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

NIZAM PETER KETTANEH and HOWARD LEPOW,	:	
	:	Index No. 113227/08
	:	(Justice Lobis)
Petitioners,	:	
	:	
For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules	:	
	:	
-against-	:	
	:	
BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,		
Respondents.		

Petitioners' Reply Memorandum of Law
In Support of Verified Petition.
(corrected)

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March 23, 2009

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PETITIONERS' REPLY MEMORANDUM OF LAW
IN SUPPORT OF ARTICLE 78 PETITION

Petitioners Kettaneh and Lepow reply to both Answering Memoranda of Law submitted by the BSA Respondents and the Respondent Congregation.[1] This Article 78 proceeding appeals from a 2008 Resolution of Respondent BSA, granting variances to the Congregation for a mixed use building on West 70th Street in Manhattan.

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

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Rather than provide two reply memoranda, Petitioners submit one reply memorandum to the BSA Memorandum of 67 pages, and the Congregation Memorandum of 21 pages (Cong. Mem.) The Verified Answer of the City Respondents, served February 9, 2009, (City Answer) consisted of 86 pages, of which 57 pages consisted of a Statement of Material Facts. The Congregation Verified Answer contained no Statement of Facts. Attached to the BSA Verified Answer were certain documents relating to the *ex parte* meeting held by the BSA Chair and Vice-Chair. Respondents Srinivasan and Collins did not submit separate Verified Answers.

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

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

With the Petition dated September 29, 2008, Petitioners served Appendix A, which consisting of 4199 pages. Certain BSA documents are in Appendix A, but not included by the BSA in its Record. Attached as Exhibit B to the Petition is a Table of Contents for the 13 volumes.

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

Petitioner served a revised version of its Memorandum of Law and the Petition dated January 2, 2009,.
Citations to BSA Res."¶ " are to the paragraph numbered version of the BSA Resolution (aka Decision) at Exhibit A to the Petition and at P-00001 and P-00019. The parties by stipulation have agreed to cite to these paragraph numbers.

[2] *See* BSA Answer, ¶292.

[3] *See* BSA Res ¶149.

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

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

The Congregation's view is that it is not prevented from moving ahead with obtaining demolition and construction permits from the DOB and commencing construction. The Petitioners are not aware of the intentions of the Congregation. Accordingly, Petitioners request that this proceeding move along without delay.[5]

Variances Granted Improperly Below

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

The BSA Has No Authority to Grant Variances Based upon Landmarking Hardships.

Because the site is in a landmarked district and the Synagogue is an individual landmark, the Congregation first sought (in 2001) and obtained a certificate of appropriateness (in 2006) from the Landmarks Preservation Commission (LPC) for a building with reduced height, but only as to the appropriateness of the building for design reasons.

[5] New York City Administrative Code, Title 25, §25-207 provides: "f. Preferences. All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.". *See* P-159. DOB refuses to release to the public any information as to the Congregation's applications and permits without the permission of the Congregation, and the Congregation will not provide such permission (R-235, R-1626, P-1283, P-1286, P-1293).

The LPC did not pass upon (and had no authority to pass upon) zoning matters, issues of height and scale, and impact on the area such as shadows on the mid-block streets.[6]

The LPC in conjunction with the City Planning Commission may consider relief from hardships caused by landmarking under Z.R. §74-711. Initially, in 2001, the Congregation had sought relief from the LPC under Z.R. §74-711, but did not pursue such relief, withdrawing its request. Despite the improper inference drawn from the positions expressed by the BSA in its Answer, the BSA has no role at all in providing relief from landmark hardships; the BSA provides variances on appeal from denials of permits by the Department of Buildings for violations of the Zoning Regulations; if Respondents argue to the contrary that the BSA can grant relief from landmark hardships not provided by the LPC, then it would seem that the Congregation did not avail itself of its remedies from the LPC.

SUMMARY OF SIGNIFICANT ISSUES

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

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

[6] Title 25, New York City Administrative Code, §25-307, states the factors considered by the LPC in issuing a certificate of appropriateness: "architectural features" and "aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color."

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

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

I. PRELIMINARY STATEMENT

Review of the BSA Resolution is made complex because the BSA Resolution does not include findings of important material facts.[7] Important feasibility studies are not presented as single integral studies; but rather require reviewing reports scattered throughout the record. The lengthy BSA Resolution contains substantial discussions of little or no relevance.[8] The BSA Resolution relies largely on conclusory assertions, and the Answers largely cite to the Resolution on the Record as a whole. The BSA Resolution and Answers mischaracterize opposition positions. The Answers attribute to Petitioners claims by "opponents", claims not made in the Petition. The BSA Resolution in general ignores even assertions by opponents supported by detailed expert reports. In making its

[7] See Morrone v. Bennet, *infra* at n. 12 " This lack of clarity constitutes a failure to specify factual support for the determination and forecloses intelligent judicial review of the issues raised by the parties on appeal."

[8] As just one example, the Congregation must establish that an "as-of-right building" would not earn a reasonable financial return to the owner. But, the BSA paid scant attention to the financial return of an as-of-right building, but rather focused on financial analysis of multiple and repetitive submissions of various proposed schemes requiring variances. The LCP had already limited the height of the building, so the BSA exercise of analyzing the proposed building was a meaningless exercise, more for "show" than substance. So, the BSA reviewed the complete construction estimates (all 15 pages) for the approved building where the estimates had no significance (R-4872 to R-4916), but looked the other way and accepted only 2 of 15 pages for the important constitutionally mandated analysis of reasonable return for the as-of-right scenarios where the full report would show the allocations between the two components of the building. (R-1996-1997). At hearings, the BSA engaged in dialogue and questioning with Mr. Freeman of Freeman Frazier, but asked nary a question of the even more experienced and certified opposition expert, Martin Levine, who was questioning the as-of-right analysis by Mr. Freeman. See Transcript R-4485-4488. The Chair rushed and dismissed Mr. Levine after he spoke for 3 minutes. Mr. Freeman, though, was questioned by Commissioners in the same hearing. R-4463-4483, yet not one Commissioner asked Mr. Freeman why the proper site value for an as-of-right scheme A would not be the area of the two condominium floors times the value per square foot.

findings, the BSA erroneously relied on factors not permitted by law: asserting landmarking hardships, asserting religious programmatic needs to justify the condominiums, asserting hardships not physical in nature, and asserting hardships lacking causation — *i.e.*, not arising out of the strict application of the zoning laws. It is immaterial whether the BSA acted intentionally or not in articulating its findings in the manner that it did — in either case, the BSA approach cannot be allowed to frustrate judicial review.

A. The BSA Failed to Make Findings of Fact as to Substantial Material Facts

The BSA Resolution on the whole resorts to either conclusory findings or findings that merely parrot the words of the Zoning Regulation and fails to make findings of specific facts, and also resulting in an non-transparent decision. The following critical facts, as to which the BSA did not make factual findings in the BSA Resolution, are material to understanding Resolution, yet appear not to be in dispute.[9]

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

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

- No Evidence Cited. Citation to the Record Showing the Actual Rent Paid by the Parsonage Tenant and the Beit Rabban Tenant.
- No Evidence Cited. Citation to the Record Showing Evidence of Obsolescence.

B. Non-Issues in This Proceeding

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

- No floor area (FAR) is required to be transferred to the development site on Lot 37 from Lot 36 where the Synagogue and Parsonage are located. Thus, all discussion of this issue in the Resolution and in the Answers is irrelevant to issues before this proceeding.[10]
- No use variances are required; Petitioners do not challenge the uses proposed by the Congregation as proper programmatic accessory uses, and all discussion in the Resolution and Answers as to these issues are irrelevant to this proceeding.[11]
- All discussion in the Resolution as to religious deference applies only to the community house variances, which constitute 10% of the variance area in dispute.
- Because access and circulation may be resolved by an as-of-right building, no hardship or claims of obsolescence or programmatic needs are relevant to this proceeding.
- Compliance with SEQR and CEQR are non-issues in the Article 78 proceeding. The only related relevant issue is compliance with Z.R. §72-21(c).

II. OVERVIEW OF RESPONDENTS' ANSWERS TO THE PETITION

The BSA absolves itself from answering any averment in the Petition if it "can be construed as alleging that the BSA acted improperly or contrary to law."

Where the Petition alleges that some fact or document did not exist in the record, Respondents simply deny these averments, and then refer the Court to the entire Record and ask the Court to find the non-existent information in the record. *See* Reply, "Citations to the Entire Record Rather Than Specific Parts of the Record." *See* Reply "Respondents Refusal to Admit Facts Not in Controversy."

The BSA conducted its hearing and prepared its Resolution in a manner which, by intent or effect, frustrates and avoids review by a court, and preserves for the BSA the ability to act arbitrarily and capriciously.[12] The Applicant was not asked questions that would elicit inconvenient facts in

[10] BSA Answer ¶ 248.

[11] BSA Answer ¶ 239.

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

conflict with the BSA's predilection to grant variances, especially to religious applicants. Disproportionate attention was paid to certain issues. The BSA seemed to draft it Resolution herein as an advocate to prevent later review.

The result is that this BSA Resolution seems to attempt to frustrate, if not foreclose, the ability of a court to provide judicial review.[13] Notwithstanding, the Court is empowered to conduct hearings as described below.

III. NATURE OF THE PROCEEDING

A Petition in an Article 78 proceeding is more like a complaint combined with the post-trial statement of facts, where all evidence is appended. Appeals from the BSA have a 30-day statute of limitations, as compared to 4 months for other administrative appeals. In an Article 78 proceeding, if the agency or other party baldly denies facts, the court is not required to accept those bare denials. Otherwise, agencies could defeat all Article 78 proceedings, especially where the record is lengthy, by referring, as was done by Respondents, in answers broadly to the entire record or by generally "denying" matters. This places the burden on the Court and the Petitioners to identify parts of the record that show the agency denials are false. If this is permitted, the BSA could also create a complex record for the simple reason of thwarting court review — or permeate its decision and the record with irrelevant matters.[14] It is for exactly these reasons that the CPLR and the City Administrative Code are clear that a hearing is required if there is a question of substantial evidence.[15]

> "Thus, it is unclear whether the Board rejected the petitioners' financial analysis itself as failing to substantiate the hardship claim, or whether the Board determined that an 8% return on equity was not an unreasonable return. This lack of clarity constitutes a failure to specify factual support for the determination and forecloses intelligent judicial review of the issues raised by the parties on appeal." (emphasis supplied).

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

[14] Where, as here, a member of the public or third party adversely affected appeals an Article 78 proceeding, such party was not a party in the administrative proceeding. Accordingly, there is no implicit res judicata effect. Here, the petitioners were denied the basic ability to cause relevant material questions to be asked.

[15] The New York City Administrative Code, Title 25, §25-207, as to the BSA (see R-159) provides:

> d. Proceedings upon return. If, upon the hearing, it shall appear to the court that

Where a substantial evidence issue is raised, under CPLR §7403(g), a hearing is to be held, and to be transferred to the Appellate Division, but under CPLR §7403(h), the issue of fact is to be tried by a referee or by a justice of the Supreme Court. *See also* CPLR §7804(g).[16] In practice, should the Supreme Court initially hold a hearing that the Appellate Division later believes considered an issue of fact, the Appellate Division does not retry the issue.

However, Petitioners contend that the Respondents have had more than an adequate opportunity to create a record to support the variances. The facts are just not there to support the variances, and, for that reason, the BSA Resolution should be annulled.

IV. LEGAL ARGUMENT

A. Because the Congregation Can Earn a Reasonable Return from an All Residential As-of-Right Building, the BSA Improperly Found that §Z.R. 72-21(b) Was Satisfied, and the Condominium Variances Must Be Annulled

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

The Scheme C analysis is required under applicable precedent requiring that the entire site be analyzed for reasonable return, not merely analyzing the slice of the property the owner wishes to develop.

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

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> testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his or her findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

[16] CPLR §7804(g): "Where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding."
."

building may not bifurcate its property — meeting its programmatic needs in one slice of the property,[17] and then claiming that it cannot earn a reasonable return as to the remaining portion.[18] See Pet. Memorandum of Law at page 74. *See* Northern Westchester Professional Park Associates v. Bedford, 60 N.Y.2d 492, 503-504 (N.Y. 1983); Koff v. Flower Hill, 28 N.Y.2d 694 (N.Y. 1971). Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (U.S. 1978) ("Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); also Spears v. Berle, 48 N.Y.2d 254, 263 (N.Y. 1979)("A petitioner who challenges land regulations must sustain a heavy burden of proof, demonstrating that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use.")

1. The Nearly All Residential Building Earns a Rate of Return of At Least 6.7%

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

Yet the BSA did not completely ignore this assertion in its Answer. After all, it was the BSA itself that initially requested that the Congregation provide an all-residential analysis. The professional staff of BSA, after it received the initial application, asked the Congregation for a "reasonable return

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

[18] In this discussion, we ignore the 10% of variances for the Community House and assume for argument's sake that the 2nd, 3rd, and 4th floor variances are proper.

(aka "feasibility") study" for an all-residential project (Pet. at ¶ 210).[19] (The "all residential" analysis was not in fact all-residential. Petition ¶ 207 to ¶ 228, also reducing the financial return.[20])

The BSA, when pressed by the Petition, felt compelled to complete the analysis by using the new reduced site value, computing a rate of return of 6.7%. As stated in Paragraph 292 of the BSA Answer (reproduced as Pet. Ex. N-1)[21]:

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

2. The Congregation Stated Repeatedly That a 6.55% Return Was Reasonable

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

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

> 31. Please provide a full plan set for a complying, 4.0 FAR residential building on Lot 36 (sic) that includes a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings).
>
> "37. Provided that the alleged hardship claim for the development site (Lot 36) (sic) is an inability to accommodate CSI's programmatic needs on Lot 37 (sic), please analyze a complying, fully residential development on Lot 36 (sic)as requested within Objection # 31. This analysis is requested for the purposes of gauging what the economic potential of the development site would be without the alleged hardship."

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

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

[21] The BSA Answer was verified by Respondent Srinivasan, the Chair of the BSA.

5.00 Conclusion 7.4 0.7.

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

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

Should the Court be so persuaded, it may ignore the remainder of this brief as to the upper floor condominium variances, although there are other reasons requiring annulment of the condominium variances.

B. Because The BSA Finding Under Z.R. §72-21(b) that the Congregation Could Not Earn A Reasonable Return from the Two Condominiums in the As-of-Right Scheme A Building Is Erroneous, Lacks Substantial Evidence, and Uses an Arbitrary, Capricious, and Irrational Site Value, the Condominium Variances Must Be Annulled

A bifurcated analysis can work to exclude a variance to the Congregation for the revenue-generating component, if it is shown that the revenue-producing component can indeed earn a profit. A proper analysis of the Scheme A two-condominium project - correcting site area, site value, construction costs, and other elements, would yield a reasonable return.[22] Thus, finding (b) could not be properly made either for the all-residential scheme or the mixed use scheme,

In the Petition, Petitioners show that the BSA had no basis on which to make the finding under §72-21(b) that the Congregation could not earn a reasonable return from Scheme C. In answer, Respondents improperly continue to portray inaccurately Petitioners' objections to the Congregation's

[22] See reports critiquing Freeman Frazier studies by opposition certified real estate appraiser Martin Levine of Metropolitan Valuation Services November 2, 2007 (R-1631); January 25, 2008 (R-02506); February 8, 2008 (R-3630); March 20, 2008 (R-4093); April 15, 2008 (R-4254); June 10, 2008 (R-4800); June 23, 2008 (R-4932); July 29, 2008 (R-5210).

reasonable return/feasibility study as being based on a single flaw: that a return on equity analysis should have been used as specifically required in the Board's written guidelines.

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

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

The proper computation of site value is simple — multiply site area times the site value per square foot. The two condominium floors in the as-of-right building contain 5316 sq. ft. (7594 gross), as stated in the Freeman Frazier analyses. R-4869. Freeman Frazier estimated a value of $450 per sq. ft. for condominium development space. R-520. Thus, the site value for the two condominiums would be the product of 5316 sq. ft. x $450 per sq. ft. or $2.6 million. *Id.*

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

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

The Chair observed at the November 27, 2007 hearing:

CHAIR SRINIVASAN
591 Freeman needs to explain to us what he's done on his financials. We've seen it. I think
592 we have some concerns which we raised yesterday and either he can go back and look at
593 that or we can state them for the record, but I think some of the issues have to do with
594 how the site is valued and how a good portion of what is anticipated as the developer
595 paying for that site is not going to be used by the developer because it's being used by the
596 synagogue.
597 So, it's almost like you should take that out of the equation and then you have this
598 value on this property without that 20,000 square feet that's being used for the
599 synagogue.

Transcript of November 27, 2007 at R-1753.

At this juncture in the proceeding, Freeman Frazier was computing site value based upon a site area/building size of 37,889 sq. ft., a number apparently made up by Freeman Frazier.[23] Pet. Ex. N-3. The as-of-right building was not 37,889 sq. ft., but 27,771.61 sq. ft. *See* As of Right Floor Area Schedule, October 22, 2007, AOR-A-2 at R-594 (the amount 27,771.61 is in the lower right corner of the table).[24] Most of the 27,271.61 sq. ft. was occupied for community purposes. See Pet. Ex. M-1, M-2. The actual site area was closer to this figure minus 20,000 sq. ft., *i.e.*, 7,771.61 sq. ft.

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

The actual amount of space for the two floors of condominiums shown on all of the Scheme A studies is 5316 sq. ft. "sellable" (7594 sq. ft. "built"). R-4869. The Answers of Respondents

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

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

completely ignore this issue.[25] It was this site area that a "developer would use and pay for," in the words of the Chair, which was to be used for the computation of site value in the Scheme A as-of-right building.[26] *See* Pet. Ex. N-1 *et seq*.

If the computation was clearly erroneous, this Court has the power to correct the computation. *See* Pantelidis v. New York City Bd. of Stds. & Appeals, 43 A.D.3d 314 at 317 (1st Dep't 2007), *aff'd* 10 N.Y.3d 846 (2008), *aff'g* 10 Misc. 3d 1077A (Sup. Ct. N.Y. Co.), *infra*. Because the computation by the BSA was clearly erroneous, the variances granted below must be annulled.

2. Market Value and Acquisition Cost Are Not One and the Same

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

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

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

Acquisition price is a factor not to be ignored under applicable case law (Pet. Mem. of Law Page 70 at page 69 and 80 *et seq.*) The price paid by an owner for his property is needed to show the return on investment upon the owner's original investment in the property. Under the feasibility

[25] The failure to present the site value of the two floors of condominiums alone should give great pause to both this Court and to anyone considering the feasibility study of Freeman Frazier taken as whole. This should call into question the entirety of the Freeman presentations. And the refusal of the BSA to discuss the computation, since the issue was fully raised by opponents, raises questions as to the candor and impartiality of the BSA itself.

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

studies, the Congregation is to receive $12.4 million of cash as the market value of the site. However, during the time the Congregation owned the property, it received value in the form of use and rent. Thus, a return on investment for the Congregation would include factoring in the original acquisition cost, the value of the use and the rent received, and the amount received as the market value on the hypothetical sale to the hypothetical developer.

3. The BSA Irrationally. Arbitrarily, and Capriciously Uses the Value of the Development Rights over the Adjoining Parsonage as the Market Value of the Site for the Two Condominiums Constituting the Revenue Generation Part of the Development

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

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

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

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

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

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

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

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

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

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

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

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

4. It Was Arbitrary and Capricious for the BSA to Fail to Consider the Entire 15-Page Construction Cost Estimate in Evaluating the As-of-Right Schemes

The BSA was arbitrary and capricious in refusing to consider the demonstrated over-allocation of construction costs in the as-of-right schemes, thereby increasing the construction costs for the as-of-right condominiums. Even the analysis suggested by the BSA in its Answer at ¶ 291 (computing base unit costs) shows that overstatement occurred. *See* discussion of Pet. Ex. N-2, below. The overstatement had the effect of reducing the rate of return for the as-of-right scenario.[27] If not for this and other errors, the as-of-right condominium projects would earn a reasonable return. Accordingly, the condominium variances must be annulled, because there is no foundation for the (b) finding.

The BSA did not even collect or analyze the basic information or consider the reasoning behind the cost allocations between community house and as-of-right condominiums. Despite repeated requests by opponents, the BSA refused to require the Congregation to provide the complete construction cost reports for the threshold as-of-right buildings (Scheme A and C) (R-4863-5; R-1968 at R-1996[28]), while at the same time considering complete reports for the less relevant proposed schemes. Pet. at ¶ 25, ¶187. (See complete McQuilken reports at R-4865.[29])

In response, the BSA admits that the BSA did not seek these reports — and the Congregation did not provide the reports — because the BSA did not request the reports (R-4863 at 4865). The BSA

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

[28] The Scheme A construction reports were not included with the earlier May 13, 2008 report at R-4649, but were included in an even earlier report, establishing that no single Freeman Frazier report supplies the complete as-of-right analysis of Pet. ¶ 131.

[29] In a July 8, 2008 report, the Freeman excuse was that "the opposition did not specifically request the entire construction cost estimates for each previous scenario." R-5175.

asserts that it "did not seek the missing pages because they were immaterial" on the reasoning that the BSA could have analyzed the base unit construction costs:[30]

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

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

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

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

5. The BSA Ignored Its Own Written Guidelines As to the §72-21(b) Finding

An administrative body cannot ignore without justification its own written regulations, yet the BSA did ignore its instructions as to the §72-21(b) Finding: The BSA accepted an unleveraged return on investment approach where the Instructions require a leveraged return on equity approach. The BSA accepted an annualized return approach when the Instructions require a total return approach. The

[30] *See also* Answers to Pet. 134, 187-198, where Respondents simply deny what was admitted in the BSA Answer at ¶ 290.

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

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

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

6. The BSA Consideration of Z.R. 72-21(b) Lacks Support in the Record and the BSA Focused on Irrelevant Issues

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

using a site area of 19,975 square feet to value a site of 5,316 square feet. The BSA findings are just conclusory parroting of the language in the zoning regulation: the BSA omits the factual findings required, obscures the facts and prevents meaningful review.

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

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

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

Petitioners had correctly observed in their Initial Memorandum that the necessity of analyzing whether a property owner could obtain a reasonable return is grounded in whether the zoning regulation amounts to a confiscatory taking. Similarly, the hardship issue is based on the concept that a land use regulation cannot create a taking. Although denying this assertion, the BSA Memorandum of Law is peppered with references to the Constitution and zoning regulation. The point is that the BSA is not free to come up with its own idiosyncratic definitions and applications of the concept of economic return. The Congregation makes this point by its citation and inclusion of this sentence from Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267 (2d Dep't 1983) at page 44-45 of the BSA Memorandum:

> Indeed, a party challenging a zoning ordinance as confiscatory must adduce "dollars and cents" proof to establish, beyond a reasonable doubt, that the property as presently zoned is incapable of yielding a reasonable return. Absent such proof a landowner may not overcome the presumption of constitutionality, especially when seeking relief from a self-inflicted hardship.

Indeed, by citing Northern Westchester Professional Park Associates, the BSA seems not to accept that, as to reasonable return, the applicable standard is not merely substantial evidence, but evidence "beyond a reasonable doubt."

The Court of Appeals is clear as to this relationship. Williams v. Town of Oyster Bay, 32 N.Y.2d 78 (1973):

> Property owners filed suit against town for the considerations for determining the constitutionality of a zoning ordinance as applied to a particular owner's property are much the same as those prescribed for the grant or denial of a variance. (citations omitted). Since these considerations are dealt with much more fully in the variance cases, we may look to them for guidance here.').

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

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

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

The Congregation disagrees and argues that the language of 72-21(b) provides that no reasonable return finding is required for any variances if the property owner is a religious non-profit

organization.[31] As noted below, the authorities cited by the Congregation in support of this proposition are inapposite.

Petitioners contend that in interpreting the application of Z.R. §72-21(b) where a non-profit organization seeks to develop a mixed-use project requiring variances, the constitutional underpinnings of this provision need to be considered, to avoid an unconstitutional taking by the land use regulation. Petitioners will not reiterate the discussion in its initial Memorandum of Law, except to note that the Respondents did not even attempt to respond to the discussion there.

1. The Congregation's Authorities Do Not Support Its Assertion Than No Finding (b) is Required

(a) The Congregation's Reliance on Fisher Is Incorrect

The Congregation completely misrepresents and mis-cites Fisher v. New York City Bd. of Standards and Appeals, 21 Misc. 3d 1134(A) (Sup. Ct. N.Y. Co.):

> For example, recently, in Fisher v. New York City Bd. of Standards and Appeals, 21 Misc. 3d 1134(A), 2008 WL 4966546 (N.Y. Cty. Sup. Ct. Nov. 21, 2008), the court considered a project "to permit the construction of a twenty story hotel." 2008 WL 4966546 at *2. The court stated, without regard to the nature of the hotel: "As a non-profit organization, Xavier was not required to demonstrate the second criteria, that the subject premises could not yield a reasonable return without the variance (Zoning Resolution § 72-21 [b])."

Congregation Memorandum, Page 15. A reading of the entire decision makes it clear that the Congregation's quotation from Fisher is taken completely out of context. The Fisher court was describing a 1963 variance granted by the BSA for "a six story school and monastery." The court was referring to the fact that in 1963, the church, as specified in the statute, was not required to demonstrate the inability to obtain a reasonable return for this pure religious use. As even a cursory reading demonstrates, the Congregation's Memorandum turns Fisher totally upside down.

(b) The Congregation's Reliance on Foster v. Saylor Is Similarly Incorrect

[31] The BSA and BSA practitioners frequently refer to the "(b) finding" or "finding (b)" when referring to the finding required under §72-21(b) of the Zoning Resolution (Z.R.), and in a similar manner to the other four findings required under §72-21 (a) through (e).

The Congregation reliance on Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) is also inappropriate. The zoning board there did find the school was able to obtain a reasonable return. The Congregation asserts at Page 14 of its Memorandum:

> Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981), merely held that a school's lease of school property to a corporation was "subject to local zoning regulations" and that the school's showing regarding its inability to sell the property satisfied those particular regulations.

Also, because the issue is one of statutory interpretation, another obvious distinction is that in Foster the zoning board was not within the City of New York and thus the court was interpreting another statute that does not contain specific language of 72-21(b), which the Congregation is attempting to misinterpret.

(c) The Congregation Also Incorrectly Cites to McGann, Which Does Not Involve the BSA at All

The Congregation most abuses McGann v. Incorporated Village of Old Westbury, 170 Misc. 2d 314 (Nassau Cty. Sup. Ct. 1996). It argues the following at page 14 and 15 of its Memorandum:

> Finally, McGann v. Incorporated Village of Old Westbury, 170 Misc. 2d 314, 647 N.Y.S.2d 934 (Nassau Cty. Sup. Ct. 1996), concerned a church's First Amendment challenge to a local zoning ordinance and held that "because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of legality," which must be overcome "beyond a reasonable doubt." The Congregation did not argue that it was exempt from zoning regulations or that the zoning regulations were unlawful. To the contrary, the BSA was not required to consider "reasonable return," because the lawful zoning regulations, promulgated by the legislature, state: "this finding shall not be required for the granting of a variance to a non-profit organization." N.Y. City Zoning Resolution § 72-21(b). (emphasis supplied)

Cong. Mem. at 14-15. The citation is completely and totally inaccurate and misleading. The cited and emphasized language does not appear in the case at all. In fact the church in McGann was in Old Westbury (in Nassau County), where the BSA has never had any jurisdiction and the exception language of New York City's Z.R.§72-21 (b) does not apply. Thus, the court could not have been interpreting the New York City Zoning Resolution. Also, the court there applied the applicable zoning regulations, even to a church, and did not engage in wholesale deference and abstention.

2. Finally, the Congregation's Citation to Homes for the Homeless Is Also Inapposite

The Congregation cites Homes for Homeless, Inc. v. Bd. of Standards and Appeals, 24 A.D.3d 340 (1st Dep't 2005), *rev'd*, 7 N.Y.3d 822 (2006)[32] at P. 15 with a quotation that §72-21(b) did not apply to a not-for-profit entity, without noting that the use was a nonprofit use.

E. As Shown By Cases Cited by Respondents, Z.R. §72-21 (a) Requires that The Unique Condition Be Physical and the Congregation Failed to Show Any Physical Condition, Let Alone One That Satisfies the Arising From Requirement

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

Z.R. §72-21(a) not only requires a "physical condition," it then describes examples of what it meant by a physical condition: "including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions." Accordingly, cases that describe other difficulties and hardships when addressing a Z.R. §72-21(a) finding still identify some type of a "physical condition."

The Congregation admits that "The building site is a rectangular 64 x 100 foot site just off Central Park West on West 70th Street and constitutes the entirety of Tax Lot 37." Cong. Answer to Pet. ¶ 41. In fact, the construction site consists of the combination of three rectangular brownstone lots, of which there are 117 nearby brownstone lots as shown just in the surrounding area diagram the

[32] The Congregation cited to the Appellate Division decision, without noting that it was later reversed by the Court of Appeals — over two years prior to their Memorandum.

Congregation filed with its application. R-53.[33] The Congregation intends to build deep into the bedrock with two subbasements, one a banquet hall of 6400 square feet. There simply are no physical conditions at all, unique or otherwise, and certainly none within the definition of Z.R. §72-21(a), which would constitute a hardship or practical difficulty.

The New York City cases cited in the Respondent Memoranda indeed are all careful to refer to specific physical conditions to justify the finding under Z.R. §72-21(a). Douglaston Civic Assoc. v. Galvin, 36 N.Y.2d 1 (1974) and Douglaston Civic Association v. Klein, 51 N.Y.2d 963 (1980) ("swampy nature of property")[34]; Galin v. Board of Estimate, 72 A.D.2d 114, 116 (N.Y. App. Div. 1st Dep't 1980), *aff'd,* 52 N.Y.2d 869, 870 (N.Y. 1981) ("narrowness and depth of the subject lot"); Albert v. Board of Estimate, 101 A.D.2d 836 (2d Dep't), *appeal denied,* 63 N.Y.2d 607 (1984) ("peculiar wedge shape of the subject lot"); and UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248 (1st Dep't 2002) ("construction of a large portion of the premises on pilings"); Vomero v. City of New York, 13 Misc. 3d 1214(A) (Richmond Cty. Sup. Ct. 2006), *rev'd,* 54 A.D.3d 1045, 864 N.Y.S.2d 159 (2d Dep't 2008) (irregular shape of the lot — no record as to what the Appellate Division found to be sufficient physical condition, though it did find that a physical condition existed); Matter of Elliott v Galvin, 33 N.Y.2d 594, 596 (1973) (irregular shape and small size — combined with split lot).

The Respondents cite to SoHo Alliance v. New York City Bd. of Stds. & Appeals, 95 N.Y.2d 437, 441 (N.Y. 2000) Congregation Memo, p. 1; BSA Memo at 16. The SoHo case involved physical conditions such as "idiosyncratic lot configuration," "L-shaped" and "irregular and unique shape of lots."

[33]Were the Respondents to argue that the rectangular lots are a physical condition, they are not unique. Judicial notice should be taken of several townhouses in Manhattan that became "lots" in the last year as a result of destruction by construction accidents or explosions.

[34] The BSA's citation at page 44, to "Douglaston" is unclear: see Douglaston Civic Assoc. v. Galvin, 36 N.Y.2d 1 (1974) and Douglaston Civic Association v. Klein, 51 N.Y.2d 963, 965 (1980).

The Respondents cite to a number of cases interpreting zoning statutes that do not include a requirement for a "physical" condition as the hardship.[35] *See* Commco, Inc. v. Amelkin, 109 A.D.2d 794 (2d Dep't 1985) (Town of Huntington — no interpretation of §72-21(a) or any other statute requiring a physical condition); Dwyer v. Polsinello, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (Rennsalaer County — no interpretation of §72-21(a) or any other statute requiring a physical condition); and Fuhst v. Foley, 45 N.Y.2d 441, 444 (1978) (Town of Greenburgh — no interpretation of §72-21(a) or any other statute requiring a physical condition).[36]

Additional cases cited by the Congregation are similarly inapposite as to interpretation of the statutes' use of "physical" as they relate to whether a condition must be unique. Douglaston, UOB, and Commco were also cited by the BSA and distinguished above. Since there are no physical conditions at all, whether the condition is unique is not relevant, but it is still clear that the perfectly rectangular shape of townhouse lots is hardly unique in the area. *See* Cong. Answer ¶ 31 ("The Congregation denies the allegations in paragraph 31 of the Petition, except admits that Lot 37 is a regularly shaped lot, 64 feet by 100 feet.")[37]

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

[36] The BSA also cites West Broadway Associates v. Board of Estimate, 72 A.D. 2d 505 (1st Dep't 1979), leave to appeal denied, 49 N.Y.2d 702 (1980) (memorandum order without opinion — no precedential value). and 97 Columbia Heights Housing Corp. v. Board of Estimate, 111 AD2d 1078 (1st Dep't 1985), *aff'd*, 67 NY2d 725 (1986) (memorandum orders without opinion — no precedential value).

[37] Although not cited by Petitioners in their Memorandum of Law, the BSA at page 23 of its Memorandum also attempts to distinguish the holdings in Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710 (2d Dept. 1988) and Bright Horizon House, Inc. v. Zng. Bd. of Appeals of Henrietta, 121 Misc.2d 703 (Sup. Ct. 1983) claiming that they were cited as to "physical condition." But they were not cited for that reason even in a letter brief submitted by another opponent in the BSA proceeding, and do not address the issue of physical condition. These cases were cited by another attorney who was amongst the community opponents, at 3908 and 3922, for the proposition that no deference is to be accorded a religious organization for variances like the condominium variances. Even if the case were cited as to physical condition, that would be irrelevant since neither case is a New York City case concerning interpretation of the words "physical condition" in the New York City statute.

On the other hand, the BSA ignored Petitioners extensive discussion of Homes for Homeless, Inc. v. Bd. of Standards and Appeals, 24 A.D.3d 340 (1st Dep't 2005), *rev'd*, 7 N.Y.3d 822 (2006). Pet. Mem. at p. 42.

1. The BSA Failed to Identify Any Evidence in the Record Identifying The Nature and Location of The Alleged Obsolescence And How It Meets the Arising From Requirement

The Respondents expend a great deal of energy in trying to explain that a physical condition can include a physical condition of a building, apparently conceding that a "physical" condition is required under §72-21(a). It seems perhaps that the physical building condition upon which the Respondents rely is "obsolescence." However, there is scant discussion of what is "obsolete" — is the Respondent claiming that the Synagogue is obsolete or the existing community house is obsolete? The Respondents can point to nothing evidentiary as to either, except possibly to a 54-year-old elevator that requires replacement. Nor is there any explanation as to the causation — how the so-called physical obsolescence (*i.e.*, physical condition) creates a hardship "arising out of" the strict enforcement of the zoning resolution.[38] If it is the community house that is "obsolete," then an as-of-right building resolves any obsolescence, but, again, it is not clear upon what particular facts in the Record the Respondents rely. If the Synagogue is "obsolete," again an as-of-right building resolves the issues of egress and circulation. So, the hardship does not "arise out of" the strict application of the zoning regulation.

2. Obsolescence Is Not an Appropriate Factor Here, Especially Where The Variances Are for a New Building

Similarly, the assertion that the existing building that occupies two-thirds of the frontage of the lot is somehow obsolete to a depth of 60 feet is not a basis for the Z.R. §72-21(a) finding because there

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

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

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

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

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

The BSA cites to 97 Columbia Heights contending on page 19 "reinstating a variance and finding that the uniqueness requirement was satisfied by the demolition of a building, resulting in increased costs." There is no showing here of any special increased costs in dollars and cents. The demolition costs are minimal. Were the BSA's view to be accepted, then any building which an owner wishes to replace with a variance requiring structure can be described as obsolete and then a finding (a) obtained to build a larger building, even though an as-of-right building responds to the hardships which the applicant asserted were caused by the obsolescence.

Obsolescence is used appropriately, arguably, when a building is deemed obsolete for its current use, as in Homes for Homeless, Inc., *discussed infra.* Some argue that obsolescence could be an appropriate factor in a case where a building may be too expensive to modify or demolish - but no such evidence exists here, and the "arising from" condition would still be need to be satisfied. The existing community house can be demolished for a nominal amount based upon the construction cost estimates provided by the Congregation. The total hard construction cost of the as-of-right Scheme A building is estimated to be $19 million, of which only $100,000 is for demolition. R-4873. Under the BSA logic, almost any building that someone wishes to replace could satisfy finding (a), rendering the requirement of physical condition to be meaningless. See Carriage Works Enterprises, Ltd. v. Siegel, 118 A.D.2d 568, 571-570 (2d Dep't 1986) ("the building is still structurally sound and could, with the infusion of approximately $ 10,000 to $ 15,000, be renovated for the proposed use. We remain unconvinced, however, that the petitioner has met its burden as to the grant of a use variance.") The citations by the BSA on page 19 of its Memorandum to Commco, *supra* and Dwyer, *supra* are similarly not apposite, since these are not New York City cases interpreting whether obsolescence can be a physical condition under New York City Z.R. §72-21(a).

In Homes for Homeless, Inc. v. Bd. of Standards and Appeals, 24 A.D.3d 340 (1st Dep't 2005), *rev'd,* 7 N.Y.3d 822 (2006), the variance there concerned a proposed homeless facility involving an existing building and a vacant lot (here, the Congregation seeks variances for an existing community house and a vacant lot). Petitioner cited this case in its initial memorandum, but the BSA chose not to respond, since, in that case, the BSA asserted a different position.

The BSA granted a use variance only for the existing building (claiming irregular lot and obsolescence), but not for the vacant lot. The BSA made a distinction that the "determination regarding the structure's obsolescence is not relevant to the requested variance for expansion into a newly constructed building." The Appellate Division remanded the case to the BSA for further consideration because the BSA provided no rationality in the distinction drawn. On appeal, the BSA

argued that "The finding that authorized the legalization of the two buildings already in use relied upon findings that the existing hotel structures were functionally obsolete and that the lot was irregular. Determinations regarding a structure's obsolescence, however, are not relevant to a requested variance for expansion into a newly constructed building." See Brief of BSA, April 29, 2005, Court of Appeals. (Brief Available on WestLaw)

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

Thus, in Homes for the Homeless, the BSA cited to the physical irregular lot, validated the causation requirement, and relied upon obsolescence only for the extension of the use variance and not for the new building in the vacant lot

F. In Stating That It Is of "No-Moment" Whether a Programmatic Need Hardship Such As Access May Be Accommodated by an As-of-Right Development, the BSA Improperly Ignored the Causation Requirement of Z.R. §72-21(a)

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

One of the "hard spots" for the BSA (R-1749) was to find a "physical condition" to support the (a) finding or to find a hardship or difficulty or programmatic need, hopefully physical in nature, to shoehorn into the (a) finding. The Congregation settled on the programmatic need of physical access and circulation to and from and within the Synagogue Sanctuary building. See extensive detailed factual averments at Pet. 242 *et seq.*, and the overbroad denials by Respondents. Access and circulation were so important that the Congregation drummed in the issue over and over again in its multiple submissions of its 50-page statement in support, sometimes mentioning the issue 30 times in a single document. The "hardship" had all the elements of drama, including a landmarked sacred site and handicapped and aged people too embarrassed to attend religious services. If the flag could have

been used, it would have been. Unfortunately, the facts do not support the claim. An as-of-right building resolves the problems. (The Congregation never even identified a single fact that it could not replace its 55-year-old elevator without erecting a new building.)

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

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

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

BSA Answer at ¶ 247. BSA Memorandum of Law at page 25, with no further explanation. This is an extraordinary proposition: that the BSA would grant a variance to a religious institution asserting a hardship, when the religious institution does not need the variance to resolve the hardship.[39]

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

The BSA's position is a fundamental error of law. Any reading of §72-21 and variance law shows that the purpose of variances is to relieve property owners from unreasonable hardships created by the zoning law. See Marchese v. Koch, 120 A.D.2d 590, 591 (N.Y. App. Div. 2d Dep't 1986):

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

> The petitioner argues that his lot is not suitable for residential use because of its large size, unusual depth, trapezoidal shape, and proximity to another lot which is being used for commercial purposes. However, the petitioner presented no evidence to show how these conditions prevent him from being able to construct residences or obtain a reasonable return from such a use.

Z.R. §72-21(a) is clear in stating that there must be a finding that "practical difficulties or unnecessary hardship arise in complying strictly with the use of bulk provisions of the Resolution." Fuhst v. Foley, 45 N.Y.2d 441, 444 (1978) ("it is incumbent upon an applicant to demonstrate that 'strict compliance with the zoning ordinance will result in practical difficulties.'"[40]

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

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

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

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

If the BSA now states that it is of "no moment" that an as-of-right building resolves the access and circulation hardships, then it needs to explain why the difficulty was mentioned in the decision, why it is included as a programmatic need, and why the BSA did not require the Congregation to

[40] In New York City, as opposed to almost all if not all other jurisdictions in New York State, the applicable zoning resolution statute requires additionally that the practical difficulty arise from a unique physical condition.

remove from its statement in support the repeated references to access and circulation hardships, as the BSA did when it had asked the Congregation to remove the assertion that revenue generation from the condominiums was a legally cognizable basis for the variances.

1. There Is No Scintilla of Evidence That Any Variances Are Needed to Resolve Access and Circulation Issues

The Congregation suggests the scintilla standard, to support its central argument, that only variances would remedy asserted hardships of access and circulation; for the access and circulation finding, the BSA and the Congregation cite not to facts in the record, but only to the BSA references to "representations" by the Congregation and to "indications." Cong. Memo at 12. BSA Res. §60, §72, §73. Indications and representations are not facts. The BSA has not cited to any facts to support the findings based upon "representations." Similarly, the BSA states in is Memorandum at 20:

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

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

Clearly the BSA was unable to find any evidentiary facts to support this proposition, since the BSA Resolution could point only to that which "the Congregation represented." Second, the BSA even there sailed right through the causation requirement in §72-21(a). Although the Congregation asserted that the proposed building will provide these systems to make the facilities barrier free, it did not assert that an as-of-right building would NOT do the same thing. Of course, since opponents raised this issue repeatedly,[41] when the BSA made its so-called findings, it was cleverly trying to distort its way around the requirement of causation (while, at the same time illustrating a lack of impartiality by the BSA).[42]

[41] For example, June 20, 2007 Community Objection #30, R-269 (Pet. Ex. E) and references cited in Pet. at ¶¶ 109 *et seq*.

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

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

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

The Respondents rely upon the asserted access and circulation hardship to underpin all of the variances. First, the Respondents claimed that these access hardships were "physical" in nature and supported the Z.R. §72-21(a) requirement for a "unique physical condition." Next the Respondents used this hardship to assert that the there was "obsolescence" that satisfied the physical condition requirement. Then the Respondents claimed that resolving these access hardships were programmatic needs. Finally, the BSA in its decision used "programmatic needs" as a hardship to support, not just the lower floor religious community house variances, but also the upper floor luxury condominium spaces, which account for 90% of the variances.[43]

Yet the Respondents have not been able to identify any evidence in the record to support the claim that variances are needed to resolve this alleged hardship. There is a simple fact that frustrates

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

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

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

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

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

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

The BSA improperly used landmarking as a unique physical condition hardship to satisfy Z.R. §72-21(a). Not only is the alleged hardship resulting from landmarking not a physical condition under Z.R. §72-21(a), but Respondents were unable to show how this hardship, especially as to the revenue-

generating condominiums, arises out of the strict application of the zoning regulations as required in Z.R. §72-21(a). Thus, the variances as to the condominiums must be annulled for that reason, but another reason is that the BSA is not authorized to consider the hardship of landmarking.

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

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

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

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

The Congregation describes it decision to withdraw it §74-711 request at page 15 of its July 9, 2008, its last version of its Statement in Support (R-5129-5128) and outrageously claimed that having been turned down by the LPC for a §74-711 special permit, that the LPC "signaled" that its issuance of a Certificate of Appropriateness (COA) for a smaller building would meet the preservation purposes required. But, if this were so, first of all the LPC would indeed have approved a special permit under §74-711 - and it did not do so. All the LPC said in effect was - "here is your COA - go to the BSA and see if you meet their other standards, because we are not giving you a special permit." The

Congregation claimed that "that CSI took every available step to seek the administrative relief provided in the Zoning Resolution for seeking a special permit to modify the bulk regulations for which this variance Application now seeks waivers, thereby exhausting its administrative remedies prior to the filing of this Application." Of course, that is false - the Congregation did not take the "available step" of applying for the special permit.

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

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

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

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

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

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

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

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

Finally, the BSA fails completely to identify any facts that illustrated why the landmark status of the Synagogue or even the landmark status of the entire West Side district prevents the Congregation from developing the construction site. The BSA's logic merely is "the Synagogue was landmarked so it creates a hardship in developing the development site." Or is the Congregation claiming that it is the application of the landmarks laws on the development site that creates the hardship? The record is silent. Where is the explanation for this logic? How do the variances relate to this hardship? Where is the causation? How do the variances provide relief from the hardship?

H. Landmarks Law Prevents the Congregation From Building a 17-Foot Wide Tower and the BSA May Not Grant Relief From This Limitation In This Matter

The split lot is a physical condition, according to Respondents, because the sliver law limitations of Z.R. §23-692 allegedly prevent the construction of a narrow 17-foot tower in the R10A portion of Lot 37.[44] See BSA Res. ¶94. Yet, it is the limitations of the landmarking law that prevent the construction of a sliver tower on Lot 37, not the sliver law, and not a result of the split zoning. Landmarks Preservation Commission made it clear that the maximum height it would allow on any part of Lot 37 was 95 feet in the R10A part of Lot 37. Alleged hardships imposed by application of the landmarks laws are not hardships caused by a physical condition, and, even if they are, they are not

[44] The Congregation's Architect, in a letter to the BSA dated March 28, 2008, stated that Section 23-692 is not applicable. R-4332, ¶ 2. This suggests perhaps that the sliver building is a ruse seized upon by the Congregation and the BSA to help contrive the split lot hardship claim.

hardships for which relief may be provided under Z.R. §72-21(a). For the reasons discussed elsewhere, hardships resulting from the landmark laws are not the basis for a variance under §72-21.

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

The Congregation is unable to satisfy the requirements of these provisions, but the BSA ignores this limitation. Both provisions restrict relief to where 50% or more of the lot is less restrictive; here the R10A portion is far less than 50% of the lot.[45] More importantly, however, is that for bulk variances, Z.R. §77-00's only relief is to realize the transfer of air rights from one part of the lot to another; it does not provide relief from height and setback requirements. This is one reason that Petitioners have stressed that this case does not involve the transfer of air rights. The Respondents do not disagree. Without such transfer, then, most of the BSA discussion in the resolution as to split lots as a hardship is irrelevant.

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

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

Not only is there no need to "transfer a small share of its zoning lot area," but the dominant constraint here is the landmark restriction, not just the contextual zoning and the sliver law, so what the board is doing here is considering landmarking as the hardship for which relief is being granted and,

[45] §73-52 Modifications for Zoning Lots Divided by District Boundaries
Whenever a zoning lot existing in single ownership on December 15, 1961, or on the effective date of any applicable subsequent amendment to the zoning maps is divided by a boundary between two or more districts in which different uses are permitted, the Board of Standards and Appeals may permit a use which is a permitted use in the district in which more than 50 percent of the lot area of the zoning lot is located to extend not more than 25 feet into the remaining portion of the zoning lot, where such use is not a permitted use.

most importantly, relying upon a hardship not arising out of the strict application of the zoning laws. Since there is no need to transfer zoning lot area in this matter, then there is no "arising from" as it relates to this claimed hardship.

1. The Eighth DOB Objection Requiring a 40-Foot Separation Between Upper Floors and the Synagogue Lot Would Have Prevented the Tall Sliver Building

Another constraint against a tall building on the 17-foot wide R10A sliver that was ignored by the Board is Z.R. §23-711, which requires that there be a 40-foot separation between a residential building on a lot and any other building on the same lot on the upper floors. With the initial application, the DOB had required a variance for this 40-foot separation, and the drawings submitted by the Congregation to the DOB and BSA "40 foot standard minimum distance between building" objection. The BSA staff agreed with the DOB and asked why the separation was not shown on the as-of-right drawings.[46] *See* Pet. N. 13 to ¶ 97.[47] The Congregation's architect agreed with the DOB as well. There was no indication at all that the DOB mistakenly applied Z.R. §23-711.

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

> 21. Page 24: Please note that ZR § 23-711 prescribes a required minimum distance between a residential building and any other building on the same zoning lot. Therefore, within the first full paragraph, please clarify that the DOB objection for ZR § 23-711 is due to the lack of distance between the residential portion of the new building and the existing community facility building to remain.
>
> 25. It appears that the "as-of-right" scenario would still require a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings) given that it contains residential use (see Objection # 21). Please clarify.

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

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

The Eighth Objection from DOB created a problem for the BSA — if the zoning resolution required a 40-foot separation in the upper floors, then the entire argument claiming that a split lot was a physical condition under 72-21(a) would not be a valid argument for the simple reason that even if all of Lot 37 was in the 10A zone, the Congregation still could not build a tall structure on the eastern 40 feet of the 64-foot wide lot.

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

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

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

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

However, there were no such revisions to the plans, and the Congregation's "direct[ing] the Court to the record" is not at all helpful in identifying that which is non-existent. In light of these denials and factual distortions, Petitioners in reply provide herewith a composite showing that there were no changes in the drawings between April 2007 and August 2007. Pet. Ex. N-8.[48]

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

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

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.

I. The BSA's Findings Under Z.R. §72-21(c) and §72-21(e) as to the Blocked Windows Were Arbitrary and Capricious

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

1. By Instructing the Congregation to Create a Courtyard to Relieve the Adverse Impact Upon Only Some Adjoining Property Owners with Lot Line Windows, The BSA Acted Arbitrarily and Capriciously

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

The BSA provides no explanation of the distinction drawn between the nearly identical front and rear cooperative apartment. Even so, despite the BSA's "no moment" statement of dismissal of the concerns of the cooperative owners, BSA did in fact realize that there was an impairment under Z.R.

§72-21(c). This section requires a BSA finding that the variance, if granted "will not substantially impair the use … of adjacent property."[49]

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

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

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

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

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

[49] The BSA falsely claims (BSA Answer ¶ 18) that Petitioners or other opponents asserted that the windows were legally required or that it had a legal right to not have the windows blocked under the building code or under general property rights and can provide no statement in the record that such assertion was ever made by other opponents.

J. In Considering Whether the Variances Will Alter the Essential Character of the Neighborhood and Impair Appropriate Use of Property and Be Detrimental to Public Welfare, Satisfaction of CEQR and SEQR Is Not Sufficient — the BSA Must Satisfy Z.R. §72-21(c) and Act Consistently With the Purposes of the Zoning Regulation

The Answers of the Respondents, as well as the BSA Resolution at ¶¶ 194-201, focus almost exclusively, when considering the impact on light and air, upon the provisions of CEQR and SEQR. See BSA Answer at ¶320. Yet, a project could satisfy SEQR and CEQR, but still not satisfy Z.R. §72-21(c). Oddly, Respondents focus on issues never raised by opponents (such as shadows in Central Park)[50] and on issues not raised in the Petition. BSA Memorandum, p. 8-10, 11-13, 40, 48, 53-54. It almost as if the Respondents are responding to another petition in another matter. *See* Pet. ¶ 54.

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

It is incumbent upon the BSA to respect the purposes of the zoning regulations: the mid-block contextual zoning regulations establish height and setback requirements to allow light and air into the narrow streets. Further, satisfaction of CEQR and SEQR requirements in no way means that Z.R §72-21(c) has been satisfied, or that the purposes of the particular zoning regulation are honored.

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

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

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

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

The proposed tower building will have a substantial detrimental impact on the character of West 70th Street and will be detrimental to the public welfare as a consequence of, among other things, the shadows that would be cast upon the mid-blocks by the tower building, and thus runs afoul of Z.R §72-21(c).[51] The impact of shadows from the proposed building on the narrow mid-block streets would be substantial, especially in the winter months, when the sun is low in the sky. At that time, even adding a mere 10 feet to a building height can have a substantial impact. Sunlight in the winter is known to have health and psychological benefits. And sunlight provides heat energy, lowering winter heating costs. What is not of consequence — of "no matter" — to the BSA is of great consequence to Mr. Kettaneh, who owns a historic brownstone across the street from the proposed tower, and to the many members of the community and the public who enjoy historic West 70th Street.[52]

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

[51] A.R. §72-21(c) provides, in part "that the variance, if granted, will not alter the essential character of the neighborhood or district in which the zoning lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare." The out-of-scale proposed building is self-evident - and that fact that the Congregation's own Synagogue building is essentially compliant with R8B zoning, although in an R10A district, makes the proposed building all the more objectionable.

[52] Clearly, City residents who live close to the project nearly uniformly oppose the project. The Congregation could only muster 3 or 4 residents in the 400-foot zone to file statements in support of the project. Pet. Ex. K.

three-dimensional computer software, there can be no excuse for not considering the impact from a vantage point high in the sky and for limited periods.

After the filing of this case, Petitioners had the first opportunity subsequent to the consultant's report to take further photographs in late December 2008 of existing conditions. Pet. Ex. M. *See* Henrietta Smigel v. Town of Rensselaerville, 283 A.D.2d 863; 725 N.Y.S.2d 138 (3rd Dep't 2001) .

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

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

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

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

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

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

2. The Rationale for Second Floor Variances Lacked Substantial Evidence and Was Irrational Because Even the Last Statement in Support Shows That the Congregation Intends Offices on That Floor

The Respondents were unable to cite to any evidence that disputed the assertions in Petition ¶307 that the 60-student toddler program need was a contrivance. From 2001 to December 2007, no plans showed an all-toddler program on this floor. Until late in the game, the 10-foot waiver in the back was always shown to provide larger offices, not to accommodate "toddlers."[53] The Congregation's statement of July 8, 2008 is unambiguous: the second floor is for 1,473 sq. ft. of offices, not toddler classrooms.[54]

Without specific citation, the Congregation in its Memorandum asserts that "The record confirms that the Congregation described the toddler program to the BSA during the first BSA hearing." The transcript belies this assertion — there is passing testimony to a very small toddler program, which the Congregation wished to expand from 2 to 5 mornings. R-1741, line 332. The 60-toddler "need" was contrived later — 50 toddlers would not justify a variance, but 60 would. *See* Pet. ¶¶331-332. The BSA Resolution does not require the Congregation to use the space for the contrived toddler programs. This is confirmed by the drawings submitted to the BSA as the November 8, 2006 ex parte meeting - the second floor is allocated for "meeting rooms, offices, or office area." Pet. Ex. S.

[53] See Pet. Ex. S, the drawings shown to the Chair and Vice Chair at the November 8, 2006 improper ex parte meeting, which show no reference at all to toddlers on the second floor - only offices and meeting rooms. R-4275-4277.

[54] See 4th column, 6th row of table at R-5114 at R-5144.

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

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

L. The Standard of Review

Z.R. §72-21 is clear; a BSA resolution must have "a rational basis and is supported by substantial evidence in the record." *See also*, Cowan v. Kern, 41 N.Y.2d 591, 599 (1977), as cited by the BSA Mem. at 15. *See also,* Conley v. Town of Brookhaven Zoning Board of Appeals, 40 N.Y.2d 309, 314 (1976).

Rational basis and substantial evidence are not direct equivalents. Substantial evidence is not a minimal standard, requiring merely some evidence or a scintilla of evidence. And ultimate facts are not evidence at all. BSA findings that merely parrot assertions of the Congregation, themselves based on conclusory statements of counsel, do not constitute substantial evidence absent any actual evidence.[55] Nor are citations to the BSA Resolution substantial evidence, or any evidence. A review of the Respondents' Answers show that most "fact" citations are to the BSA Resolution.

Yet, on the basis of repetition of assertions unsupported by ANY evidence, the Respondents seem to maintain that the role of the Court in reviewing a BSA variance determination can be nothing more than to rubber stamp the BSA, to be the proverbial potted plant. Their contention is that no

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

review is the "standard of review," even in the many instances in this matter where the BSA cannot point to any facts (much less substantial facts) to support its conclusory findings. The Respondents appear to go so far as to suggest that the BSA may make, rather than only interpret, the law. *See* Lousoun v. Deutsch, 152 A.D.2d 657, 543 N.Y.S.2d 528 (2d Dep't 1989):

> Although the BSA has been granted rule-making power (New York City Charter § 666[2]; New York City Zoning Resolution § 72-01[d]), it is well settled that it has "no authority to create a rule out of harmony"with the law (see, Matter of Jones v. Berman, 37 N.Y.2d 42, 53, 371 N.Y.S.2d 422, 332 N.E.2d 303). Since the instant rule confers upon the BSA a power which has no legal "predicate either express or implied" (see, Matter of Bates v. Toia, 45 N.Y.2d 460, 464, 410 N.Y.S.2d 265, 382 N.E.2d 1128), it must be declared null and void (See also, Matter of Tohr Indus. Corp. v. Zoning Bd. of Appeals of City of Long Beach, App.Div., 538 N.Y.S.2d 610).

1. Substantial Evidence, not a Scintilla of Evidence, Must Support the BSA Findings, and the Congregation Failed to So Demonstrate

Notwithstanding the clear expression in Z.R. § 72-21[56] as to the requirement of substantial evidence, the Congregation asserts improperly that only a bit more than a scintilla of evidence is needed to support a BSA finding,[57] citing to a 1971 employment discrimination case where the court found there was substantial evidence to support the decision. Bethlehem Steel Corp. v. New York State Division of Human Rights, 36 A.D.2d 898 (4th Dep't 1971). Clearly the standard is one of substantial evidence. *See* Fuhst v. Foley, 45 N.Y.2d 441, 444 (1978) (cited by the BSA).

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

- are purely conclusory; and/or,
- rest entirely on representation and assertions by the Congregation, or by Counsel for the Congregation; and/or,
- rest on assertions by one Congregation representative asserting that another representative had made a statement; and/or,
- have no support of substantial evidence; and/or,

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[56] Z.R. §72-21 states that "In any such case, each finding shall be supported by substantial evidence or other data considered by the Board in reaching its decision."

[57] Congregation Mem. at 12.

> "First, while Petitioners assert that the Congregation's accessibility needs could have been addressed by building an alternate structure as-of-right (Petitioners' Mem. at 35), the BSA considered such alternatives but found that they would not be viable. See BSA Res. ¶¶60-61. The BSA's reliance on materials indicating that such alternatives would not be workable clearly satisfies the more-than-a-scintilla "substantial evidence" test. See Bethlehem Steel, 36 A.D.2d at 899, 320 N.Y.S.2d at 1001."

- have no support even of a scintilla of evidence — example: false assertion that an as-of-right building does not resolve access and circulation.

2. Because New York Courts Have Frequently Scrutinized BSA and Other Zoning Board Actions and Assertions of Religious Programmatic Needs, the Court Here Should Carefully Scrutinize the Insufficiency of the Evidence What Fails to Support the Congregation's Claims for Variances

Respondents wish to mislead the Court into accepting that BSA and New York State zoning board decisions essentially are unreviewable and are always affirmed by the courts. Similarly, Respondents wish the Court to believe that courts have rejected applying scrutiny to the assertions of religious and community organizations.

A most recent case, Pantelidis, *infra*, from New York County Supreme Court and affirmed by the Court of Appeals, involved, not only a reversal by the Supreme Court of the decision of the BSA, but a Supreme Court hearing to determine facts, rather than remand to the BSA, affirmed in 2008. The Appellate Division in Pantelidis observed:

> Beyond question, judicial deference to administrative authority and expertise is an important principle, as illustrated by the decisional law cited by the dissent. Such deference does, however, admit of some elasticity, especially where a full administrative record is in existence, the agency has had an opportunity to rule on all issues, and the matter, although within the agency's purview, does not require resolution of highly complex technical issues.

Pantelidis v. New York City Bd. of Stds. & Appeals, 43 A.D.3d 314 at 317 (1st Dep't 2007), aff'd 10 N.Y.3d 846 (2008), aff'g 10 Misc. 3d 1077A (Sup. Ct. N.Y. Co.) The Appellate Division made it clear that not every issue before the BSA required deference to the claimed expertise of the BSA:

> As to the dissent's claim that we and Supreme Court lack the "competence and expertise" to resolve the remaining outstanding issues on the existing record, neither the dissent, BSA, nor intervenors-respondents explain how the glass-enclosed staircase here in question raises land-use issues so complex and technical as to be beyond judicial competence. While there are undoubtedly many variance cases that courts will be unable to analyze without guidance from BSA on all relevant factors, this does not appear to be such a case. The dissent may believe that a high degree of technical expertise is required to determine whether allowing a one-time variance for the rear-wall, glass-enclosed staircase at issue will alter the "essential character of the neighborhood," but we respectfully disagree with this view.

Id. at 318. Neither do the issues here involve facts so complex and technical that the Court must defer to the BSA in every respect, especially where common sense dictates to the contrary.

Nor do the cases cited by Respondents support the view that zoning boards and courts must defer to whatever assertions are made by religious organizations. Cases that support the proposition

that there must be some deference at the same time have not accepted the characterizations and wishes of the organization, particularly with regard to "accessory uses." As the Court of Appeals noted in Diocese of Rochester v. Planning Board, 1 N.Y.2d 508 (1956):

> That is not to say that appropriate restrictions may never be imposed with respect to a church and school and accessory uses, nor is it to say that under no circumstances may they ever be excluded from designated areas.

Id. at 526.

Another case cited by Respondents clearly demonstrates that courts and zoning boards will scrutinize the assertions of religious programmatic needs and the variance required to satisfy those needs. In Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981), the court overruled the zoning board after having scrutinized the decision of that board, and finding in essence that excessive deference was given to the school, and modified the variance to reduce it to the minimum necessary.

Thus, while respectful to the wishes of churches and schools, courts have indeed scrutinized requests of religious organizations with greater care. In a case cited by the BSA (BSA Memorandum, page 23), Yeshiva & Mesivta Toras Chaim v Rose (136 A.D. 2d 710, 711) (2d Dept. 1988), the court engaged in exactly the kind of scrutiny of an accessory religious use that the Respondents claim the courts should not and cannot engage: "The appellant supports this position by arguing that the place of burial and burial rites are important elements within the dogma of its religion. We feel that this argument goes too far."

Another case cited by Respondents that shows that courts need not, in the name of deference, accept every assertion — no matter how improbable or how much it conflicts with other evidence — is McGann v. Incorporated Village of Old Westbury, 170 Misc. 2d 314 (Nassau Cty. Sup. Ct. 1996), which held that a church was subject to the zoning regulation, even observing the cemetery that the church wished to establish may not even be a "religious use," and not supporting a variance, and disregarding the church's assertion that "it is running out of burial space." *See also,* Albany Preparatory Charter School v. City of Albany, 31 A.D.3d 879 (3d Dep't 2006).

Even Westchester Reform v. Brown, 22 N.Y. 2d 488 (1968), relied upon heavily by the BSA, was a regulation that excluded the religious use (which is not the situation here) and the court clearly stated that even in an exclusion case "the power of regulation has not been obliterated."[58]

Nor can the backdoor attempt to use religious programmatic need disguised as a landmark hardship be used to avoid the land use regulation here. That issue was laid to rest in Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York, 914 F.2d 348, 356 (2d Cir. N.Y. 1990):

> We agree with the district court that no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities. Cf. Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 872 (2d Cir. 1988).
>
> In sum, the Landmarks Law is a valid, neutral regulation of general applicability, and as explained below, we agree with the district court that the Church has failed to prove that it cannot continue its religious practice in its existing facilities. *Id.* at 356,
>
> So long as the Church can continue to use its property in the way that it has been using it -- to house its charitable and religious activity — there is no unconstitutional taking.

Id. at 357

> While expanding the amount of available space in the Community House may not provide ideal facilities for the Church's expanded programs, t does offer a means of continuing those programs in the existing building.

Id. at 358. In other words a religious institution is not entitled to the "ideal facilities" standard.

3. Arbitrary and Capricious Blindness to the Facts — Fashioning the Record

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

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

Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 351 (2d Cir. 2007).[59]

[58] Westchester Reform was interpreting a Scarsdale Zoning Ordinance that did not contain the unique provisions of the New York City Zoning Resolution. Also, in the present case, there is no evidence of any heavy financial burdens as to the 10% of variances allegedly implicated in religious programmatic need. The Westchester Reform court made clear that "a modest increase in expenditures" may not offend religious freedom.

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

Examples of the BSA deliberately blinding itself are set forth in the accompanying reply in the section "The BSA Deliberately Blinded Itself As to the Facts."

Indeed, the BSA proceeding below should be viewed not as a fair effort to seek the full facts, but as a way for the BSA to elicit just enough from the applicant with or without factual support so as to support a variance, while at the same time keeping the applicant from being forced to respond to questions from the BSA that would elicit an applicant statement that the BSA could not ignore. However, as Westchester Day School makes clear, intentional blindness is every bit as actionable as the record that would have been created.[60]

The BSA argues that it did ask questions suggested by opponents. That the BSA refused to request an updated Scheme C analysis, did not ask for the missing construction estimate pages, and did

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[59] Although the Second Circuit did overturn the zoning board's refusal to provide variances, the case did quite carefully hold that unbridled acceptance of the assertions of a religious organization were the other side of the pendulum, which is what the BSA has done here by its blind acceptance of the assertions of the Congregation. ("when an institution has a ready alternative -- be it an entirely different plan to meet the same needs or the opportunity to try again in line with a zoning board's recommendations -- its religious exercise has not been substantially burdened. The plaintiff has the burden of persuasion with respect to both factors. See § 2000cc-2 (putting burden on plaintiff to prove that government's action substantially burdened plaintiff's exercise of religion)" *Id.* at 353)

[60] The attempt at "record fashioning" by the BSA is more effective where, as here, the Department of Buildings decides not to send an attorney to oppose an applicants' appeal from the DOB decision denying the building permit.

not ask the Congregation to identify its access and circulation issues with specificity shows that the BSA argument here is wrong.[61]

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

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

Rules permitting BSA staff to meet in pre-application meetings do not authorize the Chair and Vice-Chair of the BSA to have a full-scale meeting with the Congregation and its attorneys, architects, and financial consultant. Plans submitted at the meeting were substantially identical to those submitted in April 2007 with the Application (copies of these drawings were not provided by the BSA in the Exhibits attached to its Answer).[62]

Respondents refuse to provide notes of the meeting as part of the BSA Record herein, yet these notes are not protected from disclosure under The Public Meetings Law, §108. The BSA position is that notes of meetings between the Chair and Vice-Chair (and other documents related to the variance application and in the BSA files) are part of the BSA Record only if the Chair and Vice-Chair deign to designate them as part of the record. The Public Meetings Law, by implication, states that BSA

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

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

proceedings although quasi-judicial proceedings, are still subject the disclosure requirements under the law. ("Nothing contained in this article shall be construed as extending the provisions hereof to: 1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals.")

As stated in the Petition and the Petitioners' Initial Memorandum of Law at 100, the BSA possesses all the powers needed to conduct a quasi-judicial proceeding; it has subpoena power, can order inspection (City Charter, Ch. 27, §667, *see* P-166), can take evidence under oath (City Charter, Ch. 27, §663, *see* P-163), and was established as part of the City's Office of Administrative Trials and Hearings (OATH) (City Charter, Ch. 27, §659, *see* P-162). *See* Rules of the City of New York, Title 28, §1-14. *See* P-174 (prohibiting ex parte communications).[63]

See, Calapai v. Zoning Board of Appeals of Village of Babylon, 871 N.Y.S.2nd 28 (2nd Dep't 2008) (municipal zoning tribunals are quasi-judicial); 200 West 79th Street Co. v. Galvin, 71 Misc. 2d 190, 193 (N.Y. Sup. Ct. 1970) ("Board and others like it are quasi-judicial bodies not empowered to review their own decisions…"). *See also*, Allied v. Niagara Mohawk Power Corporation, 72 N.Y.2d 271 (1988) ("the determination of whether an agency proceeding was "quasi-judicial"). *See* Real Holding Corp. v. Lehigh, 2 N.Y.3d 297, 302 (N.Y. 2004), citing with approval Jewish Reconstructionist Synagogue, Inc. v. Roslyn Harbor, 40 N.Y.2d 158, 162 (N.Y. 1976) ("(T)he board of zoning appeals is a quasi-judicial body created by State law.")

After the commencement of a variance proceeding, the BSA seems to agree that ex parte meetings involving the Chair and Vice-Chair would be improper, but not improper if the meeting

[63] A 2005 report by the New York County Lawyers' Association discussed the lack of sufficient standards for administrative law judges in New York City agencies and specifically described the BSA Commissioners as Administrative Law Judges. The report noted that many agencies confuse their rule making and adjudicatory roles. See page 7, Administrative Law Judge Reform Report, by the New York County Lawyers' Association Subcommittee on Administrative Law Judge Reform of the Task Force on Judicial Selection, September 12, 2005. Available at http://www.nycla.org/siteFiles/Publications/Publications184_0.pdf.

preceded the application.[64] That Respondents held the meeting, did not invite known opponents, and refuse to provide any indication of what took place at the meeting is sufficient to bar these Respondents from future involvement in this case.

V. Conclusion

Because there is no doubt that the Congregation can earn a reasonable return from as-of-right buildings on the development site, the condominium variances should be annulled. Similarly, because the Congregation is able to satisfy its programmatic needs in an as-of-right building that is all community space, the community space variances should be annulled. The BSA cannot just find that there is a hardship and jump to the conclusion that variances are need to resolve the hardship. For example, no variances are all are required to resolve the asserted hardship of access and circulation. Finally - because the BSA must have substantial evidence for each of the seven variances to support each of the five findings, it is clear, for the other reasons stated herein, that all of the variances should be annulled.

Dated: March 23, 2009 Corrected March 30, 2009
New York, New York

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[64] See Letter of Margaret P. Stix, BSA General Counsel to Assemblyman Richard N. Gottfried dated November 7, 2007, page 1, last paragraph, Ex, Z to BSA Answer, P-2323 (making a distinction that the meeting was not an official hearing.)

Exhibits Provided With Revised Verified Petition

Pet. Ex. A	Reformatted BSA August 26, 2006 Decision with Numbered Paragraphs	P-00019	See R-000001-R-000024
Pet. Ex. B	Table of Contents to Appendix A — 13 Volumes - Revised January 2, 2009 to Show BSA Record References		Not in BSA Record
Pet. Ex. C	Color 3-D Graphics of Project	P-00434 P-02429 P-02430	R-003571 R-001833 R-001834
Pet. Ex. D	BSA Meeting Record November 8, 2006 Improper Ex Parte Meeting	P-01245	Not in BSA Record
Pet. Ex. E	June 27, 2007 Community Objections to BSA	P-01777	R-000263
Pet. Ex. F	July 29, 2008 Letter to BSA of Martin Levine, Metropolitan Valuation Services	P-03907	R-005210
Pet. Ex. G	Letter Dated February 4, 2008 from Charles Platt to BSA Re Access Hardships Being Resolved by Conforming Building	P-02768	R-003611
Pet. Ex. H	Graphic Showing Areas of New Building Addressing Access and Circulation and Showing Lower Floor Variances Filed as Opp. Ex. GG-12 and GG-10.	P-00477, P-00475	R-004156 at P-004168 R-004156 at P-004166
Pet. Ex. I	Letter of April 10, 2007from Alan D. Sugarman to Srinivasan and Collins Requesting Recusal	P-04088	R-005511 at R-005638
Pet. Ex. J	Programmatic Drawings Floors 2, 3, 4	P-02606-08	R-002009-R-002012
Pet. Ex. K -	Analysis of Consent Forms Submitted by Respondent BSA on December 2, 2008 in the BSA Record.	P-04244-59	SEE 005189-005209
Pet. Ex. L	West 70th Street Shadows December 21, 10 AM, Shadow Study versus Actual Photographs	P-04260-60	SEE 005187-005188

Exhibits Provided With Petitioners' Reply

Pet. Ex. M-1	Location of Variances on Each Floor of Proposed Building R-4695. Composite. Diagram Showing Location of the Variances on Each of the Floors in the Proposed Building. In Reply to City and Congregation Denials of Petition ¶¶ 21 et. seq.
Pet. Ex. M-2	Allocation of Variance Areas in Proposed and As-of-Right Buildings. M-2 and M-3 Show Source Of Averment That 90% Of Variances Relate To Condominiums. In Reply To Respondents Denial Of Petition ¶21 et. seq. and ¶51, 52 et. seq.
Pet. Ex. M-2-A	Computation of Variances - Approved Building
Pet. Ex. M-2-B	Sources of Information - Area of Approved Building
Pet. Ex. M-3-A	Computation of Areas of AOR Building
Pet. Ex. M-3-B	Source of AOR Floor Area.
Pet. Ex. N-1	To Scheme C Earning a Reasonable Return. Excerpts from Record. In Reply to BSA Answer at ¶292.
Pet. Ex. N-1-A	¶ 292 of BSA Answer.
Pet. Ex. N-1-B	Acceptable rate of return R-140.
Pet. Ex. N-1-C	Acceptable rate of return R-287
Pet. Ex. N-2	Base Unit Condominium Construction Costs. Computation In Reply to And As Described by BSA Answer at ¶291.
Pet. Ex. N-3	Excerpts from BSA Record Showing Multiple Valuations of Site Values by Freeman Frazier. In Reply To BSA Answer At ¶ 296 And Respondents Answer To ¶ 206 Of The Petition Denying That Freeman Frazier Reports Were Varying And Conflicting.
Pet. Ex. N-4	Location Of The Two Condominium Floors In As-Of-Right Scheme A Building. In Reply To Respondents Bad Faith Denials To ¶22 Of The Petition As To Number Of Square Feet On Floors Five And Six.
Pet Ex. N-5	Value Of The Two Condominium Floors In As-Of-Right Scheme A Building
Pet. Ex. N-6	Location of Parsonage and Two Condominiums in Scheme A Building. R-605, R-606, R-4694. Composite, In Reply To Denials As To The Lack Of Relationship Between AOR Scheme A Condominiums And The Air Rights Over The Parsonage.
Pet. Ex. N-7	Summary and Metrics Site Value Two Condominium Floors In As-of-Right Scheme A Building.
Pet. Ex. N-8	Missing 8th Objection - R-85. R-88. R-402, R-405. In Reply To Respondents False Assertion That DOB Removed Eighth Objection In Response To Revisions To Plans. BSA Answer ¶205.
Pet Ex. N-9	Sliver Building and 40-Foot Zone R-3871. In Reply To Respondents Assertion That The DOB Removed Eighth Variance In Response to Revisions to Plans. BSA Answer ¶205.
Pet. Ex. N-9-A	BSA Comments Re 40-Foot Separation R-256. In Reply To Respondents Assertion That The DOB Removed Eighth Variance In Response To Revisions To Plans. BSA Answer ¶205.
Pet. Ex. O-1	Elevation Existing Looking South.
Pet. Ex. O-2-	Elevation AOR Looking South R-592, Provided To Respond To The

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