of its Answer.

27. On 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 since has refused to provide information to opponents as to what occurred at said meeting.

BSA Answer:

26. Deny the allegations set forth in paragraph 27 of the petition, except admit that over six months before they filed their variance application at the BSA, the Congregation had a pre-application meeting with the BSA, including Chair Srinivasan and Collins, and aver that this meeting took place in accordance with the BSA's procedures for pre application meetings [see Exhibit E, attached hereto], and further aver that the BSA offered to have a similar meeting with the Opposition and the Opposition declined the meeting [see Exhibit F, attached hereto].

2 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.

Congregation Answer:

27. The Congregation denies the allegations in paragraph 27 of the Petition that the Congregation participated in any "ex parte" meeting and admits that representatives of the Congregation participated in a standard, pre-application meeting over six months before the Congregation submitted an application to the Board of Standards and Appeals.

Petitioners' Reply:

There is no good faith denial that the City did not notify Petitioners' counsel of the meeting. See BSA Answer ¶344 implicitly admitting the same and also admitting that the City will not provide information as to the meeting. See also exhibits attached to the BSA Answer.

Background

28. Congregation Shearith Israel is the owner of two adjacent lots, tax lots 36 and 37, located at the corner of Central Park West and West 70th Street in the Borough of Manhattan, which lots are located in the West Side Historic Landmark District. In lot 36 on Central Park West, the Congregation owns a Synagogue constructed in 1896, which is an individual historic landmark. Also in lot 36 on Central Park West and south and adjacent to the Synagogue is a townhouse known as the Parsonage, and also constructed in 1896.

BSA Answer:

27. Admit the allegations set forth in paragraph 28 of the petition.

Congregation Answer:

28. With respect to the allegations in paragraph 28 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 28 as an incomplete recitation of the record.

Petitioners' Reply:

The Congregation fails to identify any incorrect statement or to cite to the source of the correct statements.

1st sentence - R 4534 CSI Revised Statement in Support dated May 13, 2008

2nd sentence – R-4540 id at p. 7

3rd sentence – R-4541 id at p. 8

29. Lot 37 is adjacent to and west of the Synagogue on West 70th Street, on which is located an existing Community House building. Lot 37 is the combination of Three residential house lots, once owned by the Congregation and sold by the Congregation in 1896 to private owners for the construction of private residences, with the restriction that no structure would exceed the height of the Synagogue itself. These three lots were conveyed back to the Congregation in 1949 and 1965.

BSA Answer:

28. Deny the allegations set forth in paragraph 29 of the petition, except admit that Lot 37 is adjacent to and west of the Synagogue and is currently partially improved with a four-story community house, and partially vacant [R. 2 (¶ 17)].

Congregation Answer:

29. With respect to the allegations in paragraph 29 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 29 as an incomplete recitation of the record.

Petitioners' Reply:

The documentation is clear - and the Respondents fail to cite which of the statements is not accurate.

Sentence 1 – R-3470 Testimony of CSI Preservation Consultant

Sentence 2 – R-3473-3481 (Deeds)

Sentence 3 - R-3470, R – 5130-R-5133 Friedman & Gotbaum Statement in Support dated July 18, 2008

30. An existing Community House is located on two of the original lots; the building on the third original residential lot was demolished by the Congregation in 1970, and is now a vacant lot, yet occupied by a trailer used for classrooms. The three house lots were recombined into a single lot, Lot 37.

BSA Answer:

29. Deny the allegations set forth in paragraph 30 of the petition, except admit that Lot 37 is currently partially improved with a community house that was created in 1954 through the combination of two row houses, and that two additional row houses previously existing on Lot 37 were demolished in 1950 [R. 20].

Congregation Answer:

30. With respect to the allegations in paragraph 30 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 30 as an incomplete recitation of the record.

Petitioners' Reply:

Respondents seem reluctant to admit that the Congregation demolished a townhouse on the development site around 1970.

R – 5130-R-5133 Friedman & Gottbaum Statement in Support dated July 18, 2008

See reply to ¶29.

31. Lot 37 is a regularly shaped lot, 64 feet by 100 feet. The subsurface conditions permit construction of a valuable basement and sub-basement, as included in the structure proposed by the Congregation. The site, located just 100 feet from Central Park West is a highly desirable site in a highly desirable location. A conforming Community House building for a nonprofit owner may occupy the entire lot up to 23 feet, with setbacks for the upper floors, with a maximum height of 75 feet. The Congregation, in pursuing its variance application, has portrayed this pristine silk purse as a flea-bitten sow's ear, but it is not. There are no physical conditions on the site that in any way prevent the full beneficial use by the Congregation of this highly desirable property. The Congregation has stated that the 3 house lots, that now comprise Lot 37, were reacquired by the Congregation.

BSA Answer:

30. Deny the allegations set forth in paragraph 31 of the petition, except admit that Lot 37 contains 6,432 square feet, permits the construction of two cellar levels [R. 2, 6 (¶¶ 13, 17, 82)].

Congregation Answer:

31. The Congregation denies the allegations in paragraph 31 of the Petition, except admits that Lot 37 is a regularly shaped lot, 64 feet by 100 feet.

Petitioners' Reply:

R – 5130-R-5133 Revised Statement in Support dated July 8, 2008 of Congregation's counsel, Friedman & Gottbaum, pages 16-19
3rd and 5th Sentences R-5115 , *Id.* at 1.

32. The Congregation desires to demolish the existing community house on Lot 37 and replace the structure with a new mixed-use building occupying all of lot 37. The existing community house currently provides a lobby and elevator to assist in access to the adjoining Synagogue, a caretaker's apartment, and school facilities, which are leased to an independent nondenominational Jewish private day school, Beit Rabban.

BSA Answer:

31. Deny the allegations set forth in paragraph 32 of the petition, except admit that Lot 37 is currently improved with community house and that the Congregation has applied to DOB for a permit to demolish the existing community house and replace it with a nine-story and cellar mixed-use building [R. 1-2 (¶¶ 1, 2, 17, 18, 24)].

Congregation Answer:

32. With respect to the allegations in paragraph 32 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 32 as an incomplete recitation of the record.

Petitioners' Reply:

The Congregation seems reluctant to point out any one single incorrect statements herein.
2nd sentence – R-5125-5126-Friedman & Gottbaum July 8, 2008 Revised Statement in Support at pages 11-12

33. The Congregation wishes to construct a new facility providing better access to the Synagogue, providing more and modern classroom space, and expanding a small synagogue.

BSA Answer:

32. Deny the allegations set forth in paragraph 33 of the petition, except admit that the Congregation has applied to DOB for a permit to demolish the existing community house replace it with a nine-story and cellar mixed-use building, and that the Congregation has stated that one reason it desires to do so is to create better access to the adjoining Synagogue [R. 1,2,4 (J 1,2, 18, 41)].

Congregation Answer:

33. With respect to the allegations in paragraph 33 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 33 as an incomplete recitation of the record.

Petitioners' Reply:

R-5117 – Friedman & Gottbaum July 8, 2008 Revised Statement in Support at p. 3

34. Rather than raise funds from its members so as to construct a new school and other facilities and to resolve accessibility issues within its historic Synagogue, Congregation Shearith Israel, one of the nation's oldest and most substantial congregations, requested that the City of New York set aside its zoning laws. The BSA approved these variances, which upset longstanding principles of landmark and zoning laws.

BSA Answer:

33. Deny the allegations set forth in paragraphs 34 and 35 of the petition.

Congregation Answer:

34. The Congregation denies the allegations in paragraph 34 of the Petition.

Petitioners' Reply:

1st Sentence -R-5119-R-5123 Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman Gottbaum, at pages 5-9

The Respondents' denials are in bad faith in that they do not identify anything in the Record that supports them

2nd Sentence -R-1-R-14 August 28, 2008 Resolution of the BSA.

35. The Congregation stated repeatedly in the course of the proceedings that the purpose of the variances is to fund the Congregation's programmatic needs, by allowing the Congregation to construct luxury condominiums atop a new community house. The community house itself includes the construction of space to be rented to a private school, expected to yield over \$1 million per year in rent. Not only has the Applicant not shown any indication of financial need, all public facts as to the Applicant are to the contrary. The financial beneficiaries from the variances, in reality, are not the institution, but the individual members of the Congregation, members who, as a result of the variances, will have much less need to provide financial support for their own institution.

BSA Answer:

33. Deny the allegations set forth in paragraphs 34 and 35 of the petition.

Congregation Answer:

35. The Congregation denies the allegations in paragraph 35 of the Petition.

Petitioners' Reply:

1st sentence- R- 3333-35, 3337-38, 3339, 3340, 3342,3343,3346-49 Written and oral statements of CSI counsel and witnesses

2nd sentence – R-523 – Schedule A2 Freeman Frazier Oct. 24, 2007 letter to BSA

3rd and 4th Respondents' answers are in bad faith in not referring to anything in the Record that supports them.

36. These members, who include well-known philanthropists and business people, apparently would rather not engage in fund-raising as has the New York Historical Society (which just announced the raising of \$50 million for a renovation and the cancellation of its own condominium project on West 76th St.), the Eldridge Street Synagogue (which under the auspices of Roberta Brandes Gratz raised millions for restoration [see Opp. Ex. D 9-11, P-00257 at P-00266]) and the 76th Street Jewish Community Center (which raised millions from the community to construct an as-of-right community facility at Amsterdam and 76th Street, but was not supported by Congregation Shearith Israel because of certain policies. See Opp. Ex. D 21-23.) (P-00257 at P-00278). Many of the members of the Congregation, including counsel for the Respondent Congregation (R-001260 and R-001543), submitted completed BSA forms dated to December, 2008 "consenting" as included in the BSA Record R-000650 at R-001068 to R-001619. The BSA consent forms under BSA rules are intended to be completed by property owners residing within 400 feet of the project. In accordance with BSA rules as to notice to owners within 400 feet of the project, the Applicant filed an Affected Property Owners List on April 1, 2007 (R-000105), None of the members of the Congregation filing these "Consent" forms are on the list, and only 4 of the members of the Congregation filing the so-called consent reside or own property within the 400 foot zone. See Exhibit K attached to the Revised Complaint showing a map analysis of the consent and objection forms. Although all of the notices objecting to the project are date stamped (R-000650 to R-0001068), none of the so-called "consents" are stamped. The BSA table of contents states that these forms were filed between November 2007 and February 2008, but the BSA provides no transmittal letter showing when the "consents" were filed. Moreover, the consents are nearly 50% duplicates. Thus, the BSA seemed to be helping the Respondent Congregation to pad the record as to the true number of consenting owners within the 400-foot zone. In fact, substantially all supporters of the variances are members of the Congregation who stand to financially benefit from the variances.

BSA Answer:

34. Deny knowledge or information sufficient to form a belief as to the allegations set forth in the first sentence of paragraph 36 of the petition, and aver that applicants for variances are not required to engage in fund-raising efforts. Deny the allegations set forth in the second, third, fourth, fifth, sixth, seventh, and eighth sentences of paragraph 36 of the petition insofar as they are inconsistent with the Record. Deny the allegations set forth in the ninth sentence of paragraph 36 of the petition. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the tenth sentence of paragraph 36 of the petition, and avers that the identity or motivation of the supporters of a variance application 7 If is irrelevant because the BSA grants variances solely based upon whether an applicant meets the requirements set forth in Z.R. §72-21.

Congregation Answer:

36. The Congregation denies the allegations in paragraph 36 of the Petition.

37. To obtain the variances (seven in number), the Congregation effectively asks that the requirements of Section 72-21 of the Zoning Resolution be ignored. The Congregation cannot show a factual basis for the five findings required for any of the variances.

BSA Answer:

35. Deny the allegations set forth in paragraphs 37 and 38 of the petition.

Congregation Answer:

37. The Congregation denies the allegations in paragraph 37 of the Petition.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition:

Respondents' answers are in bad faith insofar as they fail to cite anything in the Record to support their denials.

38. The Congregation has not and cannot show any relationship between the heart of its case, accessibility to the Sanctuary, and any of the variances claimed. Even the rear yard variances, claimed to be based on a need for classroom space, on closer inspection are revealed merely as a contrivance so as to not impinge upon the use of the fifth and sixth floors of an as-of-right building for income producing condominiums.

BSA Answer:

35. Deny the allegations set forth in paragraphs 37 and 38 of the petition.

Congregation Answer:

38. The Congregation denies the allegations in paragraph 38 of the Petition.

Petitioners' Reply:

The Congregation does not even refer the Court generally to the Record for this denial, for there is nothing to which to refer.

1ST Sentence – R-4860 – Letter to BSA dated June 17, 2008, from Congregation's counsel, Friedman & Gottbaum, page 2 ("Finding A," 1st para., last sentence) "[remediation of] the significant egress and circulation deficiencies in the landmarked Synagogue ... is at the heart of this Application."

Compare R-5134 -35-Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum, pages 20-21 and R-5146- R-5157 Id. at pages 32 -43.

2nd Sentence – R-5142 – Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum, page 28, carryover paragraph 2nd sentence.

39. The Respondents and the Decision fail to identify specific pages of the record that are claimed to be the "substantial evidence" upon which the Decision allegedly rests.

BSA Answer:

36. Deny the allegations set forth in paragraph 39 of the petition to the extent they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

39. The Congregation denies the allegations in paragraph 39 of the Petition.

Petitioners' Reply:

The Answer of Respondents in fact validate this allegation, for there are few citations to the BSA Record.

40. A mere assertion in the Decision that substantial evidence exists is insufficient to support a conclusory finding.

BSA Answer:

37. Deny the allegations set forth in paragraph 40 of the petition and aver that the BSA's decision is not simply a conclusory finding. See R 1-14.

Congregation Answer:

40. The Congregation denies the allegations in paragraph 40 of the Petition.

Specific Factual Statements

The Site

41. The building site is a rectangular 64 x 100 foot site just off Central Park West on West 70th Street and constitutes the entirety of Tax Lot 37.

BSA Answer:

38. Deny the allegations set forth in paragraph 41 of the petition, except admit that Lot 37 contains 6,432 square feet and has frontage on West 70th Street [R. 2, 6 (¶¶ 13, 82)].

Congregation Answer:

41. The Congregation admits the allegations in paragraph 41 of the Petition to the extent not inconsistent with the record.

Petitioners' Reply:

R-4673 Site Plan, Zoning Calculations and Base Plan Calculations dated 05.13.08 prepared by Congregation's architect.

42. The proposed building is a 105-foot tall building with four floors of community space and five floors of luxury condominiums.

BSA Answer:

39. Deny the allegations set forth in paragraph 42 of the petition, except admit that the proposed building will have a base height along West 70th Street of 95'-1" and a total height of 105'-10" [R. 2 (¶ 27)] and will have community facility uses on two cellar levels and the lower four stories, and residential uses on five stories including a penthouse [R. 2 (¶¶ 24, 25)].

Congregation Answer:

42. With respect to the allegations in paragraph 41 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 41 as an incomplete recitation of the record.

Petitioners' Reply:

R-5785- Schedule A to Freeman Frazier Economic Analysis letter to BSA dated August 12, 2008. ("luxury condominiums" -Net proceeds of sales of five condominiums range from \$27,479,000 - \$29,217,000)
R- 4673 – Proposed Site Plan, Zoning Calculations and Base Plan calculations dated 03.11.08, 2nd column
"Density" (Proposed - five units) Respondent Congregation's denial is in bad faith in failing to cite anything in the Record that supports it.

43. A conforming, as-of-right mixed-use building would allow, without the need for variances, a four-story community house with sub-basements and two floors of luxury condominiums, with setbacks and height consistent with the brownstones on the street: under 75 feet.

BSA Answer:

40. Deny the allegations set forth in paragraphs 43 and 44 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

43. The Congregation states that no response is required to paragraph 43 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 43.

Petitioners' Reply:

This denial is in bad faith - this is a description of Scheme A.

R-593-600 –Drawings dated 10.22.07 prepared by Congregation’s architect
Respondents’ denials are in bad faith insofar as they do not identify anything in the Record that supports them.

44. A conforming all-residential building would allow seven floors of condominiums, with two sub-basements.

BSA Answer:

40. Deny the allegations set forth in paragraphs 43 and 44 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

44. The Congregation states that no response is required to paragraph 44 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 44.

Petitioners' Reply:

These denials are in bad faith - as stated in the Reply narrative, the BSA specifically requested such a FAR 4.0 analysis.

R-631-639 Drawings dated 10.22.07 prepared by Congregation’s architect

The Sanctuary

45. The Decision at ¶16 misleadingly states that the Synagogue has a height of 75 feet. That is true as to the peak of the roof only; in actuality, the West 70th Street wall of the Synagogue rises to approximately 53 to 62 feet and sets back before rising to the peak of the roof. See, EX-14, Elevation West 70th St. (P-01365), and EX-13, Existing Elevation, West Side of Central Park West (P-01364).

BSA Answer:

41. Deny the allegations set forth in paragraph 45 of the petition.

Congregation Answer:

45. The Congregation denies the allegations in paragraph 45 of the Petition.

Petitioners' Reply:

See Pet. ex. O-2 and O-3 and R-592.

R-4691, 4692 - Drawings dated 10.22.07 prepared by Congregation’s architect.

46. In Congregation drawings for a conforming as-of-right building, at AOR-14 (P-01349), the Synagogue, although on a corner, substantially complies with the height and setback that is required by mid-block contextual zoning, reflecting the sensitivity of the original architects as to the narrow width of West 70th Street.

BSA Answer:

42. Deny the allegations set forth in paragraph 46 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

46. With respect to the allegations in paragraph 46 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 46 as an incomplete recitation of the record.

Petitioners' Reply:

See Pet. ex. O-2 and O-3 and R-592.

R-592, R-593 Drawings dated 10.22.07 prepared by Congregation’s architect

The Split Lot

47. A small part of the development site (Lot 37) is in the R10A zoning district, with most of the site being in the R8B zoning district, which is also known as contextual mid-block zoning with height and setback limitations.

BSA Answer:

43. Deny the allegations set forth in paragraph 47 of the petition, except admit that the entire Zoning Lot is divided between R1)A and R8B zoning districts.

Congregation Answer:

47. The Congregation admits the allegations in paragraph 47 of the Petition to the extent not inconsistent with the record.

Petitioners' Reply:

Respondent City essentially admits these allegation in ¶ 257 of its Answer.

R- 5150 - Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum, page 36 (chart)

R-4673 – Site Plan, Zoning Calculations, and Base Plan Calculations dated 03.11.08 prepared by Congregation's architect, 1st column, "Lot Area 6-10 W. 70th"

R- 4674 – Proposed Floor Area Schedule dated 05.13.08 prepared by Congregation's architect ("Gross Floor Area Proposed")

Respondent Congregation's answer is in bad faith in failing to point to any specific inconsistency in the 5800-page record.

48. The Decision materially confuses the facts when it suggests in ¶20 that the district boundary is at a "depth of 47 feet within the lot". As noted, the lot is 64 feet by 100 feet. The width of the lot is 64 feet. The depth is 100 feet. The Decision misuses the word "depth" displaying a lack of understanding by the BSA as to what it was approving.

BSA Answer:

44. Deny the allegations set forth in paragraph 48 of the petition, and respectfully refer the Court to the Resolution for the measurements of the subject property.

Congregation Answer:

48. The Congregation denies the allegations in paragraph 48 of the Petition.

Petitioners' Reply:

The allegation is not as to the measurement, but the misleading statement in the Board Decision that confuses the issues of the split lot.

R- 4673 Proposed Site Plan, Zoning Calculations, and Base Plan Calculations dated 03.11.08 prepared by Congregation's architect

R- 4679 Drawing dated 10.22.07 prepared by Congregation's architect

R- 4680 Drawing dated 12.26.07 prepared by Congregation's architect

R- 4681 Drawing dated 10.22.07 prepared by Congregation's architect

R- 4682 Drawing dated 12.26.07 prepared by Congregation's architect

R- 4683 Drawing dated 12.26.07 prepared by Congregation's architect

R- 4684 Drawing dated 10.22.07 prepared by Congregation's architect

R- 4685 Drawing dated 10.22.07 prepared by Congregation's architect

R- 4686 Drawing dated 12.26.07 prepared by Congregation's architect

R-4687 Drawing dated 03.11.08 prepared by Congregation's architect

R-4688 Drawing dated 03.11.08 prepared by Congregation's architect

R-4689 Drawing dated 03.11.08 prepared by Congregation's architect

R-4692 Drawing dated 10.22.07 prepared by Congregation's architect

49. Viewing the development site from West 70th Street looking south, 17 feet of the left (easterly) portion of the lot is in R10A and 47 feet of the right (westerly) portion of the lot is in R8B. Thus, 73.4% of the development site — Tax Lot 37 — is in the R8B district with the more restrictive zoning.

BSA Answer:

45. Deny the allegations set forth in paragraph 49 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

49. With respect to the allegations in paragraph 49 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 49 as an incomplete recitation of the record.

Petitioners' Reply:

The Answers of Respondents is in bad faith. This is a completely neutral accurate statement, and, one would wonder why the BSA thinks the allegation suggest that it acted improperly or contrary to the law.

R 4673 Proposed Site Plan, Zoning Calculations, and Base Plan Calculations dated 03.11.08 prepared by Congregation's architect

50. The BSA decision later holds, essentially, that because 26.6% of Tax Lot 37 is in R10A, the height and zoning restrictions in 73.4% of the lot should be ignored.²

BSA Answer:

46. Deny the allegations set forth in paragraph 50 of the petition.

Congregation Answer:

50. With respect to the allegations in paragraph 50 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 50 as an incomplete recitation of the record.

Petitioners' Reply:

R 4673 Proposed Site Plan, Zoning Calculations, and Base Plan Calculations dated 03.11.08 prepared by Congregation's architect

51. Condominium Variances Account For 90% Of Variance Area51. Using floor area as a measure, 90% of the variances floor area is provided by the four variances for the luxury condominiums, with the other 10% relating to three rear yard variances allowing an additional area of 1500 square feet of school space.

BSA Answer:

47. Deny the allegations set forth in paragraphs 51 and 52 of the petition insofar as they are inconsistent with the Record or can be construed as alleging any that the BSA acted improperly or contrary to law.

Congregation Answer:

51. With respect to the allegations in paragraph 51 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 51 as an incomplete recitation of the record.

Petitioners' Reply:

See Pet. Ex. M-2 and M-3.

R 4673 Proposed Site Plan, Zoning Calculations, and Base Plan Calculations dated 03.11.08 prepared by Congregation's architect

R 5152 Revised Statement in Support of Congregation's Counsel, Friedman and Gottbaum dated July 8, 2008 (page 38)

52. The four upper floor variances provided an additional area of 12,715 square feet of luxury condominium space.

BSA Answer:

47. Deny the allegations set forth in paragraphs 51 and 52 of the petition insofar as they are inconsistent with the Record or can be construed as alleging any that the BSA acted improperly or contrary to law.

Congregation Answer:

52. The Congregation denies the allegations in paragraph 52 of the Petition

Petitioners' Reply:

See Pet. Ex. M-2 and M-3.

Re Verified Petition Para. 52

R-594 - As of Right Floor Area Schedule dated 10.22.07 prepared by Congregation's architect

R4674 - Proposed Floor Area Schedule dated 5.13.08 prepared by Congregation's architect

² ¶¶21 and 22 of the Decision confuse the facts by describing, not the percentage within Lot 37, but the division within Lot 36 and Lot 37 combined, i.e., the sanctuary, the parsonage, and the community house site. The Decision then, in ¶21, refers to the Zoning Resolution §72-21, which permits zoning floor area averaging, even though no averaging is required for the proposed building.

53. Even though the variances do result in additional floor area, no variances are required to transfer zoning lot floor area to the development site, though the Decision's discussion of transfer of zoning lot floor area provides an incorrect impression that transfer is required.

BSA Answer:

48. Deny the allegations set forth in paragraph 53 of the petition, except admit that no variances are required to transfer zoning lot floor area to the development site.

Congregation Answer:

53. The Congregation denies the allegations in paragraph 53 of the Petition.

Petitioners' Reply:

Congregation's answer is in bad faith to the extent it fails to admit that no variances are required to transfer zoning lot area to the development site having stated to the contrary at lines 2-4 of 5310, the Congregation's July 8, 2008 statement.

Light

54. Petitioner Kettaneh owns a historic brownstone directly across the street from the proposed building and is directly impacted by the loss of sunlight and light and air intended to be protected by the contextual zoning. The claim by the Congregation's expert that only a few buildings are impacted by shadows is of no importance to Petitioner Kettaneh. AKRF Study May 12, 2008 at B-12. (P-03373 at P-03411; R-004693 at R-004635). The Congregation and the BSA responded with shadow studies of Central Park itself, an issue never raised by the opposition. (August 2007 Shadow Study, P-02015, R-000372; December 19, 2007 Shadow Study, P-02602; R-002009) The BSA and the Congregation obsessed with shadow studies of Central Park, ignored specific requests to analyze the street shadows with street level three-dimensional studies and provided scant attention to the streets that the mid-block zoning was intended to protect. (P-01638, R-000221) Opponents, to demonstrate the reasonableness of providing meaningful street level three dimensional studies provided graphics created with a free program provided by Google. P-00457, R-003597. In response, the Congregation's consultants, over a year after the application was filed, provide small scale studies of shadows of the side street from thousands of feet in the air. AKRF Study May 12, 2008 (P-03373; R-004693). These studies suffered from many deficiencies, not the least of which was lack scientific validity in comparison with actual photographs of shadows. Clearly, small narrow streets require appropriate street level studies. In addition, the studies failed to show the comparison of shadows between an as of right building and the proposed building, and was not validated with actual photographs of the streets showing actual shadows cast. The proposed building shadows would have the most impact in the winter months. The Applicant's AKRF consultant provided a shadow study for 10:00 AM on December 21 at 10:00 AM. (Fig- B-11 at P-03413, R-missing.) In order to test the validity of the shadows shown, even though after the close of the hearing, this could only be tested on or around December 21, 2008. Opponents objected clearly to the BSA that the studies used a flawed computer model and should be tested. Attached then as Exhibit L is a post-hearing photograph which shows that there is no scientific basis for the shadow study shown by AKRF and relied upon by the BSA. Even worse, the BSA Record conveniently fails to include the December 21, 2008 10:00 AM shadow study in its version of the AKRF Study at R-004597. Page R-004635 refers to the Winter shadow study diagrams, but the BSA did not include these Diagrams in the BSA Record. See Fig. B-10 and B-11 R-004635. P-03412-13. These should have been reproduced between R-004635 and R-004636.

BSA Answer:

49. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first and second sentences of paragraph 54 of the petition. Deny the allegations set forth in the third sentence of paragraph 54 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law. Deny the allegations set forth in the fourth sentence of paragraph 54 of the petition. Deny the allegations set forth in the fifth sentence of paragraph 54 of the petition and respectfully refer the Court to petitioners' submission for its full text and true meaning [R. 3327, 3359]. Deny the allegations set forth in the sixth, seventh, eighth, ninth, tenth, and

eleventh sentences of paragraph 54 of the petition and respectfully refer the Court to the Congregation's submission for its full text and true meaning [R. 4624-4643]. Deny the allegations set forth in -9 fT the twelfth sentence of paragraph 54 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law. Deny the allegations set forth in the thirteenth sentence of paragraph 54 of the petition because it is unclear what petitioners are alleging. Deny the allegations set forth in the fourteenth, fifteenth, and sixteenth sentences of paragraph 54 of the petition insofar as they allege that the BSA acted improperly or contrary to law, and aver that BSA's failure to produce one page of petitioners' submission when producing the 5,795 page Record was inadvertent and immaterial.

Congregation Answer:

54. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in paragraph 54 of the Petition.

Economic Engine

55. The rationale for the luxury condominiums consistently offered by the Congregation in seven years of proceedings is that the luxury condominiums were an “economic engine” needed to create funds for the Congregation to permit the construction of the community house. See e.g., Applicant Statements re Economic Engine, Opp. Ex. A, P-00218 et seq.; R-003328 et seq.

BSA Answer:

50. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 55 of the petition, except admit that the Congregation proposed the need to generate revenue for its mission as a programmatic need and aver that the BSA rejected the notion that revenue generation could satisfy the requirements of Z.R. §72-21(a) for a variance application by a not-for-profit organization [R. 6 (¶¶ 79-80)].

Congregation Answer:

55. With respect to the allegations in paragraph 55 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 55 as an incomplete recitation of the record.

Petitioners' Reply:

Respondent City's answer is disingenuous and in bad faith in that in fact the BSA granted variances for the luxury condominiums, the sole purpose of which – according to Congregation's numerous submissions - is to generate revenue for the Congregation and that has no relationship to the Congregation's programmatic needs. See, e.g., R-5118 - Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum, at page 4, carryover paragraph, last three lines.

56. Having raised this argument repeatedly, the Congregation, the oldest and one of the wealthiest synagogues in the City, made no showing of financial hardship, and acted offended (and the BSA acted offended³) when opponents offered evidence of the financial resources of the Congregation. The Congregation complained that it was unable to build a skyscraper on top of its historic sanctuary and parsonage on Central Park West, but was unwilling to accept the restrictions of record on those properties restricting future development.

BSA Answer:

51. Deny the allegations set forth in paragraph 56 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

56. The Congregation denies the allegations in paragraph 56 of the Petition.

³ Vice Chair Collins castigated opposition witnesses for the audacity of offering evidence of financial resources of the Congregation in response to the Congregation's implicit claims of need. See BSA Transcript, February 12, 2008, p. 85 (P-02896).

Petitioners' Reply:

R-5119-R-5123 Statement in Support dated July 7, 2008 prepared by Congregation's Counsel, Friedman & Gottbaum

R-23-R-26 Statement in Support dated 03/30/2007 prepared by Congregation's Counsel, Friedman & Gottbaum

R-2551-R-2564 Transcript of testimony of Congregation's Rabbi, Marc Angel, before NYC Landmarks Preservation Commission hearing, November 26, 2002

R-2594-2596 Transcript of testimony of Congregation member, Jack Rudin, before NYC Landmarks Preservation Commission, November 26, 2002

R-317-R-321 Statement in Support dated 09/07/2007 prepared by Congregation's Counsel, Friedman & Gottbaum

R-3737-R-3739 Testimony of Katherine Davis at 2-12-08 BSA hearing
R-3616 Letter from Congregation's Counsel to BSA Chair dated February 4, 2008, page 2, ¶2

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

BSA Answer:

52. Admit the allegations set forth in paragraph 57 of the petition.

Congregation Answer:

57. The Congregation states that no response is required to paragraph 57 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 57.

Petitioners' Reply:

R-5-R-6 BSA Decision adopted August 28, 2008

The Congregation's answer is in bad faith insofar as it denies the plain meaning of ¶78 and ¶79

58. The Respondent Chair noted in the first BSA hearing that the Congregation with its financial need claim had put the Board in a "hard place" (November 27, 2007 BSA Transcript, p. 23, line 510 (P-02440 at P-02463, R-001726 at R-001749)⁴;

BSA Answer:

53. Deny the allegations set forth in paragraph 58 of the petitioner, and respectfully refer the Court to the November 27, 2007 BSA Transcript for its full text and true meaning [R. 1749-1756].

Congregation Answer:

58. With respect to the allegations in paragraph 58 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 58 as an incomplete recitation of the record.

Petitioners' Reply:

R-1749-1750 Statement by BSA Chair Srinivasan, Transcript of 11-27-07 BSA hearing, pages 23-24, lines 499-521.

The City's answer is in bad faith in its citation to R-1750-R-1756 as suggesting the "true meaning" of those pages was anything more than recording one of the more egregious examples of the determined and persistent efforts of the BSA commissioners to help the Congregation's lawyers find a way out of the "hard place" in which the Congregation's previous submissions had placed the BSA and cure the fundamental deficiencies in those submissions.

⁴ November 27, 2008 BSA Transcript, p. 26, line 571 (P-02440 at P-02466, R-001726 at R-001752):

571 COMM. OTTLEY-BROWN: Just a comment back that

572 it's my opinion that residential use to raise capital funds to correct programmatic

573 deficiencies is not in and of itself a programmatic need. It may be a resolution to a

574 problem or a way of financing a resolution to a programmatic need.

The Congregation's answer is in bad faith at least insofar as it denies the factual assertion by the BSA Chair that is quoted in the Petition.

59. At the same time, counsel for the Congregation was boasting to CB7 that the project had "the imprimatur of the Bloomberg Administration." (Community Board 7 Land Use Committee Hearing, October 17, 2007, Page 7-8 (P-02080 at P-02081; R-002827 at R-002833-4) (Also filed as Opp. Ex. N at P-00334-5, R-003458-9)) A trustee of the Congregation, and the lead witness in the 2002 LPC proceedings, was Jack Rudin, well-known real estate developer and confidant of Mayor Bloomberg. See, November 26, 2002 Landmarks Preservation Commission Transcript, p. 50, line 1 (R-002594) (Filed as Opp. Ex. D-2-3, P-00259-60, P-00260, R-003373-74). Another fact witness appearing at this hearing on behalf of the Congregation was Louis Solomon, who subsequently filed an appearance for the Congregation in the present litigation. (Id., p. 79, at R-002623). The New York City Corporation Counsel, Michael A. Cardozo, was formerly a litigation partner in Proskauer's 275 lawyer litigation department, for which Mr. Solomon is co-chair.

BSA Answer:

54. Deny the allegation set forth in the first sentence of paragraph 59 of the petition, except admit that the Congregation's attorney made a statement at the hearing held by Community Board 7's October 17, 2007 Land Use Committee Hearing, and respectfully refer the Court to that testimony for its full text and true meaning [R. 2831-978]. Deny the allegations set forth in the second sentence of paragraph 59 of the petition, except admit that Jack Rudin, a member of the Synagogue's Board of Trustees testified at the Landmarks Preservation Commission's November 26, 2002 hearing, and respectfully refer the Court to Rudin's testimony for its full text and true meaning [R. 2594-96]. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the third sentence of paragraph 59 of the petition, and aver that it is unclear whether the individual referred to, i.e., Lou Solomon, and Louis M. Solomon, counsel for the Congregation, are the same individual. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the fourth sentence of paragraph 59 of the petition, except admit that Michael A. Cardozo, the New York City Corporation Counsel, was a litigation partner in Proskauer Rose LLP, and aver that Mr. Cardozo is not appearing in the instant proceeding.

Congregation Answer:

59. The Congregation denies the allegations in paragraph 59 of the Petition.

Petitioners' Reply:

It is surprising that Mr. Solomon, counsel for the Congregation would allow the Congregation to verify under oath that the Congregation's counsel was not the Lou Solomon who testified at these proceedings.

60. Ignoring the Congregation's inability to meet the requirements of Zoning Resolution §72-21(b), the BSA was willing to accommodate the Congregation's desire for variances, but only if the Congregation would file a new version of its Statement in Support, deleting the offending phrase "addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough capital funds to correct the programmatic deficiencies described throughout this Application."⁵ The Congregation (CSI) complied only as to this phrase and deleted this phrase in the fifth do-over of its Statement in Support filed in July 8, 2008 (although leaving in other substantially similar offending references). See Applicants July 8, 2008 Statement in Support at p. 4, line 7: p. 43, second line from bottom; and at pp. 54-55, R-005118, R-005157, R-005168-9. See e.g., Sugarman Statement in Opposition, July 29, 2008 pp. 10-11, P-03923 at P-03925-7; R-005311 at R-005323-24). The Board then granted variances — fabricating a new rationale to substitute for the true rationale.

BSA Answer:

⁵ June 24, 2008 Official Transcript BSA Hearing, p. 36 (R-004937 at R-004973, P-03762 at P-03798):7 I think the comment that Commissioner Ottley-Brown made about the programmatic need⁹ regarding revenue generation, I think we've already said that many times; that we feel¹⁰ that that in and of itself is not a part of the programmatic need.

¹¹ I know you have it still in your papers. The Board may reject that argument. But,¹² I know that we thought it would be better for the papers to take that out.

55. Deny the allegations set forth in the first sentence of paragraph 60 of the petition, except admit that petitioners accurately quoted a passage from the transcript of the BSA's June 24, 2008 public hearing. Deny the allegations set forth in the second sentence of paragraph 60 of the petition, except admit the Congregation submitted a revised Statement in Support on or about July 8, 2008, and respectfully refer the Court to that statement for its full text and true meaning [R. 5114-69]. Deny the allegations set forth in the third sentence of paragraph 60 of the petition, except admit that the BSA granted variances to the Congregation [R. 1-14].

Congregation Answer:

60. The Congregation denies the allegations in paragraph 60 of the Petition.

Petitioners' Reply:

City's answer:

1st sentence –admits the essence of Petitioners' averment

2nd sentence –City does not cite any specific portion of the Congregation's July 8, 2008, 55-page submission that supports its denial.

3rd sentence – admits the essence of Petitioners' averment

Reasonable Return

61. In order for the BSA to grant the condominium variances, the BSA needed to find that the Congregation would be unable to earn a reasonable return, under Zoning Resolution §72-21(b), from a conforming building on the property⁶. Decision, ¶148.

BSA Answer:

56. Deny the allegations set forth in paragraph 61 of the petition, and respectfully refer the Court to Z.R. §72-21(b) for its full text and true meaning.

Congregation Answer:

61. The Congregation states that no response is required to paragraph 61 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 61.

Petitioners' Reply:

R-10 BSA Decision (Resolution) dated August 26, 2008, p. 10, left hand column, 1st "WHEREAS" ¶

62. This key finding — reasonable return from the condominium construction — concerns 90% of the variances' benefits, but is addressed by the Board in only 16 of the 230 paragraphs, paragraphs lacking any factual findings.⁷

BSA Answer:

57. Deny the allegations set forth in paragraphs 62, 63, 64, 65, 66 and 67 of the petition.

Congregation Answer:

62. The Congregation denies the allegations in paragraph 62 of the Petition.

Petitioners' Reply:

Respondents do not cite Record, and cannot in good faith deny that these paragraphs of the Decision refer to the condominiums.

⁶ The July 8, 2008 Congregation Statement in Support at pages 3-4 (R-005117-18, P-03826-27) states:"As further described throughout the Application, the New Building addresses the programmatic difficulties by providing: ...(3) residential use on floors 5 - 8 (plus penthouse) to be developed as a partial source of funding to remedy the programmatic religious, educational and cultural shortfalls on the other portions of the Zoning Lot."

⁷ The Decision ¶¶125 -148 cursorily addresses whether a conforming as-of-right building would return a reasonable return under Zoning Resolution §72-21(b). But seven of these paragraphs (¶130 and ¶¶132-137) address the financial return of the proposed building (apparently as to finding (e)). Even worse, these 16 paragraphs are lacking any finding of facts — containing only a conclusory final finding at ¶148.

63. The Decision completely ignores the six separate submissions of an opposition expert, Martin Levine, who is a certified MAI real estate valuation expert.

BSA Answer:

57. Deny the allegations set forth in paragraphs 62, 63, 64, 65, 66 and 67 of the petition.

Congregation Answer:

63. The Congregation denies the allegations in paragraph 63 of the Petition.

Petitioners' Reply:

The Respondents do not cite to any portion of the Decision that refers to Mr. Levine's professional and comprehensive reports.

R-2506 – R-2508 Letter to BSA Chair dated January 25, 2008 from Petitioners' valuation expert Martin Levine of Manhattan Valuation Services (hereinafter "Levine")

R-3630 - R-3649 Letter from Levine to BSA Chair dated February 8, 2008

R-4093 – R 4106 Letter from Levine to BSA Chair dated March 20, 2008

R-4254 – R-4265 Letter from Levine to BSA Chair dated April 15, 2008

R-4800 – R 4817 Letter from Levine to BSA Chair dated June 10, 2008

R-4932- R-4936 Letter from Levine to BSA Chair dated June 23, 2008

R-5210 – R-5215 Letter from Levine to BSA Chair dated July 29, 2008

64. Levine deconstructed the Congregation's submissions. Levine showed that the BSA ignored its own detailed requirements for §72-21(b) findings as set forth in the BSA's own written guidelines (which are consistent with valuation practices and case law) and showed that a conforming as-of-right building would earn a positive return.

BSA Answer:

57. Deny the allegations set forth in paragraphs 62, 63, 64, 65, 66 and 67 of the petition.

Congregation Answer:

64. The Congregation denies the allegations in paragraph 64 of the Petition.

Petitioners' Reply:

1st Sentence See citation at ¶ 63.

2nd Sentence

R-4254, supra, page 1, 2nd ¶, R-4254 – R-4255 – R-4256 pages 2-3 ¶2, R-4256-R-4258, pages 3-5, ¶¶s 3-7

R- 4260, Letter from Levine to BSA Chair dated April 15, 2008, page 7, last¶ and R-3638-R3645 – Letter from Levine to BSA Chair dated February 8, 2008, pages 9-16

65. Even worse, the BSA evidently wished to conceal from other applicants and the land use and zoning community that the basis of the §72-21(b) finding, was the use of a site value based upon development rights in another part of the site, because it well knew that every developer in New York City would be lining up to assert the same position.

BSA Answer:

57. Deny the allegations set forth in paragraphs 62, 63, 64, 65, 66 and 67 of the petition.

Congregation Answer:

65. The Congregation denies the allegations in paragraph 65 of the Petition.

66. The BSA Decision completely ignored the objections raised as to the computation of site value, not even mentioning the issues that had been raised repeatedly by opponents.

BSA Answer:

57. Deny the allegations set forth in paragraphs 62, 63, 64, 65, 66 and 67 of the petition.

Congregation Answer:

66. The Congregation denies the allegations in paragraph 66 of the Petition.

Petitioners' Reply:

The Resondents are unable to cite to a discussion of these issues in the Resolution.

R-4259-R-4260 - Letter from Levine to BSA Chair dated April 15, 2008, pages 6-7

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

67. Although not readily apparent from the Decision, the cornerstone of the upper floor condominium variances is the reasonable return analysis for the conforming as-of-right schemes under §72-21(b).

BSA Answer:

57. Deny the allegations set forth in paragraphs 62, 63, 64, 65, 66 and 67 of the petition.

Congregation Answer:

67. The Congregation states that no response is required to paragraph 61 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 67.

Petitioners' Reply:

Respondents do not cite record or contrary authority that supports their denials.

68. The Congregation argued that the literal requirements of §72-21(b) relieved nonprofits of the requirement to satisfy the (b) finding, even for a profit-making project such as condominiums. See this and other extraordinary propositions advanced by the Congregation in Closing Statement in Response to Opposition of Certain Variances, August 12, 2008, P-03972, R-005793.

BSA Answer:

58. Deny the allegations set forth in paragraph 68 of the petition, and respectfully refer the Court to the Congregation's August 12, 2008 letter for its full text and true meaning [R.5793].

Congregation Answer:

68. With respect to the allegations in paragraph 68 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 68 as an incomplete recitation of the record.

69. The BSA rejected this strict reading of the §72-21(b), apparently holding that, despite the language that “this finding shall not be required for the granting of a variance to a non-profit organization,” such provision did not apply where a nonprofit was seeking variances for a total or partial for-profit building.

BSA Answer:

59. Deny the allegations set forth in paragraph 69 of the petition, except admit that because the residential development was not proposed to meet the Congregation's programmatic needs, the BSA directed the Congregation to perform a financial feasibility study evaluating the ability of the Congregation to realize a reasonable financial return from an as-of- right residential development on the site, just as it would have required of any for-profit applicant [R. 8 (¶¶ 125-26)].

Congregation Answer:

69. With respect to the allegations in paragraph 69 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 69 as an incomplete recitation of the record.

70. An issue not explicitly addressed by the BSA was how to conduct the reasonable return analysis, since §72-21(b) does not explicitly address either the mix of profit and nonprofit in the same structure or the mix of profit and nonprofit on the same zoning site.

BSA Answer:

60. Deny the allegations set forth in paragraph 70, 71, 72, 73, 74, 75 and 76 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

70. With respect to the allegations in paragraph 70 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states

that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 70 as an incomplete recitation of the record.

71. The BSA apparently first asked the Congregation to evaluate a conforming as-of-right scheme (“Scheme A”). Then, the BSA staff asked for an evaluation of reasonable return for an all-residential building on the site (“Scheme C”).

BSA Answer:

60. Deny the allegations set forth in paragraph 70, 71, 72, 73, 74, 75 and 76 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

71. With respect to the allegations in paragraph 71 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 71 as an incomplete recitation of the record.

Petitioners' Reply:

R-257 BSA Notice of Objections dated June 15, 2007, p. 4, ¶35

R-513, R-514 BSA Second Notice of Objections dated October 12, 2007 p. 2, ¶15, p. 3, ¶20

See BSA resolution at ¶ 126 and ¶127 where the BSA states that it directed studies, which is inaccurate as to ¶127 because the initial submission did not include the FAR 4 Scheme C.

72. The Congregation never complied with the request to provide analysis of an all-residential building, providing instead a part residential building and not including valuable basement and sub-basement space.

BSA Answer:

60. Deny the allegations set forth in paragraph 70, 71, 72, 73, 74, 75 and 76 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

72. With respect to the allegations in paragraph 72 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 72 as an incomplete recitation of the record.

Petitioners' Reply:

compare:

R-2009-R-2020 “PROPOSED SCHEME” dated, prepared by Congregation’s architect, Ray Harris Dovell, Jr., and especially R-2015, Drawing PROG P-6, “COMMUNITY FACILITY SUBCELLAR PROPOSED” dated 12.26.07, prepared by Congregation’s architect.

with

R-625-R-641 “AS OF RIGHT SCHEME C RESIDENCE SCHEME” dated 10.22.07, prepared by Congregation’s architect, Ray Harris Dovell, Jr., especially R-631 – Drawing AOR-C-6 captioned “COMMUNITY FACILITY SUB CELLAR AS-OF-RIGHT, dated 10.22.07, prepared by Congregation’s architect.

See also R-4255, Letter to BSA Chair dated April 15, 2008, prepared by Petitioners’ valuation expert. Martin Levine of MVS, p.2, §2, especially third paragraph.

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

BSA Answer:

60. Deny the allegations set forth in paragraph 70, 71, 72, 73, 74, 75 and 76 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

73. With respect to the allegations in paragraph 73 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 73 as an incomplete recitation of the record.

Petitioners' Reply:

R-1980 Economic Analysis dated December 21, 2007, prepared by Congregation's financial consultant, Freeman Frazier, p. 11 (Schedule A1)
See Pet. Ex. N-7.

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

BSA Answer:

60. Deny the allegations set forth in paragraph 70, 71, 72, 73, 74, 75 and 76 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

74. With respect to the allegations in paragraph 74 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 74 as an incomplete recitation of the record.

Petitioners' Reply:

Clearly the BSA Decision contains no findings of fact as to any fact underlying its conclusory finding.

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

BSA Answer:

60. Deny the allegations set forth in paragraph 70, 71, 72, 73, 74, 75 and 76 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

75. With respect to the allegations in paragraph 75 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 75 as an incomplete recitation of the record.

Petitioners' Reply:

R-3637 – Letter dated February 8, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.2
R-4255– Letter dated April 15, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.2, §2.
R-4932- R49333- Letter dated June 23, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, pp.1- 2, carryover ¶

76. The response of the Congregation is telling — the Congregation does not deny that it failed to provide proper analysis of Schemes A and C. Rather, its defense, as presented by the Congregation's consultant Freeman Frazier in their last submission of August 12, 2008 Freeman Frazier Letter for Applicant of August 12, 2008, pp. 2-3, (P-03952 at P-03955-55; R-005773 at R-005774-75), is as follows:

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

FFA Response to Allegation #1: As noted on page 7 of the July 8, 2008 Response, the BSA did not request a submission of an analysis of a revised Scheme C. Subsequent to its

receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

* * *

MVS Allegation #1: MVS alleges that FFA failed to respond the BSA's request to provide an all Residential Scheme in response to the Notice of Objections dated June 15, 2007. (Page 2)

FFA Response to Allegation #1: FFA provided a response to the BSA's request on page 26 of the December 21, 2007 Response, that eliminated all community facility related programmatic needs from the building. The ground floor synagogue lobby and core remained to alleviate the circulation problems. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

BSA Answer:

60. Deny the allegations set forth in paragraph 70, 71, 72, 73, 74, 75 and 76 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

76. With respect to the allegations in paragraph 76 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 76 as an incomplete recitation of the record.

Site Details

77. The development site, Tax Lot 37, currently is occupied by a to-be-demolished, four-story community house and vacant lot. It is a perfectly rectangular site, 64 by 100 feet. The site is located adjacent to the Congregation's historic 1896 synagogue sanctuary at Central Park West and 70th Street.

BSA Answer:

61. Deny the allegations set forth in paragraph 77 of the petition, except admit that Lot 37 is adjacent to the Synagogue building, contains 6,436 square feet and is currently partially improved with a four-story community house, and partially vacant, and that the Congregation has applied to DOB for a permit to demolish the exiting community house [R. 2, 6 (¶¶ 1, 2, 13, 17, 18, 24, 82)].

Congregation Answer:

77. The Congregation denies the allegations in paragraph 77 of the Petition, except admits, to the extent not inconsistent with the record, that Lot 37 is adjacent to the Synagogue building, contains 6,436 square feet and is currently partially improved with a four-story community house, and partially vacant, and that the Congregation has applied to the Department of Buildings for a permit to demolish the exiting community house.

Petitioners' Reply:

R-387 Existing Site Plan, etc. dated 08.28.07 prepared by Congregation's architect
City admit essential facts of Petitioners' averment.

78. The site has excellent subterranean conditions, allowing the construction of both a basement and a sub-basement. The sub-basement alone will provide the Congregation with an additional 6400 square feet of meeting area, permitting the assembly of 340 persons, where the Congregation proposes to create a large banquet hall.

BSA Answer:

62. Deny the allegations set forth in paragraph 78 of the petition, except admit that Lot 37 permits the construction of two cellar levels and that the Congregation proposes to construct a multi-function room on the sub-cellar level with a capacity of 360 persons for the hosting of life cycle events and weddings [R. 2, 3, 6 (¶¶ 13, 17, 39, 82)].

Congregation Answer:

78. The Congregation denies the allegations in paragraph 78 of the Petition.

Petitioners' Reply:

City admits essential facts in Petitioners' averment.

As to Banquet Hall, see 3447, drawing dated August 15, 2006, prepared by Congregation's architect.

79. The site is in a prime Manhattan residential location, 100 feet from Central Park West and a subway station and bus stop.

BSA Answer:

63. Deny the allegations set forth in paragraphs 79 and 80 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

79. The Congregation denies the allegations in paragraph 79 of the Petition.

Petitioners' Reply:

R-1910 Letter dated December 28, 2007 to Board Chair from Congregation's counsel, Freidman & Gottbaum, page 13

80. The Congregation does claim a programmatic need/hardship to construct an elevator to access the sanctuary, but admits that such an elevator would require only 100 square feet on each of the 5000 to 6400 square foot first four floors of a conforming building.⁸

BSA Answer:

63. Deny the allegations set forth in paragraphs 79 and 80 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

80. With respect to the allegations in paragraph 80 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 80 as an incomplete recitation of the record.

Petitioners' Reply:

R-5152 Revised Statement in Support dated July 8, 2008 prepared by Congregation's Counsel, Friedman & Gottbaum

Site History

81. Originally owned by the Congregation when the synagogue was constructed, what is now Tax Lot 37 was conveyed in 1896 by the Congregation to developers; three row houses were constructed thereon. In 1949, the Congregation reacquired two of the row houses and then in 1954 reconstructed the row houses, demolishing their façade, eliminating the setback and creating the existing four-floor community house. This community house provides lobby space and an elevator for access to the synagogue building. In 1965, the Congregation reacquired the third lot and in 1970 demolished the row house thereon, leaving a non-income-producing vacant lot.

BSA Answer:

64. Deny the allegations set forth in paragraphs 81, 82, 83, and 84 of the petition to the extent that they are inconsistent with the Record.

Congregation Answer:

81. The Congregation denies the allegations in paragraph 81 to the extent inconsistent with the record.

Petitioners' Reply:

1st Sentence R-5120, R-5132 Revised Statement in Support dated July 8, 2008, prepared by Congregation's counsel, Friedman & Gottbaum

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

2nd Sentence R-5124, R-5125, R-5132 Revised Statement in Support dated July 8, 2008, prepared by Congregation's counsel

3rd Sentence R-394, R-395, R-396, R-397 Drawings of Existing Conditions dated 08.28.07 prepared by Congregation's architect

4th Sentence R 5133 Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel

R-1899 Letter dated December 28, 2007 to Board Chair from Congregation's counsel, Friedman & Gottbaum, page 2 (Site History...)

Answers of City and Congregation are in bad faith in failing to point to any inconsistency in the record.

82. The primary user of the community house is a private day school, Beit Rabban, which is not only unaffiliated with the Congregation, but is Jewish nonsectarian, as contrasted with the orthodox Congregation.

BSA Answer:

64. Deny the allegations set forth in paragraphs 81, 82, 83, and 84 of the petition to the extent that they are inconsistent with the Record.

Congregation Answer:

82. The Congregation denies the allegations in paragraph 82 to the extent inconsistent with the record.

Petitioners' Reply:

R-5126 Revised Statement in Support dated July 28, 2008 prepared by Congregation's counsel

83. The school pays the Congregation as much as \$500,000 a year in rent for a building the Congregation describes as obsolete and dilapidated.

BSA Answer:

64. Deny the allegations set forth in paragraphs 81, 82, 83, and 84 of the petition to the extent that they are inconsistent with the Record.

Congregation Answer:

83. The Congregation denies the allegations in paragraph 83 of the Petition.

Petitioners' Reply:

R-5125, R-5155, R-5156, R-5167 Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel

R-4171 IRS Form PF-990 for period July 1, 2006-June 30, 2007, filed by Beit Rabban School.

Nowhere in the Record is there a statement from the Congregation of the amount of rent paid by Beit Rabban.

84. The programmatic need charts submitted by the Congregation on December 27, 2007 are clear: the exclusive user of the second floor in the existing community house is the Beit Rabban School. See Applicant Programmatic Drawings, Community Facility Second Floor Existing, Prog E-8, December 26, 2007, P-02604 at P-02606, R-002009 at R-002012 attached as Petitioners Exhibit J. Thus, the statements by the Congregation that Beit Rabban was and will only use space not used by the Congregation is absolutely false. Further, analysis of the claimed programmatic needs show that the dominant user of the proposed school is Beit Rabban, not the Congregation. Decision at ¶55.

BSA Answer:

64. Deny the allegations set forth in paragraphs 81, 82, 83, and 84 of the petition to the extent that they are inconsistent with the Record.

Congregation Answer:

84. The Congregation denies the allegations in paragraph 84 of the Petition.

85. The BSA Decision refers to the Beit Rabban as if it were part of the Congregation. But, in contradictory fashion, the BSA never required the Congregation to provide programmatic need information as to Beit Rabban when providing information to the BSA.

BSA Answer:

65. Deny the allegations set forth in paragraph 85 of the petition.

Congregation Answer:

85. The Congregation denies the allegations in paragraph 85 of the Petition.

Petitioners' Reply:

First sentence - R-4 - Decision of BSA dated August 28, 2008, page 4, 2nd column, third “WHEREAS” paragraph (¶55 in Reformatted BSA decision.)

Second sentence – R-4954 Statement of Petitioners’ counsel, Alan Sugarman, at June 24, 2008 BSA hearing, transcript page 17, lines 1-8. R- 4956 Response of BSA Chairperson to foregoing statement of Mr.Sugarman at June 24, 2008 BSA hearing, transcript page 19, lines 6-7 “Any questions for Mr. Sugarman. Thank you. Next speaker.”

86. The BSA never inquired of the Congregation as to the rent being paid by the Beit Rabban School.

BSA Answer:

66. Deny the allegations set forth in paragraphs 86 and 87 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

86. With respect to the allegations in paragraph 86 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 86 as an incomplete recitation of the record.

Petitioners’ Reply:

R-4954 Statement of Petitioners’ counsel, Alan Sugarman, at June 24, 2008 BSA hearing, transcript page 17, lines 1-8.

R- 4956 Response of BSA Chairperson to foregoing statement (and all others made by Mr.Sugarman at June 24, 2008 BSA hearing, transcript page 19, lines 6-7 “Any questions for Mr. Sugarman. Thank you. Next speaker.”

87. Similarly, the BSA never inquired of the Congregation as to the rent being paid by the residential tenant of the six-bedroom luxury parsonage residence, although, in contradictory fashion, the BSA apparently was willing to permit development rights over the parsonage to be used to compute site value.

BSA Answer:

66. Deny the allegations set forth in paragraphs 86 and 87 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

87. With respect to the allegations in paragraph 87 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 87 as an incomplete recitation of the record.

Sites Acquired To Satisfy Programmatic Needs

88. Importantly, in all of its five versions of its statements in support submitted to the BSA, the Congregation states that the three lots (now comprising the single Lot 37) were acquired to meet the development needs of the synagogue and the community house:

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

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

BSA Answer:

67. Deny the allegations set forth in paragraph 88 of the petition to the extent that they misinterpret the excerpted portion of the Congregation's Statement in Support.

Congregation Answer:

88. With respect to the allegations in paragraph 88 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 88 as an incomplete recitation of the record.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition, by providing the following reply:

Respondents' answers are in bad faith insofar as they deny the factual assertions of the Congregation's counsel quoted in the averment

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

BSA Answer:

68. Deny the allegation set forth in paragraph 89 of the petition.

Congregation Answer:

89. The Congregation denies the allegations in paragraph 89 of the Petition.

§74-711 Application

90. Prior to the initiation of the BSA variance proceeding in April 2007, because the site is located in a Landmark District, the Respondent Congregation first was required to apply for a Certificate of Appropriateness from the Landmarks Preservation Commission, which it did in 2001. Initially, the Congregation asked for a special permit under Zoning Resolution §74-711, but perhaps because the Congregation realized that unacceptable conditions might be placed on such a permit, the Congregation withdrew its application and requested only a Certificate of Appropriateness.⁹

BSA Answer:

69. Admit the allegations set forth in the first sentence of paragraph 90 of the petition. Deny the allegations set forth in the second sentence of paragraph 90 of the petition, except admit that the Congregation filed and withdrew an application for a special permit under Z.R. §74-711.

Congregation Answer:

90. The Congregation states that it is not required to respond to those allegations in paragraph 90 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

Petitioners' Reply:

City admits essential facts in Petitioners' averment.

91. As Norman Marcus observed at page 40 of the February 12, 2008 BSA Hearing (line 878, R-003693, P-02850):

878 The last time I was here, Commissioner Collins, you asked me suppose they had
879 applied for a Special Permit? And, I said to you, gee, that makes all the difference or
880 makes a big difference because they did not apply that way. Why? Because the
881 Landmarks Commission would not join that application for a Special Permit and so

⁹ See LPC Hearing, January 17, 2006, p. 7 (R-002406 at R-002412; P-01213 at P-01214) ("we are no longer requiring 74-711 transfer of bulk across the district boundary ... the building is now as for right as to the distribution of bulk across the site.")

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

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

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

the⁸⁸² applicant had to come, on its own, here, for a 72-21 variance which is very different⁸⁸³ findings than a Special Permit.¹⁰

BSA Answer:

70. In response to paragraph 91 of the petition, admit that petitioners accurately quoted a passage from the transcript of the BSA's February 12, 2008 public hearing.

Congregation Answer:

91. With respect to the allegations in paragraph 91 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 91 as an incomplete recitation of the record.

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

BSA Answer:

71. Deny the allegations set forth in paragraph 92 of the petition, except admit that the Landmarks Preservation Commission issued the Congregation a Certificate of Appropriateness on March 21, 2007, and respectfully refer the Court to the Certificate for its full text and true meaning [R. 215-16].

Congregation Answer:

92. The Congregation states that it is not required to respond to those allegations in paragraph 92 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

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

BSA Answer:

72. Deny the allegations set forth in paragraph 93 of the petition.

Congregation Answer:

93. The Congregation denies the allegations in paragraph 93 of the Petition.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition, by providing the following response:

Respondents do not cite Record.

City's answer is inconsistent with its admission respecting the averments in paragraph 69 of this Petition.

See 5129 of the July 8, 2008 Statement in Support wherein the Congregation admits that it did not pursue §74-711.

Community Board 7

94. The Community Board 7 Land Use Committee held two hearings in October and November 2007. As well, the Congregation held ex parte meetings between the Congregation and Community Board 7, which excluded opponents of the project. See March 11, 2008 Letter, Friedman to BSA (R-003841, P-03036), responding to Sugarman Letter to BSA,

¹⁰ Essentially, the BSA variance issuance can be viewed from the perspective that Commissioner Collins and the BSA seemed to feel that the LPC and City Planning should have provided the Congregation with a special permit under §74-711, and so the BSA substituted its judgment for that of not only the City Council's mid-block zoning, but also for the judgment of the LPC and City Planning that would have, but did not formally, rejected a §74-711 special permit. The question that Respondent Collins could have asked is whether the Congregation should have first exhausted its administrative remedies under §74-711 before coming to the BSA.

March 7, 2008 (R-003827, P-02985). The Community Board 7 Committee rejected, by a virtually unanimous vote, the variances for the condominiums, but on a split vote approved the smaller lower floor variances (described below).

BSA Answer:

73. Admit the allegations set forth in the first sentence of paragraph 94 of the petition. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the second sentence of paragraph 94 of the petition. Deny the allegations set forth in the final sentence of paragraph 94 of the petition, and respectfully refer this Court to Community Board 7's December 4, 2007 Resolution for its full text and true meaning [R. 1886- 92].

Congregation Answer:

94. With respect to the allegations in paragraph 94 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 94 as an incomplete recitation of the record.

Petitioners' Reply:

First sentence Congregation's typical "non-answer" is in bad faith

Second sentence R-3846 Letter to BSA Chair dated March 11, 2008 from Congregation's counsel, Friedman & Gottbaum, page 6

Third sentence R-1889 Resolution of Community Board 7 dated December 4, 2007, 3rd page

95. With the opponents having used the BSA objections to defeat the condominium variances before the CB7 Committee, the BSA Commissioners had a change of heart, and, over the objection of the opposition, changed the hearing schedule. Without waiting for the various omissions and discrepancies noted by its staff and by the opposition to be remedied (which indeed, never were remedied), the BSA went ahead, over the objections of the opposition and the Community Board, with a scheduled hearing for November 27, 2007, on short notice¹¹, even before Community Board 7 was able to hold its own full board meeting on this issue.

BSA Answer:

74. Deny the allegations set forth in paragraph 95 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

95. The Congregation denies the allegations in paragraph 95 of the Petition.

Petitioners' Reply:

1st Sentence –R-1628-R1630 Letter dated October 31, 2007 to BSA Chair from Mark LeBow, Counsel to Opponents

2nd Sentence – R1726-R1823 Transcript of BSA hearing on November 27, 2007

96. With more complete information, including the testimony from the BSA hearing of November 27, 2007, on December 4, 2007, the full Community Board 7 rejected all the variances after a thoughtful analysis of the Congregation's presentation.¹²

BSA Answer:

¹¹ The Rules of The City of New York, Title 2, BSA, § 1-06, provide that 30 days' notice be provided — the BSA only provided 29 days (P-00130). See letter dated October 31, 2007 from Mark Lebow, Esq. to BSA (R-001628, P-02314). The same rule requires the BSA examiners to "have determined the application to be substantially complete." Such a determination was never provided by the examiner, and, clearly, the Congregation had yet to respond fully to each objection in the BSA Objection letters, although claiming to have done so.

¹² See Transcript of Community Board 7, December 4, 2007 R-003160 P-02528; December 4, 2007 Resolution of CB7 Opposing Variances R-001886, P-02554; October 17, 2007 Transcript of CB7 Land Use Committee R-002827, P-02080; November 19, 2007 Transcript of CB7 Land Use Committee (R-002929, P-02330); Resolution of CB7 Land Use Committee (R-002979, P-02376).

75. Deny the allegations set forth in paragraph 96 of the petition, and respectfully refer this Court to Community Board 7's December 4, 2007 Resolution for its full text and true meaning [R. 1886-92].

Congregation Answer:

96. The Congregation denies the allegations in paragraph 96 of the Petition.

Petitioners' Reply:

R-1889 Full Board Resolution of Community Board 7 dated December 4, 2007, 3rd unnumbered page. proposal by Congregation Shearith Israel for variances, as follows: Building Height and Base Height: 38 In favor 0 Against 1 Abstention 0 Present Front Set Back: 37 In favor 1 Against 1 Abstention 0 Present Rear Set Back: 38 In favor 0 Against 1 Abstention 0 Present Rear-yard Incursion in R8B and RIOA and Lot Coverage: 21 In favor 13 Against 2 Abstentions 0 Present

The Seven Variances

97. The BSA variance proceeding granted seven variances described in ¶1 of the Decision, as reflected in the letter of objection from the Department of Buildings ("DOB") dated August 24, 2007. See DOB Letter of Objection (P-01796). The August 24, 2007 letter was the second Letter of Objection from DOB to the Applicant.¹³ When the DOB denies a requested permit, it is standard practice to issue such a Letter of Objection, which an applicant may then appeal to the BSA. The DOB Letters of Objection are not to be confused with two separate Objection Letters which the BSA sent to the Applicant Congregation. The Decision separates these seven variances as falling into two categories: Community Center Use and Residential Use. Four upper floor variances permit the construction of the condominiums, and three lower floor variances provide rear setbacks for the school facilities.

BSA Answer:

76. Deny the allegations set forth in the first sentence of paragraph 97 of the petition insofar as they are inconsistent with the BSA's Resolution [R. 1-14]. Admit the allegations set forth in the second sentence of paragraph 97 of the petition. Deny the allegations set forth in the third sentence of paragraph 97 of the petition, and aver that where DOB denies a permit application, it may issue a Letter of Objection which, under certain circumstances, the applicant may appeal to the BSA. Admit the allegations set forth in the fourth sentence of paragraph 97 of the petition. Deny the allegations set forth in the fifth sentence of paragraph 97 of the petition insofar as they are inconsistent with the BSA's Resolution [R. 1-14].

Congregation Answer:

97. With respect to the allegations in paragraph 97 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 97 as an incomplete recitation of the record.

Petitioners' Reply:

1st Sentence - Compare R-1, BSA Resolution dated August 28, 2008, page 1 and R-348 Department of Buildings Notice of Objections dated August 28, 2007.

¹³ The initial application of the Congregation to the BSA sought eight variances based upon the DOB Notice of Objections of March 27, 2007, Objection 8 (R-000018, P-01301). The Eighth Variance, as to ZR §23-711, related to a 40-foot separation required between the sanctuary and the upper floors. The BSA thereafter cited the Congregation for failing to describe this separation in the zoning schematics filed with the application. BSA Objection Letter to Applicant, June 15, 2007 at page 3, Objection 25 (R-000253 at R-000256, P-01724 at P-01727). On August 28, 2007, without explanation, the Congregation refiled its plans with the DOB and a new set of objections was issued by the DOB eliminating the eighth objection. DOB Notice of Objections, August 24, 2007 (R-000348, P-01796). Although the Decision states in ¶ 7 footnote 1 that the Congregation had filed revised plans, insofar as any plans implicating the 40-foot separation, no changes at all were provided by the Congregation to the DOB. Opponents through FOIL requests sought information as to the elimination of the eighth variance, but DOB refused to provide information, claiming that the building was "9/11" sensitive. See e.g. Letter dated October 30, 2007 from David Rosenberg to Shelly Friedman, (P-02306, R-001620). The Congregation would not provide information and the BSA would not ask for or subpoena the information from the DOB. The Congregation's maneuver is related to its §72-21(a) argument as to the split lot and to its inability to build on the R10A portion of the lot because of the sliver rule. But, clearly, §23-711 would not permit the construction of tall condominiums on the R10-A portion, and the record is completely devoid of any explanation as to the surreptitious elimination of variance 8.

2nd Sentence – R-18 Department of Buildings Objection Sheet dated 10/28/05, showing DOB denied Congregation’s request for 8 variances (stamped “VOID” 09/06/07)

3rd Sentence – Respondents’ answers are in bad faith insofar as they fail to cite any authority or citation to any particular portion of the Record on which they base their denials

4th Sentence - R-253-259 Letter from BSA dated June 15, 2007 to BSA; R-512-R-515 – Letter from BSA to Congregation’s counsel, Shelly Friedman, Esq.

5th Sentence R-1 BSA Resolution dated August 28, 2008, page 1 (Variances 1-4 condominiums; Variances 5-7 school facilities).

R-5150-5154 – Statement in Support dated July 8, 2008 prepared by Congregation’s counsel, Friedman & Gottbaum (school facilities)

R-5154-R5157 - Statement in Support dated July 8, 2008 prepared by Congregation’s counsel, Friedman & Gottbaum (condominiums)

Congregation’s standard “non-answer” is in bad faith.

98. The three lower floor variances allow the addition of ten feet in depth to each of floors two, three, and four, allegedly to allow larger classrooms. Because the lot is 64 feet wide, these three variances would allow an additional 1960 gross square feet, or approximately 1500 square feet of additional net space as stated by the Decision in ¶46. See Rear Yard Variances for Proposed Scheme (right column), Opp. Ex. GG at GG-10 (R-004156 at R-004166, P-00465 at P-00475. Opposition architectural expert Craig Morrison provided a foundation for this exhibit GG in his statement of March 24, 2008 (P-03093, R-003930) and in his testimony at the April 15, 2008 BSA Hearing, Transcript at p. 27, line 590 (P-03245 at P-03272; R-004462 at R-004489). At the conclusion of his testimony, the BSA Commissioners asked no questions of Mr. Morrison.

BSA Answer:

77. Deny the allegations set forth in the first and second sentences of paragraphs 98 of the petition, and respectfully refer the Court to the BSA's Resolution [R. 1-14] for its full text and true meaning. Deny the allegations set forth in the third and fourth sentences of paragraphs 98 and respectfully refer the Court to Craig Morrison's March 24, 2008 letter and April 15, 2008 testimony for their full text and true meaning [R. 3930-3935 and 4489-4491].

Congregation Answer:

98. With respect to the allegations in paragraph 98 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 98 as an incomplete recitation of the record.

Petitioners' Reply:

Re: Verified Petition Para.98

1st Sentence - R-5150-5154 – Statement in Support dated July 8, 2008 prepared by Congregation’s counsel, Friedman & Gottbaum

2nd Sentence R-4 – BSA Decision dated August 28, 2008, page 4, 1st column, 1st “WHEREAS” ¶

3RD Sentence R-3930-R3933 Letter to BSA Chair dated March 24, 2008 of Petitioners’ architect, Craig Morrison, AIA, pages 1-4

R-4489 – Transcript of April 15, 2008 BSA hearing, page 27 (Morrison)

4th Sentence – R-4491 -Transcript of April 15, 2008 BSA hearing, page 29 (Srinivasan-no questions)

Congregation’s standard “non-answer” is in bad faith.

99. Disproportionate attention is paid in the Decision to the lower floor variances, and much of the attention discusses irrelevancies. Any and all discussion sprinkled throughout the Decision that refers to religious deference, religious uses, schools, programmatic need, etc., could relate conceivably only to the 10-foot rear extensions and the resulting extra 1500 square feet, less than 10%, of the space provided by all seven variances. Because the rear 10 feet of the proposed building

has no elevators, stairs, or access points with the synagogue, there is no relationship between the 10-foot extension and access and circulation.¹⁴

BSA Answer:

78. Deny the allegations set forth in paragraph 99 of the petition, and respectfully refer the Court to the BSA's Resolution [R. 1-14] for its full text and true meaning.

Congregation Answer:

99. With respect to the allegations in paragraph 99 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 99 as an incomplete recitation of the record.

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

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

BSA Answer:

79. Deny the allegations set forth in paragraph 100 of the petition, except admit that the upper floor variances, which relate to height and setback, were requested so that the Congregation could construct a mixed use building with market-rate condominiums on floors five through nine, and admit that petitioners accurately quoted from the BSA's Resolution.

Congregation Answer:

100. With respect to the allegations in paragraph 100 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 100 as an incomplete recitation of the record.

Petitioners' Reply:

1st Sentence – R 4673- SITE PLAN, ZONING CALCULATIONS AND BASE PLAN CALCULATION dated 01.11.08 prepared by Congregation's architect, 2nd column, "Density" ¶ B (Proposed units – 5)

2nd Sentence R-5154-5157 Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum, pp 40-43

3rd Sentence - R-593 - AS-OF-RIGHT SITE PLAN, ZONING CALCULATIONS AND BASE PLANE CALCULATIONS dated 10.22.07 prepared by Congregation's architect

Congregation's standard "non-answer" is in bad faith.

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

BSA Answer:

80. Deny the allegations set forth in paragraph 101 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

¹⁴ As discussed below, the lower floor variances in fact are related directly to the condominium project, for the simple reason that the programmatic needs claimed to support the 1500 square feet of variances could easily be accommodated in the fifth and sixth floors of a conforming as-of-right building.

Congregation Answer:

101. With respect to the allegations in paragraph 101 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 101 as an incomplete recitation of the record.

Petitioners' Reply:

1st Sentence – R-4674 – ZONING FLOOR AREA SCHEDULE dated 05.13.08 prepared by Congregation's architect
2nd Sentence – R - 4674 – ZONING FLOOR AREA SCHEDULE dated 05.13.08 prepared by Congregation's architect

R - 594 - AS-OF-RIGHT FLOOR AREA SCHEDULE dated 10.22.07 prepared by Congregation's architect
City's answer is in bad faith insofar as it fails to note any inconsistency with the record

Congregation's standard "non-answer" is in bad faith.

102. Comparing the upper floor condominium variances at 12,715 square feet to the lower floor "school" variance at 1500 square feet, the upper floor variances represent 90% of the area for which variances are sought. Despite the impression that might be given in the Decision, these condominium variances are unrelated to the religious status of the applicant or to any programmatic needs for classroom or access space and require no transfer of zoning area rights from any other part of the zoning lot. A review of the DOB objections shows that there is no objection at all relating to floor area ratio and no variances are needed for the bulk of the proposed building — only the height and setbacks in the front and rear on the upper floors are relevant. Thus, all discussion of the transfer of zoning bulk is wholly irrelevant. See LPC Hearing, January 17, 2006, p. 7 (R-002406 at R-002412; P-01213 at P-01214) ("we are no longer requiring 74-711 transfer of bulk across the district boundary ... the building is now as for right as to the distribution of bulk across the site." The differences between an as-of-right building and the proposed building is disclosed by the graphics shown in Exhibit C Attached hereto. P-00434, P-02429, P-02430; R-003571, R-001833, R-001834, submitted to the BSA by Alan Sugarman at the hearing of November 27, 2008. See Transcript, p. 46 at line 1022 et seq.

BSA Answer:

81. Deny the allegations set forth in the first and second sentences of paragraph 102 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law. Deny the allegations set forth in the third sentence of paragraph 102 of the petition, except admit that the Congregation did not request variances relating to the FAR of the proposed building. Deny the allegations set forth in the fourth sentence of paragraph 102 of the petition. Deny the allegations set forth in the fifth sentence of paragraph 102 and respectfully refer the Court to the cited documents for their full text and true meaning [R. 3571, 1833, 1834].

Congregation Answer:

102. With respect to the allegations in paragraph 102 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 102 as an incomplete recitation of the record.

Petitioners' Reply:

1st Sentence – Respondents' answers are in bad faith insofar as they refuse to admit the results of a simple arithmetical calculation.

2nd Sentence – R-3236-3237 Transcript of Community Board hearing held December 4, 2007

R-5133-R-5146 Revised Statement in Support prepared by Congregation's counsel, Friedman & Gottbaum, pages 19-31 (Extended discussion of Congregation's "programmatic needs"; upper floor condominiums not mentioned)

R-2406 at R-2412 Transcript of January 17, 2006 Landmarks Preservation Commission hearing, lines 9-14
Statement of Congregation's counsel, Shelly Friedman

No Use Variances Were Requested Or Granted

103. Notwithstanding the impression that could be obtained from an initial reading of the Decision, the Congregation did not apply for a "use" variance for its proposed project, or for the "Toddler" day care center, the private school rental, the banquet hall, or the luxury condominiums. Nor did opponents argue that these uses were not proper accessory uses for a Synagogue. There were no issues suggestive of a desire by opponents to persuade the Board to engage in any restrictive

or exclusionary zoning against religious or educational institutions. The opponents who testified, many of whom are Jewish, uniformly supported the Congregation in its desire to build a new conforming Community Center, but not the proposed project with condominiums. Yet, the Decision repeatedly cites to court cases involving use variances where often there was a clear indication of hostility or discrimination against the religious and accessory uses sought. Even worse, the BSA wrote its decision in such a way as to mischaracterize the opposition. All that the opposition demands is a fair and equitable application of the zoning law and in particular the mid-block contextual zoning regulations.

BSA Answer:

82. Deny the allegations set forth in the first sentence of paragraph 103 of the petition, except admit that the Congregation did not request any use variances. Deny the allegations set forth in the second and third sentences of paragraph 103 of the petition to the extent they are inconsistent with the record before the BSA. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the fourth sentence of paragraph 103 of the petition. Deny the allegations set forth in the fifth and sixth sentences of paragraph 103 of the petition. Deny knowledge or information sufficient to form a belief as to the allegations set forth in the seventh sentence of paragraph 103, except deny that the BSA's determination was in any way arbitrary, capricious or an abuse of discretion.

Congregation Answer:

103. With respect to the allegations in paragraph 103 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 103 as an incomplete recitation of the record. The Congregation specifically denies the allegations in the last sentence of paragraph 103 of the Petition.

Petitioners' Reply:

Sentences 1-6 - Congregation's "boilerplate" denial is in bad faith insofar as it does not specify any instance in which Petitioners' averments are "an incomplete recitation of the record."

Sentences 2, 3 - City's answers are in bad faith insofar as they do not specify anything that is "inconsistent with the record before the BSA."

Sentence 4 – See, e.g., R-2633, Transcript of NYC Landmarks Preservation Commission hearing of November 26, 2002, page 96, lines 8-15; R-2640 – id. at page 96, lines 14-17.

Sentence 7 – Congregation's unqualified denial is in bad faith in failing to proffer any specific support for its denial.

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

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

BSA Answer:

83. Deny the allegations set forth in paragraph 104 of the petition, except admit that petitioners accurately quoted from the BSA's Resolution.

Congregation Answer:

104. With respect to the allegations in paragraph 104 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 104 as an incomplete recitation of the record.

Petitioners' Reply:

City admits the essence of Petitioners' averment.

Congregation denial is inconsistent with City's admission.

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

73-52

Modifications for Zoning Lots Divided by District Boundaries

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

BSA Answer:

84. Deny the allegations set forth in paragraph 105 of the petition, and respectfully refer this Court to Z.R. §73-53 for its full text and true meaning.

Congregation Answer:

105. The Congregation states that paragraph 105 of the Petition sets forth purported characterizations of law to which no response is required, and to the extent a response is deemed required, the Congregation denies said allegations.

Petitioners' Reply:

City's answer is unresponsive in that it refers to Z.R. §73-53, which is not cited in Petitioners' averment.

Congregation's denial is in bad faith in failing to admit that Z.R. §73-52 is relevant to Petitioners' averment.

106. Finally, the Decision's obsessive attention to these issues of use and the non-existent discrimination in fact apply only to the lower floor variances, accounting for only about ten percent of the area allowed by the variances, and serve primarily to confuse and disguise the BSA's intention to provide variances solely to provide income from the condominiums in contravention of clear BSA policy and clear law.

BSA Answer:

85. Deny the allegations set forth in paragraph 106 of the petition.

Congregation Answer:

106. The Congregation denies the allegations in paragraph 106 of the Petition.

No Variances For The Transfer Of Zoning Lot Floor Area Or FAR Were Requested Or Granted

107. Similarly, despite the repeated discussion in the Decision of the transfer of zoning lot floor area from one part of the zoning lot to another, no variances whatsoever are required for any transfers of zoning floor area (also referred to as a transfer of FAR). Indeed, even a conforming as-of-right building under the applicable height and setback requirements in no way requires transfer of zoning floor area. See Friedman & Gottbaum letter to BSA dated February 4, 2008, R-003615, P-02772) ("CSI's Application does not request additional floor area..."); Statement of Shelly Friedman, LPC Hearing Transcript, January 17, 2006, p. 7 (R-002406 at R-002412; P-01213 at P-01214). ("We are no longer requiring 74-711 transfer of bulk across the district boundary ...The building is now as of right with regard to its distribution of bulk..."). In a gross abuse of discretion, the BSA seemed to use §74-711, not as authority to transfer bulk, but as authority to ignore the height and setback restrictions for the condominium portion of the building.

BSA Answer:

86. Deny the allegations forth in paragraph 107 of the petition, except admit that the Congregation did not request variances relating to the FAR of the proposed building.

Congregation Answer:

107. The Congregation states that it is not required to respond to those allegations in paragraph 107 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

Petitioners' Reply:

City admits essence of Petitioners' averment.

Congregation does not cite Record and is denial is inconsistent with City's admission.

108. The BSA was well aware that floor area transfer was a non-issue, for the irrelevancy of such a transfer was pointedly raised by the opposition. (Sugarman Further Statement in Opposition, July 29, 2008, p. 16, n. 9, R-005311 at R-005329, P-03923 at P-03941) Yet knowing this, the BSA engaged in lengthy, irrelevant discussions of floor area transfer at ¶¶ 97, 99, 108, 109, 113, 114, 115, 117, and 120 of its Decision.

BSA Answer:

87. Deny the allegations set forth in paragraphs 108 and 109 of the petition.

Congregation Answer:

108. The Congregation states that it is not required to respond to those allegations in paragraph 108 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

Petitioners' Reply:

Respondents' denials are in bad faith in failing to specify anything in the record that supports them.

Access, Accessibility And Circulation

109. The Congregation describes the need for resolving existing problems relating to access, accessibility and circulation as the "heart" of its application and sprinkled references to these issues throughout its submissions from counsel for the Congregation. Yet, because these problems are resolved fully by a conforming as-of-right building, the issue is wholly irrelevant to this variance application, as discussed below. Even the most cursory comparison of the conforming as-of-right building to the proposed-approved building shows that these issues are handled the same way in both, as opined by the opposition architectural expert Craig Morrison. Letter from Craig Morrison, Opposition Expert, dated January 28, 2008 (P-02730, R-003282).

BSA Answer:

87. Deny the allegations set forth in paragraphs 108 and 109 of the petition.

Congregation Answer:

109. The Congregation states that it is not required to respond to those allegations in paragraph 109 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

Petitioners' Reply:

1st Sentence – R 4860 – Letter to BSA dated June 17, 2008 from Congregation's counsel, Friedman & Gottbaum, at page 2 (Finding A, 1st para., last sentence.

Congregation's boilerplate "non-answer" is in bad faith in failing to specify anything in the record that supports it.

110. Most significantly, Mr. Charles Platt of Platt Byard Dovell White, the architects for the Congregation, agreed that the conforming as-of-right schemes addressed this issue, as discussed below. Letter from Charles A Platt on Behalf of Applicant dated February 4, (P-02768, R-003611), Yet, the BSA, in disregard of all reality and evidence not refuted, notwithstanding, found that this created a programmatic need and hardship and used this hardship as a basis for the (a) finding for both the lower floor variances and even the upper floor condominium variances in this so-called finding related to the condominium variances.

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

BSA Answer:

88. Deny the allegations set forth in the first sentence of paragraph 110 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law. Deny the allegation set forth in the second sentence of paragraph 110 of the petition, except admit that petitioners accurately quoted from the BSA's Resolution.

Congregation Answer:

110. The Congregation states that it is not required to respond to those allegations in paragraph 110 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

Petitioners' Reply:

Respondents fail to cite Record as to the heart of the Congregation's application.

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

¶12. WHEREAS, however, the Opposition argues that the minimum variance finding is no variance because the building could be developed as a smaller as-of-right mixed-use community facility/ residential building that achieved its programmatic mission, improved the circulation of its worship space and produced some residential units; and
¶13. WHEREAS, the Synagogue has fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission; and

BSA Answer:

89. Deny the allegation set forth in paragraphs 111 and 112 of the petition.

Congregation Answer:

111. The Congregation denies the allegations in paragraph 111 of the Petition.

112. These findings were made in the discussion of finding (e) as to both the upper condominium variances and the lower school variances. If ¶13 refers only to the lower floor variances, and includes circulation as a programmatic need, then ¶13 is demonstrably false. In addition, if ¶13 does not refer to the condominium variances, then no (e) finding was made for the condominium variances.

BSA Answer:

90. Deny the allegations set forth in paragraphs 113 and 114 of the petition, and respectfully refer the Court to Z.R. §72-21(b) for its full text and true meaning.

Congregation Answer:

112. The Congregation states that it is not required to respond to those allegations in paragraph 112 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

Failure To Properly Analyze The Reasonable Return Of Conforming As-Of-Right Building

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

BSA Answer:

90. Deny the allegations set forth in paragraphs 113 and 114 of the petition, and respectfully refer the Court to Z.R. §72-21(b) for its full text and true meaning.

Congregation Answer:

113. The Congregation states that no response is required to paragraph 113 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 113.

114. If the Congregation does not meet this burden of proof, then the BSA must deny the variances for the upper floor condominiums.

BSA Answer:

90. Deny the allegations set forth in paragraphs 113 and 114 of the petition, and respectfully refer the Court to Z.R. §72-21(b) for its full text and true meaning.

Congregation Answer:

114. The Congregation states that no response is required to paragraph 114 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 114

115. In order to attempt to meet this burden, the Congregation provided purported analyses of a conforming mixed-use building with two condominium floors (aka "Scheme A") and a conforming "all-residential" building (aka "Scheme C"). Scheme A Drawings were filed by the Applicant on April 2, 2007 (P-01335, R-000069), September 10, 2007 (P-01832, R-000421) and October 22, 2007 (P-02134, R-missing from BSA Record). Scheme C drawings were submitted on September 10, 2007 (P-01864, R-(missing from BSA Record compilation) and October 25, 2007 (P-02151, R-000625). The "all residential" building in Scheme C was incorrectly described in that it was not "all residential" and included community space; as well the "all residential" building failed to include the value of the potential basement and sub-basement areas.

BSA Answer:

91. Deny the allegations set forth in paragraph 115 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

115. With respect to the allegations in paragraph 115 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 115 as an incomplete recitation of the record.

116. The Congregation failed to meet its burden to show that it could not earn a reasonable return, and for that reason alone, the upper floor condominium variances must be denied.

BSA Answer:

92. Deny the allegations set forth in paragraphs 116, 117, and 118 of the petition.

Congregation Answer:

116. The Congregation denies the allegations in paragraph 116 of the Petition.

117. Analyses of reasonable return that are based upon expert opinions that are confusing, disorganized, conflicting, and varying and that rely upon unsubstantiated and incomplete cost reports, and that reach irrational conclusions and are opposed as well by qualified expert opinion are insufficient to support a finding that an owner cannot earn a reasonable return.

BSA Answer:

92. Deny the allegations set forth in paragraphs 116, 117, and 118 of the petition.

Congregation Answer:

117. The Congregation states that no response is required to paragraph 117 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 117.

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

BSA Answer:

92. Deny the allegations set forth in paragraphs 116, 117, and 118 of the petition.

Congregation Answer:

118. The Congregation states that no response is required to paragraph 118 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 118.

119. "Reasonable return to the owner" is a legal concept used by the New York and federal courts in assuring that property owners do not suffer an unconstitutional taking as a result of land use and zoning regulation. The use of "reasonable return" in ZR § 72-21 is to be interpreted according to case law. When the City Council adopted the Zoning Resolution, there is no evidence that it assigned to the BSA the right to depart from the accepted meanings of this phrase.

BSA Answer:

93. Deny the allegations set forth in paragraph 119 of the petition insofar as it is inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

119. The Congregation states that no response is required to paragraph 119 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 119.

120. Analysis of the possible reasonable return from conforming as-of-right structures on the site is a key element in a zoning variance proceeding under ZR § 72-21.

BSA Answer:

94. Deny the allegations set forth in paragraph 120 of the petition, and respectfully refer this Court to Z.R. §72-21 for its full text and true meaning.

Congregation Answer:

120. The Congregation states that no response is required to paragraph 120 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 120.

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

BSA Answer:

95. Deny the allegations set forth in paragraph 121 of the petition, except admit that the BSA has issued instructions for filing variance applications in a document entitled "Detailed Instructions for Completing BZ Application," and that item M in that document discusses the Financial Feasibility Study.

Congregation Answer:

121. The Congregation states that no response is required to paragraph 121 of the Petition, which purports to characterize certain "Detailed Instructions," which speaks for itself, and that, to the extent a response is required, denies the allegations in paragraph 121.

122. In Item M of the Detailed Instructions, the BSA uses the term "Financial Feasibility Study" in describing the reasonable return analysis required under ZR § 72-21(b) and under case law.

BSA Answer:

96. Admit the allegations set forth in paragraph 122 of the petition.

Congregation Answer:

122. The Congregation states that no response is required to paragraph 122 of the Petition, which purports to characterize certain "Detailed Instructions," which speaks for itself, and that, to the extent a response is required, denies the allegations in paragraph 122.

Petitioners' Reply:

Congregation's denial does not cite Record and contradicts City's admission.

123. The BSA has admitted in response to a FOIL request by Petitioners' attorney that, other than the BSA Instructions, there are no guidelines, policy statements, or regulations of the BSA as to the reasonable return analysis. Letter dated May 7, 2008, BSA to Sugarman (P-03371, Opp. Ex. PP-104 at R-005511 responding to Sugarman FOIL request of April 22, 2008 at R-005622). . The BSA attempted to conceal these important letters from the court by excluding them from its chronological Record, but, did not realize that these documents were included in exhibits filed by the Opposition and included in the Record.

BSA Answer:

97. Admit the allegations set forth in the first sentence of paragraph 123 of the petition. Deny the allegations set forth in the second sentence of paragraph 123 of the petition, and aver that the BSA did not include the documents regarding petitioners' FOIL request as part of the Record because the documents were not considered by the Board in rendering its final agency determination, and thus were not part of the Record, and that BSA intended to, and indeed has, annexed the documents to its Answer.

Congregation Answer:

123. The Congregation is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 123 of the Petition

Petitioners' Reply:

City admits the essence of Petitioners' averment.

124. The Congregation retained the services of Freeman Frazier to conduct the feasibility studies of conforming as-of-right buildings on the property.

BSA Answer:

98. Admit the allegations set forth in paragraph 124 of the petition.

Congregation Answer:

.124. The Congregation admits the allegations in paragraph 124 to the extent not inconsistent with the record.

125. Between April 2, 2007 and August 12, 2008, Freeman Frazier provided approximately 14 submissions to the BSA with a total of 298 pages and provided testimony at several BSA hearings.

BSA Answer:

99. Deny the allegations set forth in paragraph 125 of the petition insofar as they are inconsistent with the Record.

Congregation Answer:

125. With respect to the allegations in paragraph 125 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 125 as an incomplete recitation of the record.

Petitioners' Reply:

SUBMISSIONS:; R-133-R-161 – 04/02/2007; R- 283- R-307 – 09/06/2007; R – 516-R-535 – 10/24/2007; R-1968 – R-2007 – 12/22/2007; R-3608-R-3610 1/30/2008; P 2974 – 2983 (FAX) (R#S MISSING) 02/22/2008; R-3847-R-3877 – 03/11/2008; R- 4437-R-4444 - 04/01/2008; R-4648-4671-5/13/2008; R-4683-R-4916 - 06/17/2008; R-5170-5181- 07/08/2008; R-5772- R-5791 – 08/12/2008

TESTIMONY:

BSA HEARINGS: R-3669-R-3679 02/12/2008; R-4463-R-4483-04/15/2008; R-4930-R-4944-06/24/2008

126. The Congregation and Freeman Frazier had ample opportunity during the 17-month proceeding to provide reasoned, rational, and clear proof and explanations of the reasonable return from conforming as-of-right buildings.

BSA Answer:

100. Deny the allegations set forth in paragraph 126 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

126. With respect to the allegations in paragraph 126 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 126 as an incomplete recitation of the record.

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

BSA Answer:

101. Deny the allegations set forth in paragraph 127 of the petition insofar as they are inconsistent with the text of Z.R. §72-21(b) or applicable case law and to the extent that they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

127. The Congregation states that no response is required to paragraph 127 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 127.

128. The conclusions from the Freeman Frazier reports were not consistent and varied widely from report version to report version.

BSA Answer:

102. Deny the allegations set forth in paragraph 128 of the petition.

Congregation Answer:

128. The Congregation denies the allegations in paragraph 128 of the Petition.

Petitioners' Reply:

See response at ¶125.

129. The value per square foot claimed by Freeman Frazier in the multiple versions of their reports varied between \$450 per square foot and \$750 per square foot.

BSA Answer:

103. Deny the allegations set forth in paragraphs 129 and 130 of the petition insofar as they are inconsistent with the Record.

Congregation Answer:

129. With respect to the allegations in paragraph 129 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 129 as an incomplete recitation of the record.

Petitioners' Reply:

See response at ¶125.

R-5772- R-5791 – 08/12/2008

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

BSA Answer:

103. Deny the allegations set forth in paragraphs 129 and 130 of the petition insofar as they are inconsistent with the Record.

Congregation Answer:

130. With respect to the allegations in paragraph 130 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 130 as an incomplete recitation of the record.

Petitioners' Reply:

See response at ¶125.

See Pet. Ex. N-3.

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

BSA Answer:

104. Deny the allegations set forth in paragraph 131 of the petition.

Congregation Answer:

131. The Congregation denies the allegations in paragraph 131 of the Petition

Petitioners' Reply:

See response at ¶125.

See Pet. Ex. N-3.

132. Freeman Frazier uses the phrase “acquisition cost” apparently to refer to the “market value” of the land. The Guidelines refer to “market value of the property” and “acquisition costs and date of acquisition.” Freeman Frazier improperly conflates the two terms. The BSA in its Decision uses the term “site value,” e.g., at ¶128, rather than either the term “acquisition cost” used by Freeman Frazier or “market value” as used in the Instructions.

BSA Answer:

105. Deny the allegations set forth in paragraph 132 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

132. The Congregation denies the allegation in paragraph 132 of the Petition.

Petitioners' Reply:

See response at ¶125.

See Pet. Ex. N-3.

133. The inconsistent use of terms is intended to create complexity and make it difficult for courts to review the assertions of the Congregation and the findings of the BSA.

BSA Answer:

106. Deny the allegations set forth in paragraph 133 of the petition.

Congregation Answer:

133. The Congregation denies the allegation in paragraph 133 of the Petition.

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

BSA Answer:

107. Deny the allegations set forth in paragraph 134 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

134. With respect to the allegations in paragraph 134 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 134 as an incomplete recitation of the record.

Petitioners' Reply:

R- 4933 – Letter dated June 23, 2008 to BSA from Petitioners' valuation expert, Martin Levine of MVS, at page 2.

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

BSA Answer:

108. Deny the allegation set forth in paragraph 135 of the petition.

Congregation Answer:

135. The Congregation denies the allegations in paragraph 135 of the Petition.

136. The opposition retained a professional real estate valuation expert, Martin Levine of Metropolitan Valuation Services ("MVS"). Mr. Levine holds an MAI certification in real estate and provides real estate valuations for banks and insurance companies. Mr. Levine provided over 100 pages of detailed professional real estate analysis in multiple reports responding to the multiple submissions of Freeman Frazier as follows:

January 24, 2008 P-02681, R-002506 February 8, 2008 P-02785, R003630 March 25, 2008 P-03167, R-004093 April 15, 2008 P-03310, R-004254 June 10, 2008 R-004800 June 23, 2008 R-004932 July 29, 2008 P-03907, R-005210 The BSA in its decision essentially ignores the expert analysis of Mr. Levine, except for minor instances where the report was mischaracterized. When Mr. Levine testified at hearings, the BSA Commissioners had no questions to ask of him, clearly demonstrating the intention of the BSA to blind itself to the facts.

BSA Answer:

109. Deny the allegations set forth in first, second, and third sentences of paragraph 136 of the petition, except admit that Martin Levine of Metropolitan Valuation Services made submissions to the BSA on behalf of those opposed to the Congregation's submissions on or about the dates listed by petitioners. Deny the fourth sentence of paragraph 136 and respectfully refer the Court to the BSA's Resolution [R. 1-14] for its full text and true meaning. Deny the allegations set forth in the fifth sentence of paragraph 136 of the petition insofar as they are inconsistent with the Record, or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

136. With respect to the allegations in paragraph 136 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states

that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 136 as an incomplete recitation of the record.

137. Mr. Levine concluded that all of the Freeman Frazier reports were highly flawed and that both the Scheme A and Scheme C conforming as-of-right buildings would earn a reasonable return for the owner whether using return on investment or return on equity.

BSA Answer:

110. Deny the allegations set forth in paragraph 137 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

137. With respect to the allegations in paragraph 137 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 137 as an incomplete recitation of the record.

138. Mr. Levine states in his final submission of July 29, 2008, pp 11-12 (P-03907 at P-03917-18, R-005210 at R-005220-21):

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

BSA Answer:

111. Deny the allegations set forth in paragraph 138 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law, except admit that petitioners accurately quoted from a submission by Mr. Levine to the BSA.

Congregation Answer:

138. With respect to the allegations in paragraph 138 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 138 as an incomplete recitation of the record.

139. Mr. Levine also testified at the hearing criticizing issues such as Freeman Frazier's noncompliance with BSA guidelines, construction cost estimate fallacies and incomplete documents, exaggerated soft costs, etc. See e.g., BSA Transcript of February 12, 2008, p. 46, line 1013 (P-02810 at P-02856; R-003653 at R-003699); BSA Transcript of April 15, 2008, p. 23, line 497 (P-03245 at P-03268, R-004462 at R-004485). Every single issue raised by Mr. Levine was ignored in the Decision, save for one relating to return on equity, which received a purely cosmetic, ex cathedra response

without rational explanation. The BSA's failure to address these issues suggests that the BSA failed to apply any expertise in its conclusory finding approving the unsubstantiated and unidentified conclusions of Freeman Frazier. ¶¶141-144.

BSA Answer:

112. Deny the allegations set forth in paragraph 139 of the petition.

Congregation Answer:

139. With respect to the allegations in paragraph 139 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 139 as an incomplete recitation of the record. The Congregation specifically denies the allegations in the last sentence of paragraph 139 of the Petition.

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

140. As part of the Congregation's initial application, the Congregation provided the first of many reports from its consultant Freeman Frazier.

BSA Answer:

113. Admit the allegations set forth in paragraph 140 of the petition.

Congregation Answer:

140. With respect to the allegations in paragraph 140 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 140 as an incomplete recitation of the record.

Petitioners' Reply:

Congregation's response does not cite Record and, strangely, denies averment on matters well known to it and which Respondent City admits.

141. Freeman Frazier's first report, filed with the Application on April 2, 2006 (P-01414-42, R-000133-61), contained an analysis of a conforming as-of-right Scheme A building consisting of (i) a four-floor, basement and sub-basement community house and (ii) a two-floor market-rate area on floors 5 and 6 dedicated to luxury condominiums. The building was referred to as "AOR Scheme A," although the same building in other submissions by Freeman Frazier is referred to as the "As of Right Residential Development."

BSA Answer:

114. Deny the allegations set forth in paragraph 141 of the petition, and respectfully refer the Court to the Freeman Frazier economic analysis report submitted by the Congregation in April 2007 [R. 133-611 for its full text and true meaning.

Congregation Answer:

141. With respect to the allegations in paragraph 141 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 141 as an incomplete recitation of the record.

Petitioners' Reply:

R-1691- Letter dated December 21, 2007 to BSA from Congregation's financial analyst, Freeman Frazier, p.1; R-1992-Ibid. Exhibit A.

142. Subsequently, Freeman Frazier revised its As-of-right Scheme A analysis in five further submissions. The following Freeman Frazier reports analyzed Scheme A: March 28, 2007 (P-01414); October 24, 2007, December 22, 2007, March 11, 2008 (P-03005), May 13, 2008 (P-03688), and June 17, 2008 (P-03688). The May 13, 2008 report did not analyze Scheme A as such, but provided an analysis of site value then used in the June 17, 2008 report to analyze Scheme A.

BSA Answer:

115. Deny the allegations set forth in paragraph 142 of the petition, and respectfully refer the Court to Freeman Frazier's submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] for their full text and true meaning.

Congregation Answer:

142. With respect to the allegations in paragraph 142 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 142 as an incomplete recitation of the record.

143. The Freeman Frazier reports reached widely divergent conclusions as to the results, raising the question as to whether the conclusions offered expert opinions of Freeman Frazier.

BSA Answer:

116. Deny the allegations set forth in paragraphs 143, 144 and 145 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

143. The Congregation denies the allegations in paragraph 143 of the Petition.

Petitioners' Reply:

See Pet. Ex. N-3.

R-133-R-161 – 04/02/2007; R - 283- R-307 – 09/06/2007; R – 516-R-535 – 10/24/2007; R- 1968 – R-2007 – 12/22/2007; R-3608-R-3610 1/30/2008; P 2974 – 2983 (FAX) (R#S MISSING) 02/22/2008; R-3847-R-3877 – 03/11/2008; R- 4437-R-4444 - 04/01/2008; R-4648-4671-5/13/2008; R-4683-R-4916 - 06/17/2008; R-5170-5181- 07/08/2008; R-5772- R-5791 – 08/12/2008

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

| Date | Cite | Value /sq. foot | Area | Acquisition Cost | Loss/Profit | Market Site Value Built5022 sq. ft. | Sellable 7594 sq. ft. |
|---------------|---------|-----------------------|--------|------------------|---------------|--|--------------------------|
| Mar. 28, 2007 | P-01414 | \$500 | 37,889 | \$18,944,000 | (\$8,672,000) | \$2,511,000 | \$3,797,000 |
| Oct. 24, 2007 | P-02231 | \$450 | 27,772 | \$17,050,000 | (\$7,468,000) | \$2,259,900 | \$3,417,300 |
| Dec. 21, 2007 | P-02568 | \$750 | 19,755 | \$22,875,000 | (\$6,109,000) | \$3,766,500 | \$5,695,500 |
| Mar. 11, 2008 | P-03005 | \$750 | 17,845 | \$13,384,000 | NA | \$3,766,500 | \$5,695,500 |
| May 13, 2008 | P-03007 | \$625 | 19,094 | \$12,347,000 | NA | \$3,138,750 | \$4,746,250 |
| Jun. 17, 2008 | P-03688 | \$625 | 19,094 | \$12,347,000 | (\$8,757,000) | \$3,138,750 | \$4,746,250 |
| July 8, 2008 | P-03811 | same as June 17, 2008 | | | | | |

BSA Answer:

116. Deny the allegations set forth in paragraphs 143, 144 and 145 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

144. With respect to the allegations in paragraph 144 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 144 as an incomplete recitation of the record.

Petitioners' Reply:

Submissions by Congregation's financial analyst, Freeman Frazier - BSA Record Citation.

See Reply ¶143.

145. Freeman Frazier manipulated their figures to justify the conclusions sought at various stages of the variance proceeding.. In the different versions of the Freeman Frazier reports, as the value per square foot increases, the number of square feet decreases, all keeping the project in a loss. Because Freeman Frazier uses an artificial approach to determine the site size, an approach that is unrelated to the actual number of square feet on the two floors of condominiums, the

project is then forced to show a loss. The last two columns show the site value if Freeman Frazier's Sellable Area of 5022 square feet and Built Residential Area of 7594 square feet is used in the computation.

BSA Answer:

116. Deny the allegations set forth in paragraphs 143, 144 and 145 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

145. With respect to the allegations in paragraph 145 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 145 as an incomplete recitation of the record.

Petitioners' Reply:

See Pet. Ex. N.

R-133 - Mar. 28, 2007

Submissions by Congregation's financial analyst, Freeman Frazier - BSA Record Citation.

See Reply ¶143.

See Chart in Petitioners' averment 144.

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

BSA Answer:

117. Admit the allegations set forth in paragraph 146 of the petition.

Congregation Answer:

146. With respect to the allegations in paragraph 146 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 146 as an incomplete recitation of the record.

Petitioners' Reply:

Congregation's answer does not cite Record and, strangely, denies Petitioners' averment, which City admits.

See Pet. Ex. N-5, N-6, N-7.

147. Freeman Frazier's reports assumed that the two condominium floors contained 7594 of built residential area and 5022 square feet of sellable area. (Freeman Frazier Report, March 28, 2008, p. 8, P-01414 at P-01422, R-000133 at R-000141) (In some versions of the Freeman Frazier reports, these figures were 5316 and 7594, respectively.)

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923-36, 5210-25] for their full text and true meaning.

Congregation Answer:

147. With respect to the allegations in paragraph 147 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 147 as an incomplete recitation of the record.

Petitioners' Reply:

See Pet. Ex. N-5, N-6, N-7.

148. MVS concluded that the 7594 figure is overstated due to including as condominium space areas that should have been allocated to the school space and that 5022 is closer to the appropriate figure. See Martin Levine Reply Statement, July 29, 2008, p. 4-5 (P-03907 at P-003910; R-005210 at R-005213).

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

148. With respect to the allegations in paragraph 148 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 148 as an incomplete recitation of the record.

149. Part of the Freeman Frazier analysis was to determine the “acquisition cost” of the site. (The Decision uses the term “site value.”) The site value is a component of the project cost including other costs such as construction costs.

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

149. With respect to the allegations in paragraph 149 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 149 as an incomplete recitation of the record.

Petitioners' Reply:

R-133 - Mar. 28, 2007; ;

R-522 – Oct. 24, 2007; R-1980 – Dec. 21, 2007; R-3860 – Mar. 11, 2008; R-4656 – May 13, 2008; R-4869 – Jun. 17, 2008; R-5178 – July 8, 2008

150. In the Freeman Frazier analysis, increasing the site value increases the loss and diminishes the rate of return.

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

150. With respect to the allegations in paragraph 150 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 150 as an incomplete recitation of the record.

Petitioners' Reply:

See citations at ¶149.

151. The site value in the Freeman Frazier reports was the largest component of the costs.

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

151. With respect to the allegations in paragraph 151 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 151 as an incomplete recitation of the record.

Petitioners' Reply:

See citations at ¶149.

152. In the various Scheme A reports, Freeman Frazier concluded that an as-of-right building would result in a loss.

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

152. With respect to the allegations in paragraph 152 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 152 as an incomplete recitation of the record.

Petitioners' Reply:

See, e.g.,

R-141 – March 28, 2007, page 8

R- 522 – October 24, 2007, page 8

R-190 – December 21, page 11

153. Only by artificially inflating costs was Freeman Frazier able to “conclude” that the site could not earn a reasonable return.

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

153. The Congregation denies the allegation in paragraph 153 of the Petition.

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

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

154. With respect to the allegations in paragraph 154 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 154 as an incomplete recitation of the record.

155. The aforesaid process is the same process used by ordinary people buying and selling apartments, homes, and land, i.e., multiplying the number of square feet times a comparable value per square foot.

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

155. The Congregation is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 155 of the Petition.

Petitioners' Reply:

Congregation's answer does not cite the Record or any authority that is contrary to Petitioners' averment and, indeed, denies what is common knowledge.

156. The multiplication of value per square foot times the number of square feet does not require any expertise beyond the use of arithmetic.

BSA Answer:

118. Deny the allegations set forth in paragraphs 147, 148, 149, 150, 151, 152, 153, 154, 155 and 156 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

156. The Congregation admits the allegation in paragraph 156 of the Petition.

Petitioners' Reply:

City's answer does not specify anything in Petitioners' averment that is "inconsistent with the Record" and, curiously, does not agree with Congregation's unqualified admission of that averment.

157. The BSA was unable or unwilling in reviewing the Freeman Frazier studies of Scheme A to multiply the number of square feet in the two floors of condominium by the value per square foot estimated by Freeman Frazier to arrive at site value. Had the BSA exercised the expertise that it is supposed to possess and itself made the simple calculation, , the site value would have been substantially diminished. If the diminished site value had been used, any loss would have been converted to a profit.

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

157. The Congregation denies the allegations in paragraph 157 of the Petition.

Petitioners' Reply:

City's answer does not identify anything in Petitioners' averment that is inconsistent with the "true meaning" of the multiple submissions by Congregation's financial analyst that the City cites.

March 28, 2007 Report — Scheme A

158. The March 28, 2007 Freeman Frazier study concluded that the vacant land sale price was \$500 per square foot based upon comparable vacant properties. (Section 2.10, P-01414 at P-01417, R000133 at R-000138).

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA

acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

158. With respect to the allegations in paragraph 158 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 158 as an incomplete recitation of the record.

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

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

159. With respect to the allegations in paragraph 159 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 159 as an incomplete recitation of the record.

Petitioners' Reply:

Actual # of sq. ft. on two condominium floors - R-135 §1.41 (7,596 sq. ft.); R-141 (“Built Residential Area”); R-136 carry-over ¶, 2nd line (5,022 sq. ft.), R-141 (“Sellable Area”)

Value per square foot – R-136, §2.10, 2nd ¶

37,889 sq. ft.- R- 135-§1.20, 2nd para, last line

“Acquisition cost” - \$18,944,000 (“site value”) R-141

160. Freeman Frazier states at said Section 2.10 of the March 28, 2007 report:

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

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

160. With respect to the allegations in paragraph 160 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 160 as an incomplete recitation of the record.

Petitioners' Reply:

R-139- Economic Analysis Report dated March 28, 2007 prepared by Congregation’s financial analyst, Freeman, Frazier at page 6, §4.20, 1st sentence (“potential residential floor area”)

R-136 Economic Analysis Report dated March 28, 2007 prepared by Congregation’s financial analyst, Freeman, Frazier at page 3, §2.10, 2nd paragraph last sentence.

161. Using “potential residential zoning area” was an irrational and deceptive approach to valuing the development rights pertaining to the specific “site” being valued, which was the two floors of three dimensional space available for the two condominium floors.

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

161. The Congregation denies the allegations in paragraph 161 of the Petition.

162. Thus, rather than use land values of \$2,511,000 to \$3,798,000, Freeman Frazier used the absolutely outrageous value of \$18,944,000, causing the property to show a loss. The project would have shown a profit if the lower, correctly calculated, site values were used.

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

162. The Congregation denies the allegations in paragraph 162 of the Petition..

Petitioners' Reply:

R-141 – Economic Analysis dated March 28, 2007, prepared by Freeman Frazier, Congregation’s financial analyst, page 8 (“AS OF RIGHT DEVELOPMENT”)

City’s answer does not identify anything in Petitioners’ averment that is “inconsistent with the Record” or does not reflect the “true meaning” of the Freeman Frazier submissions it cites.

163. Community opponents identified this deception in a Community Objection #44 to the BSA dated June 20, 2007, p. 8 (P-01777 at P-01784, R-000263 at R-000271).

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

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

163. The Congregation denies the allegations in paragraph 163 of the Petition.

Petitioners' Reply:

City’s answer does not identify anything in Petitioners’ averment that is “inconsistent with the Record” or does not reflect the “true meaning” of the Freeman Frazier submissions it cites.

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

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

164. The Congregation denies the allegations in paragraph 164 of the Petition.

Petitioners' Reply:

R-257 -BSA Notice of Objections dated June 12, 2007, page 4, ¶36 (Congregation's valuation method challenged)

R-514 - BSA Second Notice of Objections dated October 12, 2007. p. 3, ¶¶ 19-22 (Esp. ¶ 22 - Congregation's response to Objection 36 unsatisfactory)

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

October 24, 2007 Report — Scheme A165. In response, on October 24, 2007, Freeman Frazier prepared a new report, slightly changing the recipe, and reducing the per square foot value from \$500 to \$450, reducing the site value slightly from \$18,944,000 for the two floors of space to a new value of \$17,050,000, and still using an inflated site area of 37,889 sq. ft. to value 5000-7600 sq. ft. of condominium space. Letter dated October 24, 2007 from Freeman Frazier on behalf of Applicant, p. 5, (P-02224 at P-02229; R-00516 at R-000520).

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

165. With respect to the allegations in paragraph 165 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 165 as an incomplete recitation of the record.

Petitioners' Reply:

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

166. By this time, opponents and the Land Use Committee of Community Board 7 had objected to this ridiculous approach of valuing 5000-7600 sq. ft. of space as if it were 37,889 sq. ft., where, in concept, the Congregation was selling land to the developer, but was still using most of it for the community house and grossly overstating the value of the site so as to show a loss and purportedly satisfy the § 72-21(b) finding.

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

166. The Congregation denies the allegations in paragraph 166 of the Petition.

Petitioners' Reply:

R-476 PRELIMINARY STATEMENT BY PROTECTWEST70.ORG OPPOSING ISSUANCE OF VARIANCES, dated September 19, 2007 prepared by Petitioners' Counsel, Alan Sugarman, Esq., at pages 16-18 (R-491- R- 493)

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

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

BSA Answer:

120. Deny the allegations set forth in paragraphs 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923-36, 5210-25] for their full text and true meaning.

Congregation Answer:

167. The Congregation denies the allegations in paragraph 167 of the Petition.

Petitioners' Reply:

City does not identify anything in Petitioners' averment that is "inconsistent with the Record" or not within the "true meaning" of the voluminous submissions of Congregation's financial adviser that it cites.

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

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

BSA Answer:

121. Deny the allegations set forth in paragraph 168 of the petition, except admit that petitioners accurately quoted from the BSA's Resolution.

Congregation Answer:

168. The Congregation denies the allegations in paragraph 168 of the Petition.

December 21, 2007 Report — Scheme A

169. Freeman Frazier and the Congregation devised a new approach to valuing the land and arrived at a value of \$750 per square foot, rather than the original \$500 and then \$450 per square foot. See the Scheme A Analysis at p. 8-9 of Freeman Frazier December 21, 2007 Report, p. 5, 8-9, 11 P-02557, at -61, -64, -65, -68; R-001968 at -73, -76, -77-. -80) So as to perpetrate confusion to obscure analysis and review, this report on page **11, rather than refer to a Scheme A Development, refers to "Revised As of Right Residential Development.:**

BSA Answer:

122. Deny the allegations set forth in paragraphs 169, 170, 171, 172 and 173 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923-36, 5210-25] for their full text and true meaning.

Congregation Answer:

169. With respect to the allegations in paragraph 169 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 169 as an incomplete recitation of the record.

Petitioners' Reply:

R-1980 Economic Analysis dated December 21, 2007, prepared by Freeman Frazier, Congregation's financial analyst, page 11, heading left hand column of figures.

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

170. At the same time, in a cosmetic ploy, in this version, Freeman Frazier and the Congregation reduced the number of square feet from 37,889 square feet to 19,755 square feet, yielding a land value of \$14,816,000 (See page 6 of the report, Id.).

BSA Answer:

122. Deny the allegations set forth in paragraphs 169, 170, 171, 172 and 173 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923-36, 5210-25] for their full text and true meaning.

Congregation Answer:

170. The Congregation denies the allegations in paragraph 170 of the Petition.

Petitioners' Reply:

See Pet. Ex. N-3.

R-1973 - Economic Analysis dated December 21, 2007, prepared by Freeman Frazier, Congregation's financial analyst, page 6, 2nd ¶, 1st sentence, 2nd line (19,755 sq. ft.)

R-1981 - Economic Analysis dated December 21, 2007, prepared by Freeman Frazier, Congregation's financial analyst, page 12, left hand column of figures (" \$14,816,000)

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

171. Yet, even then, it was erroneous and irrational to use 19,755 square feet rather than actual number of feet relating to the two condominium floors (either 5022 sq. ft. or 7594 sq. ft.).

BSA Answer:

122. Deny the allegations set forth in paragraphs 169, 170, 171, 172 and 173 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923-36, 5210-25] for their full text and true meaning.

Congregation Answer:

171. The Congregation denies the allegations in paragraph 171 of the Petition

Petitioners' Reply:

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

172. Freeman Frazier did not respond to the plain meaning of the BSA request.

BSA Answer:

122. Deny the allegations set forth in paragraphs 169, 170, 171, 172 and 173 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923-36, 5210-25] for their full text and true meaning.

Congregation Answer:

172. The Congregation denies the allegations in paragraph 172 of the Petition.

Petitioners' Reply:

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

173. Opponents again pointed out the absurdity of this approach.

BSA Answer:

122. Deny the allegations set forth in paragraphs 169, 170, 171, 172 and 173 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923-36, 5210-25] for their full text and true meaning.

Congregation Answer:

173. With respect to the allegations in paragraph 173 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 173 as an incomplete recitation of the record.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition, by providing the following references to the Record

R-3637 Letter to BSA Chair dated February 8, 2008 prepared by Petitioners' valuation expert Martin Levine of MVS, page 8, "Acquisition Cost, 2nd ¶

R-3644 – Id at page 15 ("MVS TABLE 5")

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

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

BSA Answer:

123. Deny the allegations set forth in paragraph 174 of the petition.

Congregation Answer:

174. The Congregation denies the allegations in paragraph 174 of the Petition.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition, by providing the following reference to the Record:

Stream of Objections- See, e.g.:

R-247-R-248 – Letter to Freeman Frazier dated June 12, 2007 from Petitioners' counsel, Alan Sugarman, Esq., pp. 1-2

R-1678 Statement in Opposition dated November 20, 2007, submitted by Landmark West, page 13, penultimate ¶ and also Exhibits D and J thereto, cited in fn 25 and 26, and attached to the Statement

R-1717 – Letter dated November 16, 2007 to Co-Chairs of CB7 Land Use Committee prepared by Thomas Hanson, CPA, page 1, ¶2 (Exhibit J to November 20, 2007 Statement in Opposition of Landmark West)

R-1781 – R-1782 Testimony of James A. Greer, II at November 2, 2007 hearing, pp. 55-56, lines 1230-1242.

R-2506-Letter to BSA Chair dated January 25, 2008, prepared by Petitioners' valuation expert, Martine Levine of MVS, page 1. R-3637 Letter to BSA Chair dated February 8, 2008 prepared by Petitioners' valuation expert Martin Levine of MVS, page 8, "Acquisition Cost, 2nd ¶

R-3644 – Id at page 15 ("MVS TABLE 5")

March 11, 2008

175. On March 11, 2008, Freeman Frazier was back again with another report (P-03005, R-003847), reducing the square foot valuation basis from 19,755 to 17,845 square feet.

BSA Answer:

124. Deny the allegations set forth in paragraphs 175, 176, and 177 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008,

3847-77, 4648-71 and 4863- 916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

175. With respect to the allegations in paragraph 175 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 175 as an incomplete recitation of the record.

Petitioners' Reply:

R-3847 Letter to BSA Chair dated March 11, 2008, prepared by Freeman Frazier, Congregation's financial analyst, page 1, 3rd¶, 2nd sentence.

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

Congregation's answer does not cite anything in Petitioners' averment that is "an incomplete recitation of the record."

176. Opponents continued to castigate the Congregation for its duplicitous approach and the BSA for turning a blind eye to that duplicity.

BSA Answer:

124. Deny the allegations set forth in paragraphs 175, 176, and 177 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863- 916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

176. With respect to the allegations in paragraph 176 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 176 as an incomplete recitation of the record.

Petitioners' Reply:

R-4095-R-4096-Letter to BSA Chair dated March 20, 2007 from Petitioners' valuation expert, Martin Levine of MVS, pp. 3-4.

R-3998-R-4002 Letter to BSA Chair dated March 25, 2008, prepared by Petitioners' counsel, Alan Sugarman, Esq., pp. 9-13 ("Feasibility Study")

R-3977-R-3978- Statement in Opposition dated March 25, 2008, prepared by Landmark West, pp. 8-9

R-3980-R-3981- Id. at pp. 11-12 "Applicant's Financial Need")

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

May 13, 2008

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

BSA Answer:

124. Deny the allegations set forth in paragraphs 175, 176, and 177 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863- 916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

177. With respect to the allegations in paragraph 177 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 177 as an incomplete recitation of the record.

Petitioners' Reply:

R-4652 – Letter to BSA Chair dated May 13, 2008, prepared by Freeman Frazier, Congregation's financial analyst, page 4, 1st ¶

R-4869 – Letter to BSA Chair dated June 17, 2008, prepared by Freeman Frazier, Congregation's financial analyst, p. 6 (Schedule A1).

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the Freeman Frazier submissions it cites.

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

178. In another cosmetic move, the BSA objected to the \$750 figure, but gave the Congregation yet another chance to create a defensible Scheme A valuation.

BSA Answer: [none]

Congregation Answer:

178. The Congregation denies the allegations in paragraph 178 of the Petition.

179. Once again, the Congregation and Freeman Frazier returned with another recipe from their cookbook, which resulted in another slight reduction in land value, this time to \$12,347,000 in the June 17, 2008 report (Freeman Frazier Report On Behalf of Applicant date June 7, 2008, p.6, P-03688, P-03694, R-004863 at R-004869) using a land value derived in Freeman Frazier's May 13, 2008 report (P-03494, R-004668).

BSA Answer:

126. Deny the allegations set forth in paragraph 179 of the petition insofar as it is inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863-916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923-36, 5210-25] for their full text and true meaning.

Congregation Answer:

179. The Congregation denies the allegations paragraph 179 of the Petition.

Petitioners' Reply:

See Pet. Ex. N-3

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the various Freeman Frazier submissions it cites.

180. The land value approach used in Freeman Frazier May 13, 2008 report was not just novel, but was completely ridiculous, disingenuous, and insulting to any rational person.

BSA Answer:

127. Deny the allegations set forth in paragraph 180 of the petition.

Congregation Answer:

180. The Congregation denies the allegation in paragraph 180 of the Petition.

181. The May 13, 2008 report valued the remaining "allowable floor area" over the Parsonage in Lot 36. The report concluded that 19,094.20 square feet of remaining allowable floor area existed (see Section At Parsonage W/ Allowable Floor Space, Exhibit One, Freeman Frazier letter of May 13, 2008 (P-03494 at P-03510, R-004648 at R-004644) and then multiplied that number (19,094.20) by a land value of \$625 per square foot, to arrive at a site value of \$12,347,000.

BSA Answer:

128. Deny the allegations set forth in paragraphs 181 and 182 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863- 916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

181. With respect to the allegations in paragraph 181 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states

that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 181 as an incomplete recitation of the record.

Petitioners' Reply:

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "true meaning" of the various Freeman Frazier submissions it cites.

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

BSA Answer:

128. Deny the allegations set forth in paragraphs 181 and 182 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier submissions [R. 133-61, 516-35, 1968-2008, 3847-77, 4648-71 and 4863- 916] and the MVS submissions [R. 2506-08, 3630-49, 4093-106, 4254-65, 4800-10, 4923- 36, 5210-25] for their full text and true meaning.

Congregation Answer:

182. The Congregation denies the allegations in paragraph 182 of the Petition.

183. The Congregation still retains the right to engage in development of the Parsonage site, so this type of approach would have required analyzing the development of the Parsonage site. The Congregation has expressly reserved the right to develop the Parsonage space. See the group exhibit at, filed with the BSA as Opp. Ex. C on January 28, 2008 (P-00247, R-003359 as Submitted To BSA By Sugarman Affirmation of January 28, 2008 (P-00202, R-003311). See Transcript of Community Board 7 Land Use Committee, October 17, 2007, p. 135, l. 7, (P-02080 at P-02113, R-002827 at R-002961) also excerpted in Opp. Ex. C at P-00256, R-003369):

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

BSA Answer:

129. Deny the allegations set forth in paragraph 183 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

183. The Congregation states that it is not required to respond to those allegations in paragraph 183 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

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

BSA Answer:

130. Deny the allegations set forth in paragraphs 184, 185 and 186 of the petition.

Congregation Answer:

184. The Congregation denies the allegations in paragraph 184 of the Petition.

185. The BSA not only cast a blind eye toward the substantial Parsonage rental income, but also to the much larger, commercial rental income from the Beit Rabban School, the potential rental income (or value) from the proposed sub-basement banquet hall rental, and day care center income from its planned and greatly expanded Toddler program. See the group exhibit at P-00247-P-00256, filed with the BSA as Opp. Ex. C on January 28, 2008. See IRS filings by Beit Rabban showing \$450,000 a year in rental payments at P-00478, R-004169.

BSA Answer:

130. Deny the allegations set forth in paragraphs 184, 185 and 186 of the petition.

Congregation Answer:

185. The Congregation denies the allegations in paragraph 185 of the Petition.

Other Scheme A Errors

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

BSA Answer:

130. Deny the allegations set forth in paragraphs 184, 185 and 186 of the petition.

Congregation Answer:

186. The Congregation denies the allegations in paragraph 186 of the Petition.

Petitioners' Reply:

See, e.g., R-3631- Letter to BSA Chair dated February 8, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p. 2, last full ¶

See, also, R-4932-R-4933 Letter to BSA Chair dated June 23, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, pp 1-2

Freeman Frazier Not Only Failed, But Refused To Explain How Construction Costs Were Allocated To The Condominiums

187. Of particular interest, and which would be objectionable even to a court applying the most relaxed evidentiary concepts, is the failure of Freeman Frazier and the Congregation to provide an explanation of the construction costs allocable to the condominiums. The construction costs were contained in a "report" by a construction estimator, McQuilkin Associates, and this is the source of the construction costs shown in the last of many versions of Freeman Frazier's Schedules A1 and B, see Freeman Frazier Letter of June 17, 2008, p. 6 (P-03688 at P-03694-95; R-004863 at R-004869-70).

BSA Answer:

131. Deny the allegations set forth in paragraphs 187 and 188 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to the Freeman Frazier's June 17, 2008 submission [R. 4863-916] for its full text and true meaning.

Congregation Answer:

187. The Congregation states that it is not required to respond to those allegations in paragraph 187 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

Petitioners' Reply:

BSA Answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "full meaning" of the Freeman Frazier June 17, 2008 submission that it cites.

188. Although the June 17, 2008 statement includes construction cost estimate for the proposed schemes (e.g., at P-03697, R-004872), the only Scheme A construction cost estimate is found attached to the December 22, 2007 report at P-02584, R-001966. The attachment is dated August 6, 2007. It is not signed or sealed and contains no indication of the schematics reviewed. There is no explanation of how costs in this mixed-use scheme were allocated between the school and the residential areas.

BSA Answer:

131. Deny the allegations set forth in paragraphs 187 and 188 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to

law, and respectfully refer the Court to the Freeman Frazier's June 17, 2008 submission [R. 4863-916] for its full text and true meaning.

Congregation Answer:

188. With respect to the allegations in paragraph 188 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 188 as an incomplete recitation of the record.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition, by providing the following response:

City's answer does not identify anything in Petitioners' averment that is "inconsistent with the Record" or does not reflect the "full meaning" of the Freeman Frazier June 17, 2008 submission that it cites.

189. The Scheme A and Scheme C construction cost estimates included with the Freeman Frazier December 21, 2007 report are incomplete documents and each is missing pages 3-15. See Freeman Frazier Letter to BSA, December 21, 2007 (Scheme A: P-02557 at P-02584-85; R-001968 at R-001996-97) (Scheme C: P-02557 at P-02592-93; R-001968 at R-00204-5) Opponents repeatedly pointed this out and demanded that a complete copy be filed. See e.g. BSA Hearing Transcript, June 24, 2008, Testimony of Alan D. Sugarman, p. 17, line 20 (P-03762 at P-03779, R-004937 at R-004954); Sugarman Surreply Statement of June 19, 2008 at p. 4 (P-03746 at P-03749; R-004925 at R-004928); Letter of Martin Levine dated July 29, 2008, p. 8 (P-03907 at P-03914; R-005210 at R-005217). The response from Freeman Frazier and the Congregation to these requests for the missing pages was essentially that neither the opposition nor the BSA requested the complete report. E.g. Freeman Frazier July 8, 2008 Report at p. 5, (P-03803 at P-03808, R-005170 at R-005175).

BSA Answer:

132. Deny the allegations set forth in paragraphs 189, 190, 191, 192 and 193 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

189. With respect to the allegations in paragraph 189 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 189 as an incomplete recitation of the record.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition, by providing the following response:

190. Clearly, Freeman Frazier provided false, altered, incomplete documents with the intention to mislead the BSA and opponents. This was not immediately apparent: only a year after the April 2007 submission did a neighborhood opponent see that the two-page document was part of a 15-page document, noticing the legend "page 2 of 15" at the bottom of the second page. The fact that the document was altered by deleting material pages was brought to the attention of the BSA.

BSA Answer:

132. Deny the allegations set forth in paragraphs 189, 190, 191, 192 and 193 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

190. The Congregation denies the allegations in paragraph 190 of the Petition.

Petitioners' Reply:

R-4833 Further Statement in Opposition dated June 10, 2008, prepared by Petitioners' counsel, Alan Sugarman, Esq., p.13, ¶ (c)

191. After having been advised of this omission by the opposition (BSA Hearing Transcript, June 24, 2008, Testimony of Alan D. Sugarman, p. 17, line 20 (P-03762 at P-03779, R-004937 at R-004954)), the BSA did not ask for the missing pages, nor did it remonstrate Freeman Frazier or the Congregation.

BSA Answer:

132. Deny the allegations set forth in paragraphs 189, 190, 191, 192 and 193 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

191. With respect to the allegations in paragraph 191 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 191 as an incomplete recitation of the record.

192. Freeman Frazier and the Congregation never provided the missing pages 3-15 for the construction cost estimate for Scheme A or Scheme C.

BSA Answer:

132. Deny the allegations set forth in paragraphs 189, 190, 191, 192 and 193 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

192. With respect to the allegations in paragraph 192 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 192 as an incomplete recitation of the record.

193. Although in an administrative proceeding the strict rules of evidence do not apply, an incomplete, unsigned document prepared by an entity under the control of the party submitting the document should never be admitted or considered.

BSA Answer:

132. Deny the allegations set forth in paragraphs 189, 190, 191, 192 and 193 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

193. The Congregation states that no response is required to paragraph 193 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 193.

194. The BSA acted arbitrarily and capriciously for not demanding that the missing pages be supplied.

BSA Answer:

133. Deny the allegations set forth in paragraph 194 of the petition.

Congregation Answer:

194. The Congregation denies the allegation in paragraph 194 of the Petition.

195. The Congregation, by choosing to conceal and withhold the missing 13 pages from the construction estimates included in the reasonable return analyses, destroyed any credibility in the reports and the Freeman Frazier reports should be rejected. Without the Freeman Frazier reports, the Congregation fails to establish its burden under §72-21(b).

BSA Answer:

134. Deny the allegations set forth in paragraphs 195, 196, 197, 198 and 199 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

195. The Congregation denies the allegations in paragraph 195 of the Petition.

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

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

BSA Answer:

134. Deny the allegations set forth in paragraphs 195, 196, 197, 198 and 199 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

196. With respect to the allegations in paragraph 196 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 196 as an incomplete recitation of the record.

Petitioners' Reply:

See R-4933 – Letter to BSA Chair dated June 23, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p. 2 ("Construction Costs")

R-4933-34 – Id. pp 2-3 (carryover ¶ (caretaker's apartment)

R-4934 – Id, p. 3, 2nd¶, last sentence

197. As to the proper allocation of space between community house and school, it is clear that the service elevator and stairs in the new building are on floors 1-4, and are needed for the school regardless of whether there were residential condominiums or not. As the final statement in support states (Statement in Support, July 8, 2008 on page 38, 2 lines from bottom (P-03823 at P-03861; R-005114 at R-005152): "When taking into account that each floor must provide for adequate circulation and two egress points to stairs ..."

BSA Answer:

134. Deny the allegations set forth in paragraphs 195, 196, 197, 198 and 199 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

197. With respect to the allegations in paragraph 197 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 197 as an incomplete recitation of the record.

Petitioners' Reply:

Re: Verified Petition Para. 197

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

BSA Answer:

134. Deny the allegations set forth in paragraphs 195, 196, 197, 198 and 199 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

198. The Congregation denies the allegations in paragraph 198 of the Petition.

Petitioners' Reply:

R-4681, R-4682, R-4683, R-4684- Drawings dated 10.22.07, 12.26.07, 12.26.07, 10.22.07, of 1st four floors of Proposed Community Facility/Residential prepared by Congregation's architect.

City's answer does not cite Record or identify anything in Petitioners' averment that is "inconsistent with the Record."

199. The Levine reports cited above detail other deficiencies including:

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

BSA Answer:

134. Deny the allegations set forth in paragraphs 195, 196, 197, 198 and 199 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

199. With respect to the allegations in paragraph 199 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 199 as an incomplete recitation of the record.

Petitioners' Reply:

Re: Verified Petition Para. 199 1st ° R-4101- Letter to BSA Chair dated February 8, 2008 from Petitioners' valuation expert, Martin Levine of MVS, p. 9

2nd ° See, e.g., R-3636 Letter to BSA Chair dated February 8, 2008 from Petitioners' valuation expert, Martin Levine of MVS, P. 7 ("CONSTRUCTION COSTS"); R-3638 – id at p. 9 ("Soft Construction Costs")

3rd ° R-4805- Letter to BSA Chair dated June 10, 2008 from Petitioners' valuation expert, Martin Levine of MVS, p. 6 last full ¶

R-4934- Letter to BSA Chair dated June 10, 2008 from Petitioners' valuation expert, Martin Levine of MVS, p.3, 3rd full ¶

200. The Decision addresses only one of the many issues raised by Levine — the failure of Freeman Frazier to provide a return on equity analysis. Decision ¶141 to ¶144.

BSA Answer:

135. Deny the allegations set forth in paragraph 200 of the petition, and respectfully refer the Court to the BSA's Resolution for its full text and true meaning [R. 1-14].

Congregation Answer:

200. With respect to the allegations in paragraph 200 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 200 as an incomplete recitation of the record.

Petitioners' Reply:

R-9- BSA August 26, 2008 Decision (Resolution), p 9, left hand column, last three "WHEREAS" ¶¶, R-10-id at p. 10, right hand column, carry over and first complete "WHEREAS."

City's answer does not identify anything in Petitioners' averment that does not comport with the "true meaning" of the BSA decision it cites.

Congregation's answer does not cite Record.

201. In rejecting the need for return on equity analysis, the Decision failed to mention the following in Item M of the BSA Instructions: "Generally, for cooperative or condominium development proposals, the following information is required...percentage return on equity (net profit divided by equity)." Financial Feasibility Study, Item M to BSA Detailed Instructions. ¶ 4, Opp. Ex. KK at KK-8 (P-00512 at P-00518; R-004267 at R-004273).

BSA Answer:

136. Deny the allegations set forth in paragraphs 201 of the petition insofar as it is inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

201. With respect to the allegations in paragraph 201 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 201 as an incomplete recitation of the record.

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

BSA Answer:

137. Deny the allegations set forth in paragraph 202 of the petition.

Congregation Answer:

202. With respect to the allegations in paragraph 202 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 202 as an incomplete recitation of the record.

203. As stated by Levine, Scheme A (and Scheme C discussed below), would show reasonable returns not only on a return on investment basis, but also for a return on equity basis.

BSA Answer:

138. Deny the allegations set forth in paragraph 203 of the petition insofar as it is inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

203. With respect to the allegations in paragraph 203 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 203 as an incomplete recitation of the record.

Petitioners' Reply:

R-4801 – Letter to BSA Chair dated June 10, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.2 "Profit" 1st ¶

204. The Decision discussion of return on equity is not only not candid, but suggests, falsely, that this was the only issue raised by opponents as to the reasonable return/feasibility reports.

BSA Answer:

139. Deny the allegations set forth in paragraphs 204 and 205 of the petition, and respectfully refer the Court to the BSA's Resolution for its full text and true meaning [R. 1- 14].

Congregation Answer:

204. The Congregation denies the allegations in paragraph 204 of the Petition.

City's answer does not identify anything in Petitioners' averment that is not consistent with the "true meaning" of the BSA's resolution it cites. 205. The Decision refers, at ¶141 and ¶143, to "financial return based on profits." There is no such concept as a "financial return based on profit." That the BSA made such a simplistic misstatement reveals that the BSA did not exhibit or apply any financial or economic expertise in reviewing the Freeman Frazier reports, and, therefore, it would not be appropriate for the Court to defer to the BSA's wholly conclusory finding as set forth in ¶148.

BSA Answer:

139. Deny the allegations set forth in paragraphs 204 and 205 of the petition, and respectfully refer the Court to the BSA's Resolution for its full text and true meaning [R. 1- 14].

Congregation Answer:

205. The Congregation denies the allegations in paragraph 205 of the Petition.

Petitioners' Reply:

Petitioners hereby supplement its Verified Petition, and in response to the denial by Respondents to averments in the Verified Petition, by providing the following response

City's answer does not identify anything in Petitioners' averment that is not consistent with the "true meaning" of the BSA's resolution it cites.

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

BSA Answer:

140. Deny the allegations set forth in paragraph 206 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

206. The Congregation denies the allegations in paragraph 206 of the Petition.

Petitioners' Reply:

See Pet. Ex. N-3.

Conforming As Of Right Scheme C — The Supposedly All Residential Scheme

207. After submission of the initial financial report in April 2007, the BSA asked the Congregation and Freeman Frazier to provide an analysis of an all-residential as-of-right building on the development site (aka Scheme C or AOR FAR Development).

BSA Answer:

141. Admit the allegations set forth in paragraph 207 of the petition.

Congregation Answer:

207. With respect to the allegations in paragraph 207 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 207 as an incomplete recitation of the record.

Petitioners' Reply:

Congregation denial contradicts City's admission.

208. The analysis of the so-called all residential scheme suffers from many of the same deficiencies as existed as to the Scheme A reports.

BSA Answer:

142. Deny the allegations set forth in paragraphs 208 and 209 of the petition.

Congregation Answer:

208. The Congregation denies the allegations in paragraph 208 of the Petition.

Petitioners' Reply:

R-4803- Letter to BSA Chair dated June 10, 2008, prepared by Respondents' valuation expert, Martin Levine of MVS, p 4.,§2

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

BSA Answer:

142. Deny the allegations set forth in paragraphs 208 and 209 of the petition.

Congregation Answer:

209. The Congregation states that no response is required to paragraph 209 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 209.

210. Accordingly, the BSA staff properly asked for an all-residential analysis. BSA Notice of Objections, June 15, 2007, p. 4, ¶ 31 (P-01724 at P-01728; R-00253 at R-000257). In response, Freeman Frazier provided a purported analysis

in its report of September 6, 2007 (P-01904, R-00289), described as "As of Right Residential F.A.R Development," but later described in other reports as "Scheme C."

BSA Answer:

143. Deny the allegations set forth in paragraph 210 of the petition, except admit that the BSA acted properly, and respectfully refer the Court to Freeman Frazier's September 6, 2007 report [R. 283-307] for its full text and true meaning.

Congregation Answer:

210. The Congregation states that it is not required to respond to those allegations in paragraph 210 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

211. The September 6, 2007 Scheme C building is shown as having 25,642 square feet of built residential area and 15,883 square feet of sellable area. Freeman Frazier Letter September 6, 2007, p. 7 (P-01880 at P-01886; R-00283 at R-000289). The acquisition cost is shown as \$18,944,000. A loss of approximately \$5 million is shown. Id.

BSA Answer:

144. Deny the allegations set forth in paragraphs 211 and 212 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to Freeman Frazier's September 6, 2007 report [R. 283-307] for its full text and true meaning.

Congregation Answer:

211. With respect to the allegations in paragraph 211 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 211 as an incomplete recitation of the record.

Petitioners' Reply:

City's answer does not identify anything in Petitioners' averment that does not comport with the "true meaning" of the Freeman Frazier report it cites.

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

BSA Answer:

144. Deny the allegations set forth in paragraphs 211 and 212 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law, and respectfully refer the Court to Freeman Frazier's September 6, 2007 report [R. 283-307] for its full text and true meaning.

Congregation Answer:

212. The Congregation denies the allegations in paragraph 212 of the Petition.

Petitioners' Reply:

See R-289 – Economic Analysis dated September 6, 2007, prepared by Congregation's financial analyst, p.7 (Schedule A). City's answer does not identify anything in Petitioners' averment that does not comport with the "true meaning" of the Freeman Frazier report it cites.

213. The final Freeman Frazier report on the so-called all residential Scheme C building is in the December 21, 2007 report (filed December 22, 2007). P-02557, R-001968. That report described this scheme as "All Residential F.A.R. 4.0.", changing the prior description.

BSA Answer:

145. Deny the allegations set forth in paragraphs 213, 214 and 215 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly. or contrary to law, and respectfully refer the Court to Freeman Frazier's December 21, 2007 report [R. 1968-2008] for its full text and true meaning.

Congregation Answer:

213. With respect to the allegations in paragraph 213 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 213 as an incomplete recitation of the record.

Petitioners' Reply:

See R-1970 – BSA Hearing Response dated December 21, 2007, prepared by Freeman Frazier, Congregation's financial analyst at p. 2, §E

214. Although purporting to be an all residential Scheme, the Scheme C aka All Residential F.A.R. 4.0 scheme was in fact not an all residential scheme.

BSA Answer:

145. Deny the allegations set forth in paragraphs 213, 214 and 215 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly. or contrary to law, and respectfully refer the Court to Freeman Frazier's December 21, 2007 report [R. 1968-2008] for its full text and true meaning.

Congregation Answer:

214. With respect to the allegations in paragraph 214 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 214 as an incomplete recitation of the record.

Petitioners' Reply:

Compare:

R-631 Drawing AOR-C-6 dated 10.22.07 – Community Facility Sub Cellar As-Of-Right prepared by Congregation's architect.

R-2015 – Drawing PROG P-6 dated 12.26.07 – Community Facility Sub Cellar – Proposed - prepared by Congregation's architect.

City's answer does not identify anything in Petitioners' averment that does not comport with the "true meaning" of the Freeman Frazier report it cites.

215. This report used a new acquisition value of \$14,816,000 and found an estimated profit of \$2,894,000.

BSA Answer:

145. Deny the allegations set forth in paragraphs 213, 214 and 215 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly. or contrary to law, and respectfully refer the Court to Freeman Frazier's December 21, 2007 report [R. 1968-2008] for its full text and true meaning.

Congregation Answer:

215. With respect to the allegations in paragraph 215 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 215 as an incomplete recitation of the record.

Petitioners' Reply:

R-1980 – Economic Analysis dated December 21, 2008, page 11 (Schedule A1) (Acquisition Cost)

City's answer does not identify anything in Petitioners' averment that does not comport with the "true meaning" of the Freeman Frazier report it cites.

216. Had Scheme C utilized all the space for residential purposes and assigned value to the 6400 square foot sub-basement, it would have shown a substantially higher profit than \$2,894,000.

BSA Answer:

146. Deny the allegations set forth in paragraphs 216, 217, 218 and 219 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

216. The Congregation denies the allegation in paragraph 216 of the Petition.

Petitioners' Reply:

217. When Freeman Frazier provided its final report, the acquisition value for all of the other schemes had become \$12,347,000, but Freeman Frazier never modified the conforming all residential Scheme C analysis of December 21, 2007, which, using the same methods of the final report of July, 2008. Doing so would have resulted in a \$5,363,000 developer's profit.

BSA Answer:

146. Deny the allegations set forth in paragraphs 216, 217, 218 and 219 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

217. The Congregation denies the allegation in paragraph 217 of the Petition.

Petitioners' Reply:

Compare

R-1980 – Economic Analysis dated December 21, 2008, prepared by Congregation's financial analyst, Freeman Frazier, page 11 (Schedule A1) (Acquisition Cost- \$14,816,000)

and

R-5178 Economic Analysis dated July 8, 2008, prepared by Congregation's financial analyst, Freeman Frazier page 8 (Schedule A) (Acquisition Cost - \$12,347,000)

218. When challenged, Freeman Frazier stated in its July 8, 2008 report at page 7 (P-03803 at 03810: R-005170 at R-005177):

Revised Scheme C

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

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

BSA Answer:

146. Deny the allegations set forth in paragraphs 216, 217, 218 and 219 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

218. With respect to the allegations in paragraph 218 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 218 as an incomplete recitation of the record.

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

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

(Page 5)

FFA Response to Allegation #1: As noted on page 7 of the July 8, 2008 Response, the BSA did not request a submission of an analysis of a revised Scheme C. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

BSA Answer:

146. Deny the allegations set forth in paragraphs 216, 217, 218 and 219 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

219. With respect to the allegations in paragraph 219 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 219 as an incomplete recitation of the record.

220. The failure and refusal of Freeman Frazier to revise Scheme C was a deliberate act by the Congregation and Freeman Frazier in collusion with the BSA to conceal the profitability of Scheme C.

BSA Answer:

147. Deny the allegation set forth in paragraph 220 of the petition.

Congregation Answer:

220. The Congregation denies the allegations in paragraph 220 of the Petition.

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

BSA Answer:

148. Deny the allegations set forth in paragraphs 221, 222, 223, 224, 225, 226, 227, and 228 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

221. The Congregation denies the allegations in paragraph 221 of the Petition.

Petitioners' Reply:

R-1994 BSA Hearing Response dated December 21, 2007, prepared by Congregation's financial analyst, Freeman Frazier, EXHIBIT C (P. 26)

R-5211- Letter to BSA Chair dated July 29, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.2,

"The second AOR Scheme - Scheme C - the so-called All Residential Scheme" 1st ¶
Congregation does not cite Record.

222. However, despite the name "all-residential," the actual analysis performed by Freeman Frazier still allocated the first floor for community use. And although the proposed building developed the sub-basement with an enormous 6400 square foot hall, the proposed Scheme C building fails to include the same sub-basement that was included in the community space schemes.

BSA Answer:

148. Deny the allegations set forth in paragraphs 221, 222, 223, 224, 225, 226, 227, and 228 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

222. With respect to the allegations in paragraph 222 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 222 as an incomplete recitation of the record.

Petitioners' Reply:

R-1994 BSA Hearing Response dated December 21, 2007, prepared by Congregation's financial analyst, Freeman Frazier, EXHIBIT C (P. 26)

R-5211- Letter to BSA Chair dated July 29, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.2,

"The second AOR Scheme - Scheme C - the so-called All Residential Scheme" 1st ¶
Congregation does not cite Record.

223. Thus, the Scheme C analysis ignored over 11,000 square feet of developable real estate — 6400 square feet in the sub-basement, and 4480 square feet on the first floor.

BSA Answer:

148. Deny the allegations set forth in paragraphs 221, 222, 223, 224, 225, 226, 227, and 228 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

223. With respect to the allegations in paragraph 223 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 223 as an incomplete recitation of the record.

Petitioners' Reply:

R-1994 BSA Hearing Response dated December 21, 2007, prepared by Congregation's financial analyst, Freeman Frazier, EXHIBIT C (P. 26)

R-5211- Letter to BSA Chair dated July 29, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.2,

"The second AOR Scheme - Scheme C - the so-called All Residential Scheme" 1st ¶
Congregation does not cite Record.

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

BSA Answer:

148. Deny the allegations set forth in paragraphs 221, 222, 223, 224, 225, 226, 227, and 228 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

224. With respect to the allegations in paragraph 224 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 224 as an incomplete recitation of the record.

Petitioners' Reply:

R-1994 BSA Hearing Response dated December 21, 2007, prepared by Congregation's financial analyst, Freeman Frazier, EXHIBIT C (P. 26)

R-5211- Letter to BSA Chair dated July 29, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.2,

"The second AOR Scheme - Scheme C - the so-called All Residential Scheme" 1st ¶
Congregation does not cite Record.

225. This glaring error, identified by the Opposition expert Martin Levine in his July 29, 2008 Statement (P-03757 at P-03758; R-005210 at R-005211) was defended by Freeman Frazier in their last report of August 12, 2008, page 3, P-03952 at P-03995, R-005772 at R-005775 as follows:

MVS Allegation #1: MVS alleges that FFA failed to respond the BSA's request to provide an all Residential Scheme in response to the Notice of Objections dated June 15, 2007. (Page 2)

FFA Response to Allegation #1: FFA provided a response to the BSA's request on page 26 of the December 21, 2007 Response, that eliminated all community facility related programmatic needs from the building. The ground floor synagogue lobby and core remained to alleviate the circulation problems. Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.

BSA Answer:

148. Deny the allegations set forth in paragraphs 221, 222, 223, 224, 225, 226, 227, and 228 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

225. With respect to the allegations in paragraph 225 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 225 as an incomplete recitation of the record.

226. There are two undisputed omissions in the Congregation's Scheme C analysis: failure to update the acquisition cost and failure to provide a best use all residential conforming scheme.

BSA Answer:

148. Deny the allegations set forth in paragraphs 221, 222, 223, 224, 225, 226, 227, and 228 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

226. The Congregation denies the allegations in paragraph 226 of the Petition.

Petitioners' Reply:

Freeman Frazier's Failure to Update its Acquisition Cost calculations for All-Residential, As-of-Right Scheme C Compare:

R-1980 – Economic Analysis dated December 21, 2008, prepared by Congregation's financial analyst, Freeman Frazier, page 11 (Schedule A1) (Acquisition Cost- \$14,816,000)

and

R-5178 Economic Analysis dated July 8, 2008, prepared by Congregation's financial analyst, Freeman Frazier page 8 (Schedule A) (Acquisition Cost - \$12,347,000)

R-5775 Response to Opposition dated August 12, 2008 prepared by Congregation's financial analyst, Freeman Frazier, page 3, ("MVS Letter to BSA dated July 29, 2008) (Congregation's) failure to provide an as-of-right, all-residential scheme.)

227. Freeman Frazier admits these omissions and, consequently, its use of the phrase "all-residential" is deceptive.

BSA Answer:

148. Deny the allegations set forth in paragraphs 221, 222, 223, 224, 225, 226, 227, and 228 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

227. The Congregation denies the allegations in paragraph 227 of the Petition.

Petitioners' Reply:

R-1980 – Economic Analysis dated December 21, 2008, prepared by Congregation's financial analyst, Freeman Frazier, page 11 (Schedule A1) (Acquisition Cost- \$14,816,000)

and

R-5178 Economic Analysis dated July 8, 2008, prepared by Congregation's financial analyst, Freeman Frazier page 8 (Schedule A) (Acquisition Cost - \$12,347,000)

R-5775 Response to Opposition dated August 12, 2008 prepared by Congregation's financial analyst, Freeman Frazier, page 3, ("MVS Letter to BSA dated July 29, 2008) (Congregation's) failure to provide an as-of-right, all-residential scheme.)

228. It is not for the BSA to advise the applicant as to when it has not proved its case. The burden is on the Congregation, not the BSA. The Congregation failed to provide this analysis, and thus cannot even make the § 72-21(b) argument.

BSA Answer:

148. Deny the allegations set forth in paragraphs 221, 222, 223, 224, 225, 226, 227, and 228 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

228. The Congregation states that no response is required to the first two sentences of paragraph 228 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 228. The Congregation specifically denies the allegations in the last sentence of paragraph 228 of the Petition.

Petitioners' Reply:

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

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

BSA Answer:

149. Neither admit nor deny the allegations set forth in paragraphs 229 and 230 of the petition as they consists of legal argument to which no response is required; however to the extent that this Court requires such a response, City Respondents deny the allegations set forth in said paragraph.

Congregation Answer:

229. The Congregation states that no response is required to paragraph 229 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 229.

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

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

BSA Answer:

149. Neither admit nor deny the allegations set forth in paragraphs 229 and 230 of the petition as they consists of legal argument to which no response is required; however to the extent that this Court requires such a response, City Respondents deny the allegations set forth in said paragraph.

Congregation Answer:

230. The Congregation states that no response is required to paragraph 230 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 230.

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

Item M of the BSA Instructions states:

5. Generally, for cooperative or condominium development proposals, the following information is required: market value of the property, acquisition costs and date of acquisition;
Financial Feasibility Study, Item M to BSA Detailed Instructions Opp. Ex. KK at KK-7 (P-00512 at P-00518; R-004267 at R-004273)

BSA Answer:

150. Deny the allegations set forth in paragraphs 231 and 232 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

231. The Congregation states that no response is required to paragraph 231 of the Petition, which purports to characterize certain "Detailed Instructions," which speaks for itself, and that, to the extent a response is required, denies the allegations in paragraph 231.

232. The Congregation failed to provide both the market value of the property or the acquisition cost and date of acquisition as required by Item M. The “acquisition cost” as provided by Freeman Frazier not only is an artificial contrivance, but would not seem to meet the definition of market price. It certainly does not meet the meaning of “acquisition cost” as used in Item M. Financial Feasibility Study, Item M to BSA Detailed Instructions Opp. ¶ 5, Ex. KK at KK-8 (P-00512 at P-00519; R-004267 at R-004274)

BSA Answer:

150. Deny the allegations set forth in paragraphs 231 and 232 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

232. The Congregation denies the allegations in paragraph 232 of the Petition.

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

BSA Answer:

151. Deny the allegations set forth in paragraph 233 of the petition.

Congregation Answer:

233. The Congregation states that no response is required to paragraph 233 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 233.

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

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

BSA Answer:

152. Deny the allegations set forth in paragraphs 234, 235, 236, 237, 238, 239 and 240 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

234. The Congregation states that it is not required to respond to those allegations in paragraph 234 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

Petitioners’ Reply:

Submissions by Congregation’s financial analyst, Freeman Frazier cited above.

235. In fact, all the Freeman Frazier reports assume, but conceal, that the “acquisition cost” is being paid to the Congregation as the owner.

BSA Answer:

152. Deny the allegations set forth in paragraphs 234, 235, 236, 237, 238, 239 and 240 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

235. The Congregation denies the allegations in paragraph 235 of the Petition.

Petitioners’ Reply:

Submissions by Congregation’s financial analyst, Freeman Frazier cited above.

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

BSA Answer:

152. Deny the allegations set forth in paragraphs 234, 235, 236, 237, 238, 239 and 240 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

236. With respect to the allegations in paragraph 236 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 236 as an incomplete recitation of the record.

Petitioners' Reply:

R-3643-Letter to BSA Chair dated February 8, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.14 ("Total Net Proceeds Analysis")

R-1980 – Economic Analysis date December 21, 2007, prepared by Congregation's financial analyst, Freeman Frazier, p. 11 (Schedule A1)

See R-4811-R-4812 – Letter to BSA Chair dated June10, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, pp. 12-13

See also R-4096 Letter to BSA Chair dated March 24 0, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, p.4 ("MVS Report Response")

237. Under the latest Scheme A scenario provided by Freeman Frazier, where the Congregation is able to develop its community house, the Congregation receives a cash payment of \$12,347,000.

BSA Answer:

152. Deny the allegations set forth in paragraphs 234, 235, 236, 237, 238, 239 and 240 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

237. With respect to the allegations in paragraph 237 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 237 as an incomplete recitation of the record.

Petitioners' Reply:

R-3643-Letter to BSA Chair dated February 8, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.14 ("Total Net Proceeds Analysis")

See also R-4811-R-4812 – Letter to BSA Chair dated June10, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, pp. 12-13

See also R-4096 Letter to BSA Chair dated March 24 0, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, p.4 ("MVS Report

R-4656 Economic Analysis dated May 13, 2008, prepared by Congregation's financial analyst, Freeman Frazier, p.8

See also R-1980 – Economic Analysis date December 21, 2007, prepared by Congregation's financial analyst, Freeman Frazier, p. 11 (Schedule A1)

See R-4811-R-4812 – Letter to BSA Chair dated June10, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, pp. 12-13

See also R-4096 Letter to BSA Chair dated March 24 0, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, p.4 ("MVS Report Response")

238. Under the final Revised Proposed Development scheme for the building approved by the BSA, the Congregation would receive \$12,347,000 as a cash payment for the acquisition cost. Thus, in the scheme approved by the BSA, a hypothetical developer would earn \$6,815,000, after making the \$12,347,000 payment to the Congregation.

BSA Answer:

152. Deny the allegations set forth in paragraphs 234, 235, 236, 237, 238, 239 and 240 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

238. With respect to the allegations in paragraph 238 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 238 as an incomplete recitation of the record.

Petitioners' Reply:

R-5178- Economic Analysis dated July 8, 2008, prepared by Congregations financial analyst, Freeman Frazer, p. 8 (Schedule A. right hand column)

R-3643-Letter to BSA Chair dated February 8, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.14 ("Total Net Proceeds Analysis")

See also R-4811-R-4812 – Letter to BSA Chair dated June10, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, pp. 12-13

See also R-4096 Letter to BSA Chair dated March 24 0, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, p.4 ("MVS Report

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

BSA Answer:

152. Deny the allegations set forth in paragraphs 234, 235, 236, 237, 238, 239 and 240 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

239. With respect to the allegations in paragraph 239 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 239 as an incomplete recitation of the record.

Petitioners' Reply:

R-5178- Economic Analysis dated July 8, 2008, prepared by Congregations financial analyst, Freeman Frazer, p. 8 (Schedule A. right hand column)

R-3643-Letter to BSA Chair dated February 8, 2008, prepared by Petitioners' valuation expert, Martin Levine of MVS, p.14 ("Total Net Proceeds Analysis")

See also R-4811-R-4812 – Letter to BSA Chair dated June10, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, pp. 12-13

See also R-4096 Letter to BSA Chair dated March 24 0, 2008, prepared by Petitioners' valuation expert. Martin Levine of MVS, p.4 ("MVS Report

240. The Congregation had stated that it would act as its own developer. One of the Congregation's trustees, Jack Rudin, is one of the largest real estate developers in New York City. P-00332; R-003449 and P-00257; P-003359.

BSA Answer:

152. Deny the allegations set forth in paragraphs 234, 235, 236, 237, 238, 239 and 240 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

240. With respect to the allegations in paragraph 240 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 240 as an incomplete recitation of the record.

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

BSA Answer:

153. Deny the allegations set forth in paragraph 241 of the petition, and respectfully refer the Court to the BSA's Resolution [R. 1-14] for its full text and true meaning.

Congregation Answer:

241. With respect to the allegations in paragraph 241 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 241 as an incomplete recitation of the record.

Access, Accessibility And Circulation Are Not Hardships Under §72-21(a) Because They Do Not Result From The Strict Application Of The Zoning Regulations And Are Resolved in a Conforming As-Of-Right Building

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

BSA Answer:

154. Deny the allegation set forth in paragraph 242 of the petition.

Congregation Answer:

242. The Congregation denies the allegations in paragraph 242 of the Petition.

Petitioners' Reply:

R-5765-Statement in Reply dated August 12, 2008, prepared by Congregation's counsel, Friedman & Gottbaum, p.13

R-5117 – Revised Statement in Support dated July 8, 2008, prepared by Congregation's counsel, Friedman & Gottbaum, p.3; R-5124 – id at p.10; R-5125- id at p 11; R-5143 – id at p.29; R-5146 – id at p. 32;R-5150- id at p.36; R-5152 – id at p.38; R-5157- id. at p.42; R-5158 – id at p. 44; R-5164- id at p. 50; R-5167; id at p. 53; R-5158 – id at p. 54

Circulation:

R-3 BSA Decision (Resolution) dated August 26, 2008, p.3 – right hand column – 4th WHEREAS

R-4 – BSA Decision (Resolution) dated August 26, 2008, p. 4 - left hand column – 3rd WHEREAS

R-4 - BSA Decision (Resolution) dated August 26, 2008, p. 4 –right hand column – last complete WHEREAS

R-5 - BSA Decision (Resolution) dated August 26, 2008, p. 5 – right hand column – 3rd WHEREAS

R- 5 - BSA Decision (Resolution) dated August 26, 2008, p. 5 – right hand column – 4th WHEREAS

R- 13 – BSA Decision (Resolution) dated August 26, 2008, p. 13 – left hand column – 4th WHEREAS

Access:

R-5 - BSA Decision (Resolution) dated August 26, 2008, p. 5 – right hand column – 4th WHEREAS

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

BSA Answer:

155. Deny the allegations set forth in paragraph 243 of the petition insofar as they are inconsistent with the Record, except admit that the Congregation has asserted the need to improve access and circulation in the synagogue as one of the reasons for the requested variances.

Congregation Answer:

243. The Congregation denies the allegations in paragraph 243 of the Petition to the extent inconsistent with the record, and specifically denies that resolving the issue required an as-of-right building.

Petitioners' Reply:

R-5133-R-5135 – Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum, pp. 19-20

R-5146 - Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum, p. 32

R- 5164 - Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum p. 50

244. The references to access are not hardships under §72-21 (a) of the Zoning Regulations for the simple reason that this alleged hardship is resolved completely by a conforming as-of-right building, without even the lower floor variances.

BSA Answer:

156. Deny the allegations set forth in paragraph 244 of the petition.

Congregation Answer:

244. The Congregation denies the allegations in paragraph 244 of the Petition

Petitioners' Reply:

R- 3611 – R-3612 – Letter to BSA Chair dated February 4, 2008, prepared by Congregation's architect, pp. 1-2 (carry over paragraph) (last sentence on R-3611 states "Access and circulation in the proposed and as-of-right schemes

proposed schemes relieve the now untenable access to the synagogue.")

R-3283 - Letter to BSA Chair dated January 28, 2008, prepared by Petitioners' architectural expert, Craig Morrison, AIA, p.2 ¶ 5

R-3650 – Letter to BSA Chair dated February 11, 2008, prepared by Petitioners' architectural expert, Craig Morrison, AIA, p.1

See also R- 3931 - – Letter to BSA Chair dated March 24, 2008, prepared by Petitioners' architectural expert, Craig Morrison, AIA, p.2 ¶ 7; R-3933 – id at p. 4, ¶ III.

245. The Zoning Resolution is quite clear that any hardship upon which a variance is based must arise out of the strict application of the Zoning Resolution.

BSA Answer:

157. Deny the allegations set forth in paragraph 245 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

245. The Congregation states that no response is required to paragraph 245 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 245.

246. The mere existence of a hardship is not sufficient — there must be a logical relationship between the hardship, the Zoning Resolution, and the variance. Here, there is none.

BSA Answer:

158. Deny the allegations set forth in paragraph 246 of the petition.

Congregation Answer:

246. The Congregation states that no response is required to the first sentence of paragraph 246 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 246. The Congregation specifically denies the allegations in the second sentence of paragraph 246 of the Petition.

247. In the Congregation's own words, the need to remedy alleged access and circulation issues relating to the synagogue is "the heart of its application" as stated in its June 17, 2008 filing¹⁵.

BSA Answer:

159. In response to the allegations set forth in paragraph 247 of the petition, admit that petitioners have accurately quoted from Friedman & Gotbaum's June 17, 2008 letter to the BSA.

Congregation Answer:

247. With respect to the allegations in paragraph 247 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states

¹⁵ "... the significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application." June 17, 2008 Friedman & Gotbaum to BSA, p. 2, last line second full paragraph (P-03742 at P-03743; R-004859 at R-004860).

that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 247 as an incomplete recitation of the record.

Petitioners' Reply:

Congregation's answer does not cite Record and is inconsistent with City's admission.

R-004859 at R-004860 June 17, 2008 Friedman & Gotbaum to BSA, p. 2, last line second full paragraph.

248. To emphasize this claim, the Congregation mentions this issue on 30 separate occasions of its final version of its Statement in Support, and similarly in the four earlier versions of the report.¹⁶

BSA Answer:

160. Deny the allegations set forth in paragraph 248 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

248. With respect to the allegations in paragraph 248 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 248 as an incomplete recitation of the record.

Petitioners' Reply:

See, e.g.,

R-5765-Statement in Reply dated August 12, 2008, prepared by Congregation's counsel, Friedman & Gottbaum, p.13

R-5117 – Revised Statement in Support dated July 8, 2008, prepared by Congregation's counsel, Friedman & Gottbaum, p.3; R-5124 – id at p.10; R-5125- id at p 11; R-5143 – id at p.29; R-5146 – id at p. 32;R-5150- id at p.36; R-5152 – id at p.38; R-5157- id. at p.42; R-5158 – id at p. 44; R-5164- id at p. 50; R-5167; id at p. 53; R-5158 – id at p. 54

249. The issue of access has great emotional and public relations appeal. The BSA's acceptance of this false issue would suggest that the BSA acted emotionally or cynically.

BSA Answer:

161. Deny the allegations set forth in paragraph 249 of the petition.

Congregation Answer:

249. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in the first sentence of paragraph 249 of the Petition. The Congregation denies the allegations in the remainder of paragraph 249 of the Petition.

250. Yet, it is indisputable that access and accessibility issues are fully resolved by a conforming as-of-right building that provides the large lobby and modern elevator needed to resolve these problems. See Petitioners' Exhibit H attached hereto filed as Opp. Ex. GG at GG-12 (P-00465 at P-00477, R-004156 at P-004168). The areas marked in red are those that address the access and circulation issues, and involve a very small part of each floor.

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

¹⁶ The public relations emotional appeal is shown in this quotation attributed to Shelly Friedman in the Jewish Week, which is the same as statements made in the proceeding.

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

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

Congregation Answer:

250. With respect to the allegations in paragraph 250 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 250 as an incomplete recitation of the record.

251. Simple comparison of the as-of-right plans to the proposed plans shows that the access and accessibility (i.e., elevators and lobbies) are designed identically in both schemes. See “Access Comparison - Conforming AOR to Proposed, filed January 28, 2008 as Opp. Ex. FF” (P-00459 at P-00460-64; R-003600 at R-003602 et. seq.).

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

251. With respect to the allegations in paragraph 251 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 251 as an incomplete recitation of the record.

252. But comparison of the floor plans is not needed to establish the important point shows that the access and accessibility are designed identically in both the as-of-right and proposed schemes. The opposition expert witness Craig Morrison, an AIA certified architect, stated unequivocally that a conforming as-of-right building resolved all of the access and circulation issues (Letter from Craig Morrison, Opposition Expert, January 28, 2008, P-02730, R-003282). In response, the Congregation’s rebuttal expert witness, Charles Platt, its architect from Platt Byard Dovell White, acknowledged that Mr. Morrison was absolutely correct in a letter submitted February 4, 2008 to the BSA (P-02768, R-003614) and attached to this Verified Petition as Exhibit G:

Access and circulation in the proposed and as-of-right schemes are discussed in these paragraphs. Mr. Morrison correctly points out that both the as-of-right and proposed schemes relieve the now untenable access to the synagogue. Both schemes remedy the circulation through the addition of an ADA compliant elevator adjacent to the historic synagogue building. In each scheme, the proposed elevator serves both the historic synagogue and the community facility floors of the proposed building. Unlike the existing non-compliant elevator, the proposed elevator is sized and configured to meet program needs and ADA requirements. Most importantly, it stops on all levels of both the existing synagogue and the community facility floors of the proposed building. Because the current elevator does not stop at the level of the main sanctuary, disabled congregants must now be carried up a flight of stairs to reach the main sanctuary. The proposed elevator is a necessary and required improvement to the synagogue’s everyday circumstances and is used in both the proposed and as-of- right schemes. (emphasis supplied)

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

252. With respect to the allegations in paragraph 252 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 252 as an incomplete recitation of the record.

253. Yet even after the definite statement of its expert witness to the BSA that access and circulation problems were resolved by a conforming as-of-right building, the Congregation's counsel persisted in hundreds¹⁷ of false references to assert the contrary (without objection or question from the BSA). See Sugarman Supplemental Statement in Opposition of June 10, 2008, pp. 17-20 (P-04200 at P-04219, R-004818 at R-004837).

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

253. With respect to the allegations in paragraph 253 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 253 as an incomplete recitation of the record.

254. For example, in a statement repeated many times, the final version of the Congregation's Statement in Support of July 8, 2008 falsely states at page 53, last paragraph, that

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

(P-03823 at P-03876 , R-005114 at R-005167)

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

254. With respect to the allegations in paragraph 254 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 254 as an incomplete recitation of the record.

255. Because the access hardship is fully resolved by a conforming as-of-right building, the Decision should have ignored the access hardship. This is variance law 101. Zoning Resolution §72-21(a) is quite clear that the hardship upon which a variance is granted must result from the strict application of the zoning resolution. A conforming as-of-right building is a building that strictly applies this zoning resolution. If a hardship is remedied by a conforming building, then it is not a hardship cognizable under finding (a).

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

255. The Congregation denies the allegations in paragraph 255 of the Petition.

256. Petitioners repeatedly objected to the BSA as to the abusive repetition by the Congregation of the false claims concerning access and circulation. (See, June 10, 2008 Landmark West Summary of Flaws (P-03620; R-004790), where opponents identified 30 instances of false statements just in the Congregation's latest version of its Statement in Support;¹⁸ see also, June 19, 2008, Sugarman letter brief to the BSA at page 3 (P-03746 at P-03748, R-004925 at R-

¹⁷ The false assertion was stated or implied at least 30 times in each of the multiple versions of the Statements in Support filed by the Congregation, in addition to being referred to in other documents and in testimony.

¹⁸ "So, why does the Applicant persist with its irrelevant assertions? Primarily, because the BSA allows them to do so. The BSA Board does not engage in questioning of the witnesses of Applicant's in such a way as to create a clear record of the facts — here the clear fact that the as-of-right and proposed buildings resolve access issues identically. One result is that 15 months and thousands of pages into this proceeding, the BSA has utterly failed to narrow the issues, which it quite clearly could accomplish if it so wished. So

004927).¹⁹⁾ At the final hearing, counsel for Petitioners confronted the BSA Commissioners as to their refusal to clear the record.

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

rather than the BSA engaging in a few minutes of careful questioning of the Applicant's witnesses and its consultants (and not only the Applicant's conclusory attorney) designed to elicit clear admissions, we have again the same irrelevant, and indeed false, statements polluting the record and creating complexity out of nothing. Unlike most administrative adjudicatory proceedings, the BSA does not allow opponents to cross-examine (sic) of the applicant's for relief." See June 10, 2008, Sugarman Supplemental Opposition Statement, n. 6, p. 16 (P-04200 at P-02418, R-004818 at R-004836).

19

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

(P-03746 at P-03748, R-004925 at R-004927).

22 So, it seems to me that the answer to the question is there is no relationship
23 whatsoever between this hardship and any requested variance.²⁰

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

256. With respect to the allegations in paragraph 256 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 256 as an incomplete recitation of the record.

257. In response, the BSA did and said nothing and did not ask the questions. Instead, in its Decision, the BSA repeated the Congregation's false claim, ignoring in the hearing and in its Decision the objections of the opponents on this issue. (Decision ¶ 41).

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

257. The Congregation denies the allegations in paragraph 257 of the Petition.

258. Notwithstanding the overwhelming facts and in the face of the specific and repeated objections by opponents, the BSA in its Decision referred to this irrelevant issue repeatedly, sometimes directly (¶¶41, 45, 61, 72, 73, and 74), and other times indirectly, having included resolution of this "hardship" as a programmatic need or as related to "floor plates" or "obsolescences" (¶¶44, 46, 47, 50, 57, 69, 75, 76, and 122).

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

258. With respect to the allegations in paragraph 258 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 258 as an incomplete recitation of the record.

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

BSA Answer:

162. Deny the allegations set forth in paragraphs 250, 251, 252, 253, 254, 255, 256, 257, 258 and 259 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

²⁰ June 24, 2008 Official Transcript BSA Hearing, pp. 15-16 (P-03672 at P-03776-77, R-004937 at R-004953-4).

259. The Congregation states that it is not required to respond to those allegations in paragraph 259 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

Petitioners' Reply:

R-5133-R-5135 – Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum, pp. 19-20

R-5146 - Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum, p. 32

R- 5164 - Revised Statement in Support dated July 8, 2008 prepared by Congregation's counsel, Friedman & Gottbaum p. 50

R-3283 - Letter to BSA Chair dated January 28, 2008, prepared by Petitioners' architectural expert, Craig Morrison, AIA, p.2 ¶ 5

See also R-3650 – Letter to BSA Chair dated February 11, 2008, prepared by Petitioners' architectural expert, Craig Morrison, AIA, p.1

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

BSA Answer:

163. Deny the allegations set forth in paragraphs 260 and 261 of the petition.

Congregation Answer:

260. The Congregation denies the allegations in paragraph 260 of the Petition.

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

BSA Answer:

163. Deny the allegations set forth in paragraphs 260 and 261 of the petition.

Congregation Answer:

261. The Congregation denies the allegations in paragraph 261 of the Petition.

Finding §77-21(c) Lot Line Windows

262. The building initially proposed by the Congregation would have resulted in the closure of 7 windows in six cooperative apartment units in the adjacent 18 West 70th Street building, which abuts and is to the west of the development site.

BSA Answer:

164. Deny the allegations set forth in paragraphs 262, 263, 264, 265, 266, 267 and 268 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

262. The Congregation denies the allegations in paragraph 262 of the Petition.

Petitioners' Reply:

R-577 Drawing P-4 PROPOSED LOT LINE WINDOW DIAGRAM dated 10.22.07 prepared by Congregation's architect

R-573 Rendering entitled "PROPOSED SCHEME" dated 10.22.07 prepared by Congregation's architect, showing relationship between proposed building and 18 West 70th Street.

263. A conforming as-of-right building would not brick up any windows in 18 West 70th Street. See Graphic of Images, Exhibit C, P-00434, R-003571.

BSA Answer:

164. Deny the allegations set forth in paragraphs 262, 263, 264, 265, 266, 267 and 268 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

263. The Congregation states that it is not required to respond to those allegations in paragraph 263 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

264. Although initial filings of the Congregation suggested that 18 West 70th Street windows would be impacted (see P-01443-44; R-000162-63) as filed by the Congregation), the fact that a conforming building would not block up windows was concealed from the BSA.

BSA Answer:

164. Deny the allegations set forth in paragraphs 262, 263, 264, 265, 266, 267 and 268 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

264. The Congregation denies the allegations in paragraph 264 of the Petition.

265. The drawings filed by the Congregation did not show windows in the 18 West 70th Street building's eastern face. See, Drawing AOR-3 dated March 27, 2007, P-01335 at P-01338; R-000053 at R-000072.

BSA Answer:

164. Deny the allegations set forth in paragraphs 262, 263, 264, 265, 266, 267 and 268 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

265. With respect to the allegations in paragraph 265 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 265 as an incomplete recitation of the record.

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

BSA Answer:

164. Deny the allegations set forth in paragraphs 262, 263, 264, 265, 266, 267 and 268 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

266. With respect to the allegations in paragraph 266 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 266 as an incomplete recitation of the record.

Petitioners' Reply:

R-217-R-219-Letter to BSA Chair dated April 21, 2007 prepared by Petitioners' counsel, Alan Sugarman, Esq., pp. 1-3

R-256 –BSA Notice of Objections to Congregation's counsel, Friedman & Gottbaum dated June 15, 2007, page 3, ¶22

267. In the drawings filed by the Congregation on October 22, 2007 at P-4A, the Congregation finally showed the windows on the proposed scheme, but omitted the outline of an as-of-right building. Thus, the Congregation continued to obscure the fact that a conforming building would block no windows in 18 West 70th Street. Within days, the Land Use Committee of Community Board 7 voted to deny the upper floor condominium variances. See Minutes of Community Board Land Use Committee, November 19, 2007 (P-0235). Report of Community Board Land Use Committee, November 19, 2007 (P-02376; R-002979):

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

BSA Answer:

164. Deny the allegations set forth in paragraphs 262, 263, 264, 265, 266, 267 and 268 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

267. With respect to the allegations in paragraph 267 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 267 as an incomplete recitation of the record.

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

BSA Answer:

164. Deny the allegations set forth in paragraphs 262, 263, 264, 265, 266, 267 and 268 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

268. With respect to the allegations in paragraph 268 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 268 as an incomplete recitation of the record.

Petitioners' Reply:

See drawings submitted to LPC at Pet. Ex. Q.

269. No laws are violated by the lot line windows in 18 West 70th Street. Thus the windows are not illegal.

BSA Answer:

165. Deny the allegations set forth in paragraphs 269, 270 and 271 of the petition.

Congregation Answer:

269. The Congregation states that no response is required to paragraph 269 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 269.

270. If a building were constructed by the Congregation without a variance and blocked the lot line windows in 18 West 70th Street, then such a building would be illegal.

BSA Answer:

165. Deny the allegations set forth in paragraphs 269, 270 and 271 of the petition.

Congregation Answer:

270. The Congregation states that no response is required to paragraph 270 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 270.

271. The Congregation in its variance request was effectively asking the BSA to make an otherwise illegal act legal, which legalized act would allow the lot line windows to be blocked.

BSA Answer:

165. Deny the allegations set forth in paragraphs 269, 270 and 271 of the petition.

Congregation Answer:

271. The Congregation states that no response is required to paragraph 271 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 271.

272. The Board avoided making actual factual findings relating to the 18 West 70th Street windows, merely repeating assertions of the opposition and the Congregation.

¶188. WHEREAS, the Opposition contended specifically that the proposed building abuts the easterly wall and court of the building located at 18 West 70th Street, thereby eliminating natural light and views from seven eastern facing apartments which would not be blocked by an as-of-right building; and

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

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

BSA Answer:

166. Deny the allegations set forth in paragraph 272 of the petition, except admit that petitioners accurately quoted from the BSA's Resolution.

Congregation Answer:

272. The Congregation denies the allegation in paragraph 272 of the Petition.

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

BSA Answer:

167. Deny the allegations set forth in paragraph 273 of the petition, except admit that the BSA directed the Congregation to provide a fully compliant outer court to the sixth through eighth floors of the building [R. 9 (¶ 132)].

Congregation Answer:

273. With respect to the allegations in paragraph 273 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 273 as an incomplete recitation of the record.

Petitioners' Reply:

274. The Congregation submitted a drawing, Proposed Lot Line Window Diagram, on March 11, 2008 (Drawing P-4A rev. dated March 11, 2008, P-03041 at P-03044; R-0003890 at 003897 - incomplete replication) and refiled May 13, 2008 (P-03518 at P-03523, R-004672 at R-004692). This is a section drawing. The drawing fails to show the outline of a conforming building so as to disguise the impact of the proposed building when compared to a conforming building.

BSA Answer:

168. Deny the allegations set forth in paragraphs 274 and 275 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

274. With respect to the allegations in paragraph 274 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 274 as an incomplete recitation of the record.

275. The Congregation did not submit any three-dimensional drawings of the proposed building showing the windows and the so-called compliant courtyard.

BSA Answer:

168. Deny the allegations set forth in paragraphs 274 and 275 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

275. With respect to the allegations in paragraph 274 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 274 as an incomplete recitation of the record.

276. The BSA and the Congregation collaborated to create a record which obscured the fact that the similarly situated lot line windows in the front of the building would still be bricked up.

BSA Answer:

169. Deny the allegations set forth in paragraphs 276 and 277 of the petition.

Congregation Answer:

283. The Congregation denies the allegations in paragraph 276 of the Petition. in paragraph 277 of the Petition. in paragraph 278 of the Petition. in paragraph 279 of the Petition. in paragraph 280 of the Petition. in paragraph 281 of the Petition. in paragraph 282 of the Petition. in paragraph 283 of the Petition.

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

BSA Answer:

169. Deny the allegations set forth in paragraphs 276 and 277 of the petition.

Congregation Answer:

283. The Congregation denies the allegations in paragraph 276 of the Petition. in paragraph 277 of the Petition. in paragraph 278 of the Petition. in paragraph 279 of the Petition. in paragraph 280 of the Petition. in paragraph 281 of the Petition. in paragraph 282 of the Petition. in paragraph 283 of the Petition.

278. The BSA term "compliant outer court" is not found in any zoning resolutions and is a misleading term, since there will remain non-complying setbacks on the easterly side of these floors.

BSA Answer:

170. Deny the allegations set forth in paragraphs 278, 279 and 280 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

283. The Congregation denies the allegations in paragraph 276 of the Petition. in paragraph 277 of the Petition. in paragraph 278 of the Petition. in paragraph 279 of the Petition. in paragraph 280 of the Petition. in paragraph 281 of the Petition. in paragraph 282 of the Petition. in paragraph 283 of the Petition.

279. The so-called "compliant outer court" will not alter the fact that the extra condominium floors will also block the air and light into a courtyard abutting the lot line, and into the windows facing the courtyard.

BSA Answer:

170. Deny the allegations set forth in paragraphs 278, 279 and 280 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

283. The Congregation denies the allegations in paragraph 276 of the Petition. in paragraph 277 of the Petition. in paragraph 278 of the Petition. in paragraph 279 of the Petition. in paragraph 280 of the Petition. in paragraph 281 of the Petition. in paragraph 282 of the Petition. in paragraph 283 of the Petition.

280. The BSA provided no rationale whatsoever as to why it required a courtyard to keep the three windows in the rear unblocked, but ignored the situation as to the four lot line windows in the front portion of the lot.

BSA Answer:

170. Deny the allegations set forth in paragraphs 278, 279 and 280 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

283. The Congregation denies the allegations in paragraph 276 of the Petition. in paragraph 277 of the Petition. in paragraph 278 of the Petition. in paragraph 279 of the Petition. in paragraph 280 of the Petition. in paragraph 281 of the Petition. in paragraph 282 of the Petition. in paragraph 283 of the Petition.

281. The BSA therefore acted in an arbitrary and capricious manner by providing relief to the apartments in the rear of 18 West 70th Street, but not to the front apartments on the eastern side of the building.

BSA Answer:

171. Deny the allegations set forth in paragraphs 281, 282 and 283 of the petition.

Congregation Answer:

283. The Congregation denies the allegations in paragraph 276 of the Petition. in paragraph 277 of the Petition. in paragraph 278 of the Petition. in paragraph 279 of the Petition. in paragraph 280 of the Petition. in paragraph 281 of the Petition. in paragraph 282 of the Petition. in paragraph 283 of the Petition.

282. The BSA required the Congregation to provide the courtyards in the rear because the variances extending the upper condominium floors to the rear were in conflict with Zoning Resolution §72-21(c), which bars granting variances that adversely affect adjoining property owners.

BSA Answer:

171. Deny the allegations set forth in paragraphs 281, 282 and 283 of the petition.

Congregation Answer:

283. The Congregation denies the allegations in paragraph 276 of the Petition. in paragraph 277 of the Petition. in paragraph 278 of the Petition. in paragraph 279 of the Petition. in paragraph 280 of the Petition. in paragraph 281 of the Petition. in paragraph 282 of the Petition. in paragraph 283 of the Petition.

283. It was an abuse of discretion and arbitrary and capricious for the BSA to require courtyards in the rear of the building but not to require a courtyard for the identically situated apartments in the front part of the eastern face of the building.

BSA Answer:

171. Deny the allegations set forth in paragraphs 281, 282 and 283 of the petition.

Congregation Answer:

283. The Congregation denies the allegations in paragraph 276 of the Petition. in paragraph 277 of the Petition. in paragraph 278 of the Petition. in paragraph 279 of the Petition. in paragraph 280 of the Petition. in paragraph 281 of the Petition. in paragraph 282 of the Petition. in paragraph 283 of the Petition.

284. The variances affecting the windows are unrelated to any programmatic need of the Congregation.

BSA Answer:

172. Deny the allegations set forth in paragraphs 284, 285 and 286 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

284. The Congregation denies the allegations in paragraph 284 of the Petition.

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

BSA Answer:

172. Deny the allegations set forth in paragraphs 284, 285 and 286 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

285. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in paragraph 285 of the Petition.

286. The variances affecting the windows are unrelated to any programmatic needs of the Congregation.

BSA Answer:

172. Deny the allegations set forth in paragraphs 284, 285 and 286 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

286. The Congregation denies the allegations in paragraph 286 of the Petition.

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

BSA Answer:

173. Deny the allegations set forth in paragraphs 287 and 288 of the petition.

Congregation Answer:

287. The Congregation denies the allegations in paragraph 287 of the Petition.

288. Accordingly, it was arbitrary, capricious, erroneous and irrational for the BSA to make the §72-21(c) finding as to the upper floor condominiums because it ignore the direct impact upon the cooperative apartments in 18 West 70th Street, especially the lot line windows in the front of the building.

BSA Answer:

173. Deny the allegations set forth in paragraphs 287 and 288 of the petition.

Congregation Answer:

288. The Congregation denies the allegations in paragraph 288 of the Petition.

The Respondent Chair And Vice Chair Held An Improper Ex Parte Meeting Just Prior To The Commencement Of The Proceeding

289. The Congregation waited for over a year after the 2006 LPC approval to file its application for variances with the BSA. In the meantime, the Congregation held an ex parte meeting with the Chair and Vice-Chair of the BSA. See BSA Meeting Record, November 8, 2006 (P-01245), attached to this Verified Petition as Exhibit D.

BSA Answer:

174. Deny the allegations set forth in paragraph 289 of the petition, except admit that on November 6, 2006 BSA staff as well as its Chair and Vice Chair had a routine pre- application meeting with the Congregation's representatives.

Congregation Answer:

289. The Congregation denies the allegations in paragraph 289 of the Petition.

Petitioners' Reply:

Congregation does not cite Record, and its denial is inconsistent with City's admission.

289a. The Respondent City when compiling the BSA Record assumed, improperly, that documents relating to the improper November 8, 2006 ex-parte meeting and requests for recusal were not part of the record, even though the matters discussed at the meeting concerned the same project as to which the LPC Certificate of Appropriateness applied, and as to which was submitted first to the DOB and then to the BSA, and even though the matter was discussed by the Respondent Chair Srinivasan at the first BSA hearing of November 27, 2007 at p.1 (P-02440 at P-02441; R-001726 at R-001727). The following documents filed by Petitioner with its initial Petition related to the improper ex-parte meeting and the recusal request were omitted by the BSA from the BSA Record served December 2, 2008:

| | | |
|--------------------------------------|--------------------|---|
| 01199-01200 | September 1, 2006 | September 1, 2006 Letter Sugarman to BSA Objecting to BSA Variance and Inquiring as to Status |
| <input type="checkbox"/> 01238-01239 | September 1, 2006 | September 1, 2006 Sugarman to BSA FOIL Request and Status |
| <input type="checkbox"/> 01242-01242 | October 13, 2006 | October 13, 2006 Letter from Friedman & Gotbaum re Upcoming ex parte Meeting |
| <input type="checkbox"/> 01243-01243 | November 3, 2006 | November 3, 2006 Letter from Freidman & Gotbaum to BSA Enclosing Plans of Proposed Building for Improper Ex Parte Meeting |
| <input type="checkbox"/> 01244-01244 | November 8, 2006 | November 8, 2006 BSA Memorandum Scheduling Ex Parte Meeting |
| <input type="checkbox"/> 01245-01245 | November 8, 2006 | November 8, 2006 Sign In Sheet for Improper Ex Parte Meeting at BSA with Two BSA Commissioners and Entire Applicant Team |
| <input type="checkbox"/> 01252-01252 | November 14, 2006 | November 14, 2006 Letter BSA to Sugarman FOIL Response |
| <input type="checkbox"/> 01246-01251 | November 14, 2006 | November 14, 2006 Documents Sent to Sugarman from BSA After Ex Parte Meeting of November 8, 2006 |
| <input type="checkbox"/> 01201-01206 | November 15, 2006 | November 15, 2006 Documents Provided By BSA to Sugarman re FOIL - Ex Parte Meeting |
| <input type="checkbox"/> 01207-01209 | November 20, 2006 | November 20, 2006 Letter Sugarman to BSA re Ex Parte Meeting |
| <input type="checkbox"/> 01261-01263 | November 20, 2006 | November 20, 2006 Sugarman Letter to BSA re Ex Parte Meeting |
| <input type="checkbox"/> 01253-01257 | November 27, 2006 | November 27, 2006 Letter BSA Counsel to Sugarman Re FOIL |
| <input type="checkbox"/> 01210-01211 | December 18, 2006 | December 18, 2006 Sugarman to BSA FOIL Ex Parte Meeting Notes |
| <input type="checkbox"/> 01258-01259 | December 18, 2006 | December 18, 2006 Letter Sugarman to BSA Counsel Re Notes of Improper Meeting |
| <input type="checkbox"/> 01212-01212 | December 19, 2006 | December 19, 2006 Sugarman FOIL Request to BSA |
| <input type="checkbox"/> 01260-01260 | December 19, 2006 | December 19, 2006 Letter from Sugarman to BSA FOIL Request |
| <input type="checkbox"/> 04087-04095 | April 10, 2007 | Opp. Ex. PP-14 Request for Recusal April 10, 2007 |
| <input type="checkbox"/> 01539-01545 | April 10, 2007 | April 10, 2007 Sugarman Letter to BSA Srinivasan and Collins Requesting Recusal |
| <input type="checkbox"/> 01546-01578 | April 17, 2007 | April 17, 2007 BSA to Sugarman Response Letter with Documents |
| <input type="checkbox"/> 01579-01579 | April 19, 2007 | April 19, 2007 Letter from BSA to Sugarman re Recusal |
| <input type="checkbox"/> 01648-01651 | April 24, 2007 | April 24, 2007 Letter to NYC Boards of Standards and Appeals re Freedom of Information Law |
| <input type="checkbox"/> 01605-01637 | April 25, 2007 | April 25, 2007 Letter Mulligan to Sugarman re FOIL December 19, 2006 |
| <input type="checkbox"/> 03371-03372 | May 5, 2007 | May 5, 2007 BSA to Sugarman FOIL Response re (b) Regulation |
| <input type="checkbox"/> 01658-01658 | May 9, 2007 | May 9, 2007 Letter from Public Advocate to Sugarman |
| <input type="checkbox"/> 01659-01660 | May 10, 2007 | May 10, 2007 Letter BSA to Sugarman Denying FOIL Appeal |
| <input type="checkbox"/> 01671-01672 | May 29, 2007 | May 29, 2007 Letter from BSA to Public Advocate Re Recusal |
| <input type="checkbox"/> 01240-01241 | September 14, 2007 | September 14, 2007 Landmark West FOIL Request to BSA |
| <input type="checkbox"/> 02070-02070 | October 3, 2007 | October 3, 2007 Letter Public Advocate to Sugarman |
| <input type="checkbox"/> 02079-02079 | October 17, 2007 | October 17, 2007 BSA to Public Advocate |
| <input type="checkbox"/> 02323-02324 | November 7, 2007 | November 7, 2007 Letter Margaret Stix to Dick Gottfried Re Ex Parte Meetings |
| <input type="checkbox"/> 02327-02328 | November 14, 2007 | November 14, 2007 Sugarman to BSA re Stix Letter re Recusal |

☐

BSA Answer:

175. Deny the allegations set forth in paragraph 289a of the petition, and aver that the BSA did not include the documents regarding the November 8, 2006 meeting as part of the Record because the documents were not considered by the Board in rendering its final agency determination, and thus were not part of the Record, and that BSA intended to, and indeed has, annexed the documents to its Answer.

Congregation Answer:

none

290. The complete details as to the meeting and the legal issues raised thereby are described in Petitioners' Exhibit I attached to this Petition. See Letter of Alan D. Sugarman dated April 10, 2007 (P-04088). The statements in the letter are incorporated herein and, for the sake of brevity, will not all be repeated

BSA Answer:

176. Deny the allegations set forth in paragraph 290 of the petition, except admit that petitioners purport to proceed as set forth therein.

Congregation Answer:

290. With respect to the allegations in paragraph 290 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 290 as an incomplete recitation of the record.

291. On September 1, 2006, Alan Sugarman wrote a letter to Respondent Srinivasan expressing opposition to the Congregation's project, which had been approved by LPC on or about March 14, 2006. P-01199. The letter also requested documents under the Freedom of Information Law.

BSA Answer:

177. Deny the allegations set forth in paragraphs 291, 292, 293, 294 and 295 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

291. With respect to the allegations in paragraph 291 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 291 as an incomplete recitation of the record.

292. Respondent Srinivasan had also received a letter or letters from other opponents to the project.

BSA Answer:

177. Deny the allegations set forth in paragraphs 291, 292, 293, 294 and 295 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

292. With respect to the allegations in paragraph 292 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 292 as an incomplete recitation of the record.

Petitioners' Reply:

The BSA is well aware that a letter was received from Kate Wood of Landmark West.

293. On November 8, 2006, Respondents Srinivasan and Collins held a meeting at the offices of the BSA with the Congregation's representatives, as shown by the BSA Meeting Record. P-01245. Present at the meeting were said Respondents, Shelly Friedman and Lori Cuisinier (counsel for the Congregation), Jack Freeman of Freeman Frazier (real estate consultant for the Congregation), Ray Dovell and Kathryn Growley of PBDW (architects for the Congregation) and three BSA staff members.

BSA Answer:

177. Deny the allegations set forth in paragraphs 291, 292, 293, 294 and 295 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

293. The Congregation states that no response is required to paragraph 293 of the Petition, which purports to characterize a certain "BSA Meeting Record," which speaks for itself, and that, to the extent a response is required, denies the allegations in paragraph 293.

Petitioners' Reply:

City admits all the factual allegations relating to the meeting.

Congregation's answer contradicts City's admission.

294. The meeting was confirmed by Friedman & Gotbaum on October 13, 2006 in a letter to Respondent Srinivasan on October 13, 2006.

BSA Answer:

177. Deny the allegations set forth in paragraphs 291, 292, 293, 294 and 295 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

294. The Congregation states that no response is required to paragraph 294 of the Petition, which purports to characterize a certain "October 13, 2006... letter," which speaks for itself, and that, to the extent a response is required, denies the allegations in paragraph 294

Petitioners' Reply:

City admits the factual allegation relating to confirmation of the meeting.

Congregation's answer contradicts City's admission.

295. On November 3, 2006, Friedman & Gotbaum delivered to respondent Srinivasan proposed and as-of-right plans for the proposed Shearith Israel development. P-01243.

BSA Answer:

177. Deny the allegations set forth in paragraphs 291, 292, 293, 294 and 295 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

295. With respect to the allegations in paragraph 295 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 295 as an incomplete recitation of the record.

Petitioners' Reply:

See Pet. Ex. Q which purport to be the drawings received by the BSA for said meeting and were supplied on March 16, 2009.

City admits the factual allegation relating to November 3, 2006, delivery to BSA Chair by Congregation's counsel of plans for its proposed project and also as-of-right plans.

Congregation's answer contradicts City's admission.

296. In most material respects, the plans submitted to the BSA on November 3, 2006 were substantially the same as the plans submitted by the Congregation to the BSA with its application of April 2, 2007, which plans, as far as zoning envelope issues, were the same as those approved by the LPC on March 13, 2006.

BSA Answer:

178. Admit the allegations set forth in paragraph 296 of the petition.

Congregation Answer:

296. With respect to the allegations in paragraph 296 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 296 as an incomplete recitation of the record.

Petitioners' Reply:

See Pet. Ex. Q which purport to be the drawings received by the BSA for said meeting and were supplied on March 16, 2009. City's admission contradicts Congregation's denial.

297. Respondent Srinivasan did not invite Mr. Sugarman and other opponents known to Respondent Srinivasan to the November 8, 2006 ex parte meeting.

BSA Answer:

179. Deny the allegations set forth in paragraphs 297, 298 and 299 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

297. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in paragraph 297 of the Petition.

Petitioners' Reply:

City's answer effectively admits this factual averment.

Congregation's answer is not credible.

298. After the November meeting, the BSA responded to the FOIL request and provided the limited documents referred to above concerning the ex parte meeting.

BSA Answer:

179. Deny the allegations set forth in paragraphs 297, 298 and 299 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

298. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in paragraph 298 of the Petition.

Petitioners' Reply:

City effectively admits facts stated in Petitioners' averment.

Congregation's answer is not credible.

299. Sugarman then sent a FOIL request to the BSA asking for information about what occurred at the meeting, including notes of the participants, which request was denied. One of the grounds for denial was that providing the records would interfere with judicial proceedings under FOIL § 87.2. See Letter of November 27, 2006 to Sugarman. P-01253.

BSA Answer:

179. Deny the allegations set forth in paragraphs 297, 298 and 299 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

299. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in paragraph 299 of the Petition.

Petitioners' Reply:

City effectively admits facts stated in Petitioners' averment.

Congregation's answer is not credible

300. On April 10, 2007, after the application was refiled by the Congregation, Sugarman immediately requested that Respondents Srinivasan and Collins recuse themselves on account of the highly improper ex parte meeting, for the reasons set forth in detail in the April 10, 2007 letter. P-04087. (Also filed as Opp. Ex. PP-14 (P-04807; R-005511 at R-005638).

BSA Answer:

180. Deny the allegations set forth in paragraph 300 of the petition, except admit that Sugarman requested that the Chair and Vice Chair recuse themselves from considering the Congregation's application.

Congregation Answer:

300. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in paragraph 300 of the Petition.

Petitioners' Reply:

City effectively admits all the facts stated in Petitioners' averment.

Congregation's answer does not cite Record and is not credible

301. In a letter dated November 7, 2007 (P-02323), Margaret Stix, BSA General Counsel, responded to a letter from Assemblyman Dick Gottfried concerning the ex parte meeting. Stix claimed that the meeting was not improper because

the application had yet to be filed. This is similar to stating that is allowable to have an ex parte meeting with a judge to discuss a case that will be filed, but not after the case is filed.

BSA Answer:

181. Deny the allegations set forth in paragraph 301 of the petition, except admit that BSA General Counsel Margaret Stix and Assemblyman Richard Gottfried exchanged letters regarding the BSA's routine pre-application meeting with the Congregation.

Congregation Answer:

301. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in the first two sentences of paragraph 301 of the Petition. The Congregation denies the allegations in the last sentence of paragraph 301 of the Petition.

Petitioners' Reply:

Congregation effectively admits facts stated in first two sentences of Petitioners' averment. It does not cite to the Record or any other authority to support its denial of the last sentence of Petitioners' averment.

302. At the first hearing of November 27, 2007, the Respondent Srinivasan stated she would not recuse herself. Transcript, BSA Hearing, November 27, 2007 at p.1 (P-02440 at P-02441; R-001726 at R-001727). Respondent Collins never responded at all to the April 10, 2007 request for recusal.

BSA Answer:

182. Deny the allegations set forth in paragraph 302 of the petition, and respectfully refer this Court to Chair Srinivasan's statement at the November 27, 2007 hearing for its full text and true meaning [R. 1727

Petitioners' Reply:

R-1727 Transcript of BSA hearing dated November 27, 2007, p.1, lines 3-15

CHAIR SRINIVASAN: All right. Before we discuss the

4 application, I'd like to address the request made by a community resident that the Vice-
5 Chair and myself recuse ourselves based on a meeting we had with the synagogue prior
6 to the application being filed.

7 Just for the record, the Board routinely holds meetings with potential applicants
8 and the rationale and procedures of these meetings are described on our web site.

9 Since the meeting occurred outside a hearing context and any proceedings,
10 indeed, it was six months before the application was filed. That meeting is not
11 considered an ex parte communication under Section 10-46 of the City's Administrative
12 Procedure Act and, therefore, is not the basis for a recusal by the Board members who
13 attended it.

14 Furthermore, we did offer a similar meeting to the community resident but he
15 declined to take advantage of that offer.

303. Neither Respondent Srinivasan nor Respondent Collins has ever explained the content of the meeting of November 8, 2006.

BSA Answer:

183. Deny the allegations set forth in paragraph 303 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

303. The Congregation is without knowledge or information sufficient to form a belief as to the allegations in paragraph 303 of the Petition.

No Deference Should Be Paid To The Findings Of The BSA In This Proceeding

304. To the Congregation, a BSA proceeding is nothing more than "a colloquy between the Applicant and the Board, with public input, to explore all aspects of the case." June 17, 2008 Friedman & Gottbaum Reply, p-1, (P-03742, R-004859). According to the Applicant, the BSA is the "easier agency". October 17, 2007 CB7 Land Use Committee Hearing Transcript, p. 15, line 11(P-02080 at P-02083; R-002827 at 002841), (which is to respond to the "the imprimatur of the Bloomberg administration") Id. at p. 8, line 18 (P-02081; R-002834).

BSA Answer:

184. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 304 of the petition.

Congregation Answer:

304. With respect to the allegations in paragraph 304 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 304 as an incomplete recitation of the record.

305. According to the Applicant, the BSA has no powers to question a nonprofit's description of its programmatic need, and further that:

"Accordingly, we ask that none of the material submitted by the opponents, whether in oral testimony at the hearings on this application, in direct written submissions or in written response to the applicant's papers, such as the material in the Opposition Papers challenging Shearith Israel's statements of programmatic need, be permitted to enter the Board's deliberations with regard to the required findings."

August 12, 2008 Friedman & Gottbaum Reply Statement in Response, p. 9, first full paragraph (P-03973 at -82; R-005752 at -61).

BSA Answer:

185. Deny the allegations set forth in paragraph 305 of the petition, except admit that petitioners have quoted from Friedman & Gottbaum's August 12, 2008 Reply Statement.

Congregation Answer:

305. With respect to the allegations in paragraph 305 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 305 as an incomplete recitation of the record.

306. The BSA in all of its statements and actions clearly shares this perspective. Opponents to Applications before the BSA are warned that "Please understand that the applicant has paid a fee and is prosecuting the application. So applicants and their witnesses are entitled to speak longer than three minutes" but not opponents. (BSA Guidelines For Hearing Attendees, P-00154). Opponents are merely tolerated as an inconvenience by the BSA - the professional architects, financial and real estate experts who appeared to testify against the variance application were not questioned and treated with condescension by the BSA.

BSA Answer:

186. Deny the allegations set forth in the first sentence of paragraph 306 of the petition. Deny the allegations set forth in the second sentence of paragraph 306 of the petition insofar as they allege or purport to allege that the BSA acted improperly or contrary to law. Deny the allegations set forth in the third sentence of paragraph 306 of the petition.

Congregation Answer:

306. The Congregation states that no response is required to paragraph 306 of the Petition, which purports to characterize certain "BSA Guidelines for Hearing Attendees," which speaks for itself, and that, to the extent a response is required, denies the allegations in paragraph

307. The BSA did not ask questions that would embarrass the Congregation, such as why the Toddler program was first raised in December 2007 and why the earlier plans for the second floor never mentioned the toddler classrooms, but instead showed offices. The BSA would not question the Applicant as to how much it would cost to fix its access problems by remodeling the elevator, and why the Applicant had not addressed the issue since 1954. The BSA would not question the Applicant as to what its financial lease arrangements were with the tenant school. The BSA would not question the Applicant as to the missing pages from the construction estimates and as to how allocations were performed. The BSA would not question the Applicant as to why the Scheme C all-residential analysis was never completed. The BSA would not question the Applicant as to why the caretaker's apartment could not be located on the fifth or sixth floors. The BSA would not disclose what it discussed with the Applicant at the November 8, 2006 improper ex-parte meeting.

BSA Answer:

187. Deny the allegations set forth in paragraphs 307, 308, 309, 310 and 311 of the petition insofar as they are inconsistent with the-Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

307. The Congregation denies the allegations in paragraph 307 of the Petition.

R-4950-R-4956) Transcript of BSA hearing dated June 24, 2008, pp 13 (lines 22-23) -19 (lines 1-7).

308. Opponents to Applications to the BSA may speak, but are not allowed to ask questions of the Applicant — completely eliminating the ability to cross-examine Applicants on any issues of fact. Although the BSA has the right to subpoena witnesses that might clarify assertions of an Applicant, it does not exercise that power. (See Decision in *Carroll v. Srinivasan*, Index No. 110199/07, N.Y. Sup. Ct. (February 7, 2008) discussing New York City Charter, Chapter 45, City Administrative Procedures Act, § 1046 Adjudications, reproduced at P-00170) (P-00183).

BSA Answer:

187. Deny the allegations set forth in paragraphs 307, 308, 309, 310 and 311 of the petition insofar as they are inconsistent with the-Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

308. The Congregation denies the allegations in paragraph 308 of the Petition.

309. The Board is authorized to "administer oaths and compel the attendance of witnesses" (New York City Charter, Chapter 27, Board of Standards and Appeals, § 663) (P-00163), yet it fails to exercise either of these powers. The Board, instead of administering oaths, relies largely on conclusory statements of counsel for applicants and ignores and indeed condones false statements.

BSA Answer:

187. Deny the allegations set forth in paragraphs 307, 308, 309, 310 and 311 of the petition insofar as they are inconsistent with the-Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

309. The Congregation denies the allegations in paragraph 309 of the Petition.

310. Instead of taking steps to assure the truth, accuracy, and completeness of the representations and facts made to the BSA, the BSA does the opposite. In this proceeding, it asked the Applicant to remove from its supporting statement the accurate representation by the Applicant that the condominium apartments were intended to provide economic support for the community facilities and other religious programmatic needs of the applicant. At the same time, despite overwhelming evidence and admissions by the Applicant, the BSA allowed the Applicant to repeatedly assert that the upper floor variances were needed to resolve programmatic needs, never questioning the Applicant on the issue, and permitted this patent falsehood to remain in the Applicant's supporting material.

BSA Answer:

187. Deny the allegations set forth in paragraphs 307, 308, 309, 310 and 311 of the petition insofar as they are inconsistent with the-Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

310. The Congregation denies the allegations in paragraph 310 of the Petition.

Petitioners' Reply:

2nd sentence - R- 4973 – Transcript of BSA hearing dated June24, 2008, p 36, lines 5-12.

3rd sentence – see e.g., R-5118 – Revised Statement in Support dated July 8, 2008, prepared by Congregation's counsel, Friedman & Gottbaum, p. 4, carryover ¶, § (3) (last three lines).

311. Where, as here, an Applicant submits a poorly substantiated Application, the Board extends itself to allow the Applicant to submit and resubmit is application material, with one do-over after another.

BSA Answer:

187. Deny the allegations set forth in paragraphs 307, 308, 309, 310 and 311 of the petition insofar as they are inconsistent with the-Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

311. The Congregation denies the allegations in paragraph 311 of the Petition.

Petitioners' Reply:

R-4051-R-4052 Transcript of BSA hearing dated April 15, 2008. pp. 39-40, lines 853-879 (Testimony of Bruce Simon, Esq.)

312. Opponents to Applications to the BSA have no procedural due process. Opponents are not allowed to intervene as parties, and thus are accorded no rights of subpoena or cross-examination, as is permitted to parties under City Charter § 1046(c). (P-00170). See *Carroll v. Srinivasan*, No. 110199/08, February 7, 2008, N.Y. Sup. Ct. (P-00183).

BSA Answer:

188. Deny the allegations set forth in paragraphs 312 and 313 of the petition.

Congregation Answer:

312. The Congregation states that no response is required to paragraph 312 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 312.

313. Thus, important questions just were not asked, and then the BSA ignored the issues in its Decision, issues such as the site area and site value, the income from Beit Rabban, the failure to ask for the missing construction estimate pages, and the income from the Parsonage.

BSA Answer:

188. Deny the allegations set forth in paragraphs 312 and 313 of the petition.

Congregation Answer:

318. The Congregation denies the allegations in paragraph 313 of the Petition. in paragraph 314 of the Petition. in paragraph 315 of the Petition. in paragraph 316 of the Petition. in paragraph 317 of the Petition. in paragraph 318 of the Petition.

314. Exhibiting their schizophrenic world view, the Respondents justified the ex parte meeting by on the one hand claiming that the BSA was not a quasi-judicial agency and that the application had not been filed yet, but then seeming to acknowledge that such a meeting would have been improper, perhaps, if the application had been filed, and, then, confused as to what type of body or proceedings, arguing in response to FOIL requests that its deliberative processes were exempt from FOIL and refusing to provide information as to the ex parte November 8, 2006 meeting. If the meeting was deliberative, then it was improper; if the meeting was not deliberative, then all notes taken at the meeting should have been disclosed in response to FOIL requests.

BSA Answer:

189. Deny the allegations set forth in paragraph 314 of the petitioner, and aver that to the extent petitioners are attempting to challenge the BSA's determination to deny its request for the BSA's handwritten notes, based to an assertion of privilege, that petitioners are time-barred from doing so.

Congregation Answer:

318. The Congregation denies the allegations in paragraph 313 of the Petition. in paragraph 314 of the Petition. in paragraph 315 of the Petition. in paragraph 316 of the Petition. in paragraph 317 of the Petition. in paragraph 318 of the Petition.

315. In further demonstration of its cavalier approach to due process in procedure, the Board in this proceeding repeatedly ignored the law and its own rules.

BSA Answer:

190. Deny the allegations set forth in paragraphs 315, 316, 317, and 318 of the petition.

Congregation Answer:

318. The Congregation denies the allegations in paragraph 313 of the Petition. in paragraph 314 of the Petition. in paragraph 315 of the Petition. in paragraph 316 of the Petition. in paragraph 317 of the Petition. in paragraph 318 of the Petition.

Petitioners' Reply:

See, e.g.:

R-217-R-220 - Letter to BSA dated April 23, 2008, prepared by Respondents' counsel, Alan Sugarman

R-221-R-226 Facsimile letter to BSA dated April 26, 2008, prepared by Respondents' counsel, Alan Sugarman

R-227- R-232 - Letter to BSA dated May 1, 2008, prepared by Respondents' counsel, Alan Sugarman

316. It commenced the proceeding with improper and incomplete documentation of the action of the DOB.

BSA Answer:

190. Deny the allegations set forth in paragraphs 315, 316, 317, and 318 of the petition.

Congregation Answer:

318. The Congregation denies the allegations in paragraph 313 of the Petition. in paragraph 314 of the Petition. in paragraph 315 of the Petition. in paragraph 316 of the Petition. in paragraph 317 of the Petition. in paragraph 318 of the Petition.

Petitioners' Reply:

See, e.g.:

R-217-R-220 - Letter to BSA dated April 23, 2008, prepared by Respondents' counsel, Alan Sugarman

R-221-R-226 Facsimile letter to BSA dated April 26, 2008, prepared by Respondents' counsel, Alan Sugarman

R-227- R-232 - Letter to BSA dated May 1, 2008, prepared by Respondents' counsel, Alan Sugarman

317. Once this was pointed out, Applicant refiled with the DOB and again submitted the DOB objection to the BSA signed by an unauthorized DOB officer and with improperly dated and unstamped drawings from the Applicant.

BSA Answer:

190. Deny the allegations set forth in paragraphs 315, 316, 317, and 318 of the petition.

Congregation Answer:

318. The Congregation denies the allegations in paragraph 313 of the Petition. in paragraph 314 of the Petition. in paragraph 315 of the Petition. in paragraph 316 of the Petition. in paragraph 317 of the Petition. in paragraph 318 of the Petition.

Petitioners' Reply:

R-348 DOB Notice of Objections dated 8/24/2007

318. The BSA ignored its rule that a hearing would not be scheduled until there was a determination that the application was complete.

BSA Answer:

190. Deny the allegations set forth in paragraphs 315, 316, 317, and 318 of the petition.

Congregation Answer:

318. The Congregation denies the allegations in paragraph 313 of the Petition. in paragraph 314 of the Petition. in paragraph 315 of the Petition. in paragraph 316 of the Petition. in paragraph 317 of the Petition. in paragraph 318 of the Petition.

319. It then scheduled the first hearing without providing the required 30-day notice.

BSA Answer:

191. Deny the allegations set forth in paragraphs 319, 320 and 321 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

319. The Congregation states that it is not required to respond to those allegations in paragraph 319 of the Petition that purport to state conclusions of law or characterize the record (and refers the Court thereto) and denies the allegations therein as to which a response is required.

320. Just a few days before the Board's decision in this case, the Applicant for the first time provided legal case law to support its position in a reply, having never provided it previously –and without providing opponents any opportunity to respond.

BSA Answer:

191. Deny the allegations set forth in paragraphs 319, 320 and 321 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

320. The Congregation denies the allegations in paragraph 320 of the Petition.

Petitioners' Reply:

R-752-R-5766 Closing Statement in Response to Opposition of Certain Variances dated August 12, 2008, prepared by Congregation's counsel, Friedman & Gottbaum.

321. Then, when the time came for the Board's decision, rather than vote on each finding for each variance as required by law, at the meeting of August 26, 2008, counsel for Applicant made a motion to the Board to approve the application, and the BSA Commissioners each voted Aye, but there was no resolution before the Board. –None. And it was only days later when the resolution appeared and was filed with the BSA clerk. Transcript of BSA Vote on Application held on August 26, 2008, R-005794. Clearly, on August 26, 2008, there was no compliance by the BSA with this dictate: "The board shall keep minutes of its proceedings, showing the vote of each member upon every question." New York City Charter, Chapter 27, Board of Standards and Appeals, § 663 – Meetings, P-00163.

BSA Answer:

191. Deny the allegations set forth in paragraphs 319, 320 and 321 of the petition insofar as they are inconsistent with the Record or can be construed as alleging that the BSA acted improperly or contrary to law.

Congregation Answer:

321. The Congregation denies the allegations in paragraph 321 of the Petition.

322. The BSA will now ask that the Court provide deference to the determinations from this caricature of an adjudicative or deliberative process.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

322. The Congregation denies the allegations in paragraph 322 of the Petition.

323. On account of the manner in which the BSA conducted itself in this proceeding, close scrutiny should be paid as to the findings of the BSA. On this record, little or no deference should be paid to the determinations of the BSA.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

323. The Congregation denies the allegations in paragraph 323 of the Petition.

324. Based upon the foregoing, the following are specific allegations as to the arbitrary and capricious nature of the Decision, which lacked rationality, and was not consistent with the law.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

324. The Congregation denies the allegations in paragraph 324 of the Petition.

FIRST CAUSE OF ACTION - NO FINDINGS OF FACT TO SUPPORT MATERIAL ISSUES

325. The BSA failed to make findings of facts as to material issues in violation of § 72-21. The BSA failed to make findings of facts and relied upon assertions and claims made by the Congregation without finding that the assertions or statement were fact. Findings are required to be supported by substantial evidence, but as described above, many findings cited no evidence at all. The absence of findings of facts to support the mere conclusory ultimate findings which parrot the statutory requirements requires vacating and annulling the decision.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

325. The Congregation denies the allegations in paragraph 325 of the Petition.

SECOND CAUSE OF ACTION- SPECIFIC FINDINGS

326. Zoning Resolution 72-21 requires that the "decision or determination of the Board shall set forth each required finding in each specific grant of a variance" There were seven separate variances and the BSA failed to provide the required specific findings for each variance. Conclusory findings are not sufficient to support the findings.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

326. The Congregation denies the allegations in paragraph 326 of the Petition.

327. Furthermore, the Decision itself shows, and as revealed by the transcript for the final meeting approving the variances shows (R-005794), the BSA commissioners did not vote upon the specific findings, voted prior to the preparation of the decision, and voted on all variances in one vote, which does not satisfy §72-21.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

327. The Congregation denies the allegations in paragraph 327 of the Petition.

THIRD CAUSE OF ACTION - FINDINGS (A) and (B) LOWER FLOORS

328. The findings failed to identify physical conditions arising out of the strict application of the zoning resolution as to the lower floor variances

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

328. With respect to the allegations in paragraph 328 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 328 as an incomplete recitation of the record.

329. Because the alleged hardships relating to access, accessibility and the alleged obsolescence are resolved in a conforming as of right building, these alleged hardships may not be used to support an (a) finding for the lower floors.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

329. The Congregation denies the allegations in paragraph 329 of the Petition.

330. Because the alleged hardship relating to extending the classrooms on floor 3 and 4 to add a total of 1000 square feet could be resolved by moving the caretaker's apartment to the fifth floor of a conforming as-of-right building, the hardship alleged by the Congregation is not "unnecessary" or a "practical difficulty" since the Congregation provided no facts to show why the apartment could not be moved up one floor, except that the Congregation wishes to use the fifth floor for market rate luxury condominiums. Further, nothing in the Decision would prevent the Congregation from housing the caretaker in another location, such as the Parsonage now being rented as a residence, and converting the caretaker's apartment to a condominium.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

330. The Congregation denies the allegations in paragraph 330 of the Petition.

331. Because the Congregation never provided any testimony other than conclusory statements from counsel as to the need to use the second floor for 60 toddlers rather than a smaller number, there was no showing of an inability for the Congregation to meet its programmatic needs.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

331. The Congregation denies the allegations in paragraph 331 of the Petition.

332. Because the initial plans of the Congregation and previous plans supplied to the LPC showed office space rather than toddler space in the rear of the second floor and the so-called compelling need for 60 toddlers was expressed by counsel for the Congregation in December 2007, having never been mentioned in the 6 years of prior proceedings and not having been mentioned by the Rabbi and Education Director in their testimony of November 27, 2007 before the board, it was arbitrary and capricious and an abuse of discretion to accept the unsubstantiated claims for the hardship. The evidence is clear that the Toddler program was an artifice to fabricate a programmatic need.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

332. The Congregation denies the allegations in paragraph 332 of the Petition.

333. Because the BSA failed to make a finding that there was no reasonable possibility, based upon the record, that the 1500 square feet of uses alleged by the Congregation could be accommodated on the fifth and sixth floors of the same building, then there is no basis for using programmatic need as a substitution for the (b) finding.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

333. The Congregation denies the allegation in paragraph 333 of the Petition.

FOURTH CAUSE OF ACTION - FINDING (D) AND (E) LOWER FLOOR VARIANCE

334. Because the desire to not use the fifth and sixth floors of a conforming as of right building or in other parts of the building to accommodate the 1500 square feet, is a decision of the Congregation and not compelled by an programmatic or other reasons, the alleged difficulty relating to the lower floor variance is completely self-imposed.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

334. The Congregation denies the allegations in paragraph 334 of the Petition.

335. Similarly, because a conforming as of right building could accommodate the needs alleged as to the lower floor variances, it was an abuse of discretion for the BSA to find, if it did, that the lower floor variances are the minimum variances needed as required by §72-21 (e).

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

335. The Congregation denies the allegations in paragraph 335 of the Petition.

336. The BSA acted irrationally, arbitrarily and capriciously, by making the findings related to §77-21(d) and §72-21(e) as to the lower floors.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

336. The Congregation denies the allegation in paragraph 336 of the Petition.

337. Further, the BSA abused its discretion in not pressing the Congregation to provide any reason for not utilizing the fifth and sixth floors to satisfy programmatic need, other than the need for income, a reason the BSA admits is not a qualifying reason under the Zoning Resolution.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

337. The Congregation denies the allegation in paragraph 337 of the Petition.

FIFTH CAUSE OF ACTION - FINDING (A) - ALL VARIANCES

338. In making the conclusory findings as to the findings required under §77-21(a), the Decision failed to make the necessary specific factual findings to support the required element that (i) the physical condition must cause the hardship or difficulty and (ii) the hardship or difficult must arise out of the strict application of the zoning resolution.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

338. The Congregation denies the allegations in paragraph 338 of the Petition.

Petitioners' Reply:

339. A hardship that is resolved by a conforming as-of-right building is accordingly not a hardship or difficulty that meets the requirement of §77-21(a), and, accordingly, any alleged physical condition causing such hardship does not meet the requirement of §77-21(a).

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

339. The Congregation states that no response is required to paragraph 339 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 339.

340. The decision cites obsolescence as a physical condition under §77-21(a), but makes no finding as to the hardship or difficulty arising therefrom. If the hardship or difficulty is "access, accessibility, and circulation" to and within the sanctuary, then such hardships or difficulties are resolved by an as of right building, and, accordingly do not meet the requirements of §77-21(a).

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

340. The Congregation denies the allegations in paragraph 340 of the Petition.

341. The Decision further cites other physical conditions as creating a hardship or difficulties relating to "access, accessibility, and circulation". For the same reasons just stated, that the hardships or difficulties are resolved in an as-of-right building, those other physical conditions do not meet the requirements of §77-21(a).

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

341. The Congregation denies the allegations in paragraph 341 of the Petition.

342. The Decision further cites resolution of hardships or difficulties relating to "access, accessibility, and circulation" as a programmatic need. Since the underlying hardship or difficulty is resolved by an as-right building, then the programmatic need is satisfied. Further, if the programmatic need is satisfied by an as-of-right building, then a minimum variance under §77-21(e) would be no variance.

BSA Answer:

192. Deny the allegations set forth in paragraphs 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341 and 342 of the petition.

Congregation Answer:

342. The Congregation denies the allegations in paragraph 342 of the Petition.

343. In support of the §77-21(a) finding for the upper floor condominium variances, the Decision finds:

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

Although referring to "and in light of the Synagogue's programmatic needs", there is no supporting factual finding whatsoever to identify said "programmatic needs" creating hardships relating to the upper floor variances. If the "programmatic needs" is referring to that related to "access, accessibility, and circulation", then it fails as a supporting factor as to the upper floor variances.

BSA Answer:

193. Deny the allegations set forth in paragraph 343 of the petition to the extent they allege or purport to allege that the BSA acted improperly or contrary to law.

Congregation Answer:

343. With respect to the allegations in paragraph 343 of the Petition, the Congregation directs the Court to the record, which speaks for itself, for a full and complete recitation of the contents thereof, and states that no response is required to those allegations and that, to the extent a response is deemed required, denies the allegations in paragraph 343 as an incomplete recitation of the record.

344. As a result of the lack of specificity as to what the Decision is referring to as "programmatic need" and the reliance upon said unknown programmatic need, then ¶122 of the Decision must be stricken and then there is no support in the Decision as to the §77-21(a) finding for the upper floor condominium variances.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

344. The Congregation denies the allegations in paragraph 344 of the Petition.

345. Further, as to the upper floor condominium, the Decision cites other alleged hardships or difficulties relating to the landmarking of the zoning site and the split lot. Standing alone, absent any physical condition creating any hardship, the alleged hardship or difficulties are not physical conditions satisfying §77-21(a). Under the rationale, all split lots necessarily create a financial hardship in that the owner cannot fully develop the entire lot to meet the owner's financial desires. Not making more money is not a hardship. Thus, accepting the Decision's rationale, not only would all split lots result in variances, but all zoning restrictions would be conditions supporting a hardship, because all negatively impact value in one way or the other. Further, the specific provisions of the Zoning Resolution as to split lots could just be ignored.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

345. The Congregation denies the allegations in paragraph 345 of the Petition.

Petitioners' Reply:

R-12. BSA Decision (Resolution) dated August 26, 2008, p. 12, right hand column, 6th, 7th and 8th "WHEREAS"

346. As to the landmark hardship, it is not a physical condition and moreover the Congregation did not exhaust its administrative remedies.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

346. The Congregation denies the allegations in paragraph 346 of the Petition.

347. For this and the other reasons set forth above, there is no rational basis of the §77-21(a) finding, which finding is not supported by law and is arbitrary and capricious.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

347. The Congregation denies the allegations in paragraph 347 of the Petition

SIXTH CAUSE OF ACTION - REASONABLE RETURN - UPPER FLOOR VARIANCES

348. As the facts described above state, the Congregation failed, after 18 months and voluminous submissions, to support a finding that it could not earn a reasonable return from the development of either a two-floor condominium or an all-residential building. Thus, the Congregation utterly failed in showing that the zoning regulations in any way prevented it from earning a reasonable return.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

348. The Congregation denies the allegations in paragraph 348 of the Petition.

349. Moreover, the Congregation, as a religious non-profit, is able to satisfy its programmatic needs from the conforming development of the property, and, therefore there is no taking that would in any way suggest that the Congregation's property rights were improperly taken by the land use regulations.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

349. The Congregation states that no response is required to paragraph 349 of the Petition, which purports to set forth legal conclusions, and that, to the extent a response is required, denies the allegations in paragraph 349.

350. That the Decision ignored any discussion of the many well-founded objections as to the reasonable return studies, demonstrates the capricious and arbitrary nature of the findings, if they indeed exist, as to reasonable return.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

350. The Congregation denies the allegations in paragraph 350 of the Petition.

351. The basis apparently accepted by the Decision as to the determination of site area and site value was irrational.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

351. The Congregation denies the allegations in paragraph 351 of the Petition.

352. The findings as to §72-21(b) for the reasonable return were entirely conclusory -the paragraphs in the Decision referring to statements and assertions are not findings of fact as to those statements and assertions.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

352. The Congregation denies the allegations in paragraph 352 of the Petition.

Petitioners' Reply:

R-8 -R-10 – BSA Decision (Resolution) dated August 26, 2008, pp. 8-10, beginning at “Residential Development” in right hand column on p 8 and ending with 5th “WHEREAS”§ in left hand column on p. 10. Respondents do not cite Record or provide any other basis for their denials.

353. It was improper for the BSA to accept as a basis for its reasonable return conclusory finding altered and incomplete construction cost estimates.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

353. The Congregation denies the allegations in paragraph 353 of the Petition.

354. The reasonable return analysis did not comply with the BSA's own written guidelines and was not consistent with applicable law.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

354. The Congregation denies the allegations in paragraph 354 of the Petition.

SEVENTH CAUSE OF ACTION - FINDING (C)

355. The upper floor condominium variances clearly have an adverse consequence on the adjoining properties as to windows, light, and air.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

denies

356. It was arbitrary and capricious for the BSA to require redesign of the proposed building so as to not block rear lot line windows, but to ignore identically situated windows in the front of the building.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

denies

357. It was admitted by the Congregation that the proposed building would [ADVERSELY IMPACT light and sun on the narrow West 70th street, the specific interest protected by the zoning regulations which the variance approval disregarded. The BSA substituted its own views for the legislative finding inherent in the adoption of mid-block zoning.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

denies

358. The Decision failed to note clearly that the sanctuary building essentially conformed to the mid-block height and setback restrictions of mid-block zoning, making the non-complying tall building even more discordant and undercutting the Decision's rationale that the proposed building would not alter the essential character of the neighborhood.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

denies

359. For these and all the other reasons set forth below[ABOVE?], the BSA's findings as to §72-21(c) for the upper floor variances should be vacated and annulled.

EIGHTH CAUSE OF ACTION - LACK OF IMPARTIALITY

360. The BSA actions as described above including the ex parte meeting, the deceptive manner in which relevant issues were addressed in the Decision, the manner in which the proceedings below were conducted, the ready acceptance of false and inconsistent information from the Applicant Congregation as the basis for its decision, and the other facts set forth above show a lack of impartiality and a wholly capricious proceedings.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

denies

361. As a result, the Court should not accord any deference to the findings of the BSA below and should not defer to the expertise of the BSA.

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

denies

CONCLUSION

For the foregoing reasons, the determination of the BSA should be annulled and the following relief should be granted:

BSA Answer:

194. Deny the allegations set forth in paragraphs 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 258, 359, 360 and 361 of the petition.

Congregation Answer:

denies

362. Declaring as arbitrary, capricious, illegal, unlawful, and irrational the Decision of the Respondent Board of Standards and Appeals of the City of New York ("BSA") in Calendar No. 74-07-BZ, issued August 26, 2008, and filed August 29, 2008, granting height and setback variances under Zoning Resolution §72-21 to the Respondent The Trustees of the Congregation Shearith Israel (the "Congregation") for the construction of a mixed use building at 8-10 West 70th

Street in the Borough of Manhattan, on appeal from an alleged determination of the Manhattan Borough Commissioner of the New York City Department of Buildings (“DOB”) (the “Variances”);

BSA Answer:

195. Deny the allegations set forth in paragraphs 362, 363, 364 and 365 of the petition, except admit that petitioners purport to proceed as set forth therein. STATEMENT OF MATERIAL FACTS The Subject Property and Applicable Zoning Requirements

Congregation Answer:

denies

363. Annulling, vacating, and reversing the Decision;

BSA Answer:

195. Deny the allegations set forth in paragraphs 362, 363, 364 and 365 of the petition, except admit that petitioners purport to proceed as set forth therein. STATEMENT OF MATERIAL FACTS The Subject Property and Applicable Zoning Requirements

Congregation Answer:

denies

364. Should the Court in its discretion determine that the Decision be remanded for further proceeding, ordering that in any proceeding, the Respondent BSA be ordered to allow Petitioners to intervene, to question representatives of the Respondent Congregation as to material issues, to propound written questions and request for documents, and to have the other rights of a party to the proceeding and declaring that, upon the evidence, the Respondents BSA Chair MEENAKSHI SRINIVASAN and BSA Vice-Chair CHRISTOPHER COLLINS may not participate in any rehearing as a result of improper ex parte meetings with the Respondent Congregation and the lack of impartiality of said Chair and Vice-Chair in the proceeding below; and

BSA Answer:

195. Deny the allegations set forth in paragraphs 362, 363, 364 and 365 of the petition, except admit that petitioners purport to proceed as set forth therein. STATEMENT OF MATERIAL FACTS The Subject Property and Applicable Zoning Requirements

Congregation Answer:

denies

365. Any further relief this Court deems just and proper.

BSA Answer:

195. Deny the allegations set forth in paragraphs 362, 363, 364 and 365 of the petition, except admit that petitioners purport to proceed as set forth therein. STATEMENT OF MATERIAL FACTS The Subject Property and Applicable Zoning Requirements

Congregation Answer:

365. The Congregation denies the allegations in paragraph 359 of the Petition. the allegations in paragraph 360 of the Petition. the allegations in paragraph 361 of the Petition. the allegations in paragraph 362 of the Petition. the allegations in paragraph 363 of the Petition. the allegations in paragraph 364 of the Petition. the allegation in paragraph 365 of the Petition.

Dated: March 18, 2009

New York, New York



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