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

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NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

- against -

Index No. 113227/08

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.

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MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION ON BEHALF OF RESPONDENTS BSA, SRINIVASAN AND COLLINS

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February 6, 2009

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PRELIMINARY STATEMENT

Respondents, Board of Standards and Appeals of the City of New York, Meenakshi Srinivasan, Chair and Christopher Collins, Vice Chair (collectively "BSA" or "Board"), submit this memorandum of law in support of the BSA's August 26, 2008 determination to grant lot coverage, rear yard, height and setback variances to respondent Congregation Shearith Israel ("the Congregation" or "the Synagogue"), and in opposition to petitioners' application for a judgment pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR").

On or about April 1, 2007, the Congregation submitted an application to the BSA for waivers of zoning regulations for lot coverage and rear yard to develop a community facility that could accommodate its religious mission, and waivers of zoning regulations pertaining to base height, total height, front setback and rear setback to accommodate a market rate residential

development that could generate a reasonable financial return at the property known as both 6-10 West 70th Street and 99-100 Central Park West, New York, New York ("the subject property"). After reviewing voluminous submissions by both the Congregation and Opposition, and holding four public hearings, the BSA granted the Congregation's application, finding that the Congregation had met the requisite criteria set forth in New York City Zoning Resolution ("Z.R." or "Zoning Resolution") § 72-21.

Thereafter, petitioners commenced the instant Article 78 proceeding seeking a judgment annulling and reversing the BSA's determination, i.e., the Resolution on Calendar No. 74-07-BZ, which was adopted by the BSA on August 26, 2008 and filed on August 29, 2008 ("Resolution"). For the reasons set forth in this memorandum of law, and in the accompanying verified answer, the Resolution is rational and proper in all respects, and should be upheld by this Court.

STATEMENT OF MATERIAL FACTS

The Subject Property and Applicable Zoning Requirements

The subject property is located within the Upper West Side/Central Park West Historic District and consists of 2 tax lots (Block 1122, Lots 36 and 37), with a total lot area of 17,286 square feet. Pursuant to Zoning Resolution Section 12-10, the lots constitute a single Zoning Lot because the two tax lots have been in common ownership since 1984 (the date of the adoption of the existing zoning district boundaries – i.e. "an applicable amendment to the Zoning Resolution"). The Zoning Lot has 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage on Central Park West, and is situated partially in an R8B residence zoning district and partially in an R10A residence zoning district [R. 1-2 (¶¶ 12, 13, 15, 19, 20, 22)].

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

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

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

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

This proceeding concerns an application by the Congregation, a not-for-profit religious institution, to demolish the community house that presently occupies tax lot 37 and replace it with a nine-story (including penthouse) and cellar mixed-use community facility/residential building that does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear setback applicable in the

residential zoning districts in which the zoning lot sits ("the proposed building") [R.1-2 (¶¶ 1-3, 24, 27)].[1]

The proposed building will have community facility uses on two cellar levels and the lower four stories and residential uses on the top five stories (although a minimal amount of the floor area on the first through fourth floors will also be dedicated to the residential use) [R. 2, 7 (¶¶ 24, 84)]. The community facility uses will include: mechanical space and a multi-function room on the sub-cellar level with a capacity of 360 persons for the hosting of life cycle events and weddings, dairy and meat kitchens, babysitting and storage space on the cellar level, a synagogue lobby, rabbi's office and archive space on the first floor, toddler classrooms on the second floor, classrooms for the Synagogue's Hebrew School and the Beit Rabban day school on the third floor, and a caretaker's apartment and classrooms for adult education on the fourth floor. [R. 3 (¶ 39)]. All uses are as-of-right in the residence zoning districts in question and no use waivers were requested by the Congregation. At the first hearing before the BSA, representatives for the Congregation discussed the reasons why a new facility is needed, including the need to: 1) accommodate the growth in membership from 300 families when the synagogue first opened to its present 550 families; and 2) update the 110-year old building to make it more easily handicapped accessible [R. 1728-46].

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

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

The proposed building will have a total floor area of 42,406 square feet, comprising 20,054 square feet of community facility floor area and 22,352 square feet of residential floor area [R. 2 (¶ 26)]. The proposed building will have a base height along West 70th Street of 95'-1" (60 feet is the maximum permitted in an R8B zoning district), with a front setback of 12'-0" (a 15'-0" setback is the minimum required in an R8B zoning district), a total height of 105'-10" (75'-0" is the maximum permitted in an R8B zone), a rear yard of 20'-0" for the second through fourth floors (20"-0' is the minimum required), a rear setback of 6'-8" (10'-0" is required in an R8B zone), and an interior lot coverage of 80 percent (70 percent is the maximum permitted lot coverage) [R. 2 (¶ 27)].[2]

The Congregation submitted its development application to DOB and, on or about March 27, 2007, DOB's Manhattan Borough Commissioner denied the Congregation's development application, citing eight objections. After revisions to the application by the Congregation, the Manhattan Borough Commissioner issued a second determination on the

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

Congregation's application which eliminated one of the prior objections. DOB's second determination, which was issued on August 27, 2007, became the basis for the Congregation's variance application before the BSA [R. 1 (¶ 1)].

The Zoning Resolution provides that the BSA may grant a variance to modify the applicable zoning regulations only where the BSA determines that (1) there are practical difficulties or unnecessary hardships involved in carrying out the strict letter of the provision, (2) the proposed use will not have a detrimental effect on the surrounding area, and (3) the proposed variance is the minimum necessary to afford relief. In making such a determination, the BSA, pursuant to Z.R. §72-21, is required to make "each and every one" of five specific findings of fact, as follows:

> [w]hen in the course of enforcement of this Resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this Resolution, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board of Standards and Appeals may, in accordance with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.
>
> Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this Resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:
>
> (a) that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the zoning lot is located;

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

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

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

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

In addition, Z.R. §72-21 requires the BSA to set forth in its decision or determination:

each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be supported by substantial evidence of other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board.

Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection.

Congregation Shearith Israel's Application for a Variance

On or about April 1, 2007, the Congregation submitted an application to the BSA for waivers of zoning regulations for lot coverage and rear yard to develop a community facility

that could accommodate its religious mission, and waivers of zoning regulations pertaining to base height, total height, front setback and rear setback to accommodate a market rate residential development that could generate a reasonable financial return [R. 2 (¶ 30)]. The application was designated by the BSA as Calendar Number 74-07-BZ [R. 1].

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

Environmental Review

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

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

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

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

Initially, the lead agency must make a threshold determination as to whether the proposed action is subject to environmental review. See 62 RCNY § 5-05(a). If the project is determined to be subject to environmental review, the proposed action must be assessed for possible environmental consequences. In this regard, the lead agency is required to prepare an EAS containing a detailed environmental assessment of the action, and to then make a determination, based on the EAS, as to whether the proposed action may have significant effect on the environment. See 62 RCNY § 5-05(b).

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

If the lead agency determines that the proposed action may have a significant effect on the environment, then it issues a positive declaration and an Environmental Impact Statement ("EIS") must be prepared. See 43 RCNY § 6-07(b). The EIS must describe the adverse environmental impacts identified in the EAS, identify any mitigation measures that

could minimize those impacts, and discuss alternatives to the proposed action and their comparable impacts. See 43 RCNY § 6-09.

If, however, the lead agency determines that the proposed action will not have a significant effect on the environment, then it issues either a negative declaration or a conditional negative declaration.[3] Where a conditional negative declaration has been issued, an EIS is not required, because in such circumstances there are no adverse impacts to describe, nor is there a need to identify mitigation measures or to consider alternatives to the proposed action. See 43 RCNY § 6-07(b).

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

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

After due notice by publication and mailing, a public hearing on Calendar Number 74-07-BZ was held by the BSA on November 27, 2007 [R. 1 (¶ 4), 1648-63, 1726-1823]. The public hearing continued on February 12, 2008 [R. 1 (¶ 4), 3653-758], April 15,

[3] A conditional negative declaration is "a written statement prepared by the lead agencies after conducting an environmental analysis of an action and accepted by the applicant in writing, which announces that the lead agencies have determined that the action will not have a significant effect on the environment if the action is modified in accordance with conditions or alternative designed to avoid adverse environmental impacts." See 43 RCNY § 6-02.

2008 [R. 1 (¶ 4), 4462-515], June 14, 2008 [R. 1 (¶ 14), 4937-74], and on to decision on August 26, 2008 [R. 1 (¶ 4), 5784-95].

Opponents to the application, including petitioners and Alan Sugarman, petitioners' counsel in this proceeding, presented testimony at each of the public hearings, and made written submissions in opposition to the application [R. 217-232, 241-252, 260-274, 472-501, 1721-25, 1856-58, 3288-607, 3622-29, 3827-39, 3902-07, 3990-4005, 4811-58, 4925-32, 5310-750]. In their testimony and submissions, petitioners and other opponents attempted to discredit the applicant's arguments that the five findings had been met. Specifically, the Opposition touched on arguments including, *inter alia*, 1) the ability of the Congregation to satisfy its programmatic needs through an as-of-right development; 2) the ability of the Congregation to recognize a reasonable return on its investment from an as-of-right development; and 3) the detrimental effects the proposed development will have on the community, including the loss of windows in the adjoining buildings.

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

After conducting an environmental review in accordance with SEQRA and CEQR which found that the Congregation's proposed development would not have a significant adverse impact on the environment,[4] considering all the submissions and testimony before it, and after

[4] This finding obviated the need for the preparation of an Environmental Impact Statement. See 43 RCNY § 6-07(b).

visiting the site and surrounding area, the BSA met on August 26, 2008 and adopted a Resolution granting the variance by a vote of five to zero [R. 1-14].

Specifically, the BSA concluded as follows:

WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made under Z.R. §72-21; and

WHEREAS, the project is classified as a Type I action pursuant to 6 NYCRR, Part 617; and

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

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

WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes the required findings under Z.R. §72-21, to permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/ residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to Z.R. §§ 24-11, 77-24, 24-36, 23-66, and 23-633; on condition that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked

"Received May 13, 2008" – nineteen (19) sheets and "Received July 8, 2008" – one (1) sheet; and on further condition:

THAT the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80; and

THAT the applicant shall obtain an updated Certificate of Appropriateness from the Landmarks Preservation Commission prior to any building permit being issued by the Department of Buildings;

THAT refuse generated by the Synagogue shall be stored in a refrigerated vault within the building, as shown on the BSA-approved plans;

THAT this approval is limited to the relief granted by the Board, in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted;

THAT substantial construction be completed in accordance with Z.R. §72-23;

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted [R. 13-14 (¶¶ 218-230)].

The Article 78 Proceeding

Petitioners, Kettaneh, a resident of a townhouse at 15 W. 70th Street (across from the synagogue) and Lepow, the owner of several cooperative apartments in 18 W. 70th Street, commenced this proceeding by filing and serving a Notice of Petition and Petition, wherein they seek an order, pursuant to Article 78 of the CPLR, annulling, vacating and reversing as arbitrary and capricious, the BSA's decision to grant the Congregation's application for waivers of the lot

coverage, rear yard, height and setback requirements otherwise applicable to developing the property at 6-10 West 70th Street (99-100 Central Park West) in Manhattan.

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

ARGUMENT

POINT I

BSA'S DETERMINATION TO GRANT THE CONGREGATION'S VARIANCE APPLICATION SHOULD BE SUSTAINED AS A REASONABLE AND PROPER EXERCISE OF ITS DISCRETIONARY AUTHORITY.

The determination challenged in this Article 78 proceeding was made by the BSA following lengthy hearings and the receipt of voluminous evidence, pursuant to Charter §668 and Z.R. §§72-01(b) and 72-21. The BSA's determination to grant the variance was a reasonable and proper exercise of its authority, inasmuch as there is substantial evidence in the Record to establish "each and every one" of the five specified findings of fact required by Zoning Resolution § 72-21. Accordingly, the determination should be upheld this Court.

A. The Applicable Standard of Review.

The BSA is an expert body comprised of persons with unique professional qualifications, including a planner and a registered architect both with at least ten years of experience. City Charter § 659; Fordham M.R. Church v. Walsh, 244 N.Y. 280, 287 (1927). The BSA has been delegated the responsibility of interpreting the Zoning Resolution and enforcing its mandates. Among other things, the BSA is empowered to hear, decide and determine, in specific cases of practical difficulties or unnecessary hardship, whether to vary the

application of the provisions of the Zoning Resolution. See New York City Charter ("Charter") §§ 666(5) and 668; Z.R. §§ 72-01(b) and 72-20 et seq.

Where, as here, the BSA grants a variance application, its determination is reviewable in the Supreme Court of this State. See Charter § 668(d); CPLR §7803. The reviewing court cannot substitute its judgment for that of the local zoning body however. Rather, it is the function of the court to determine whether there is in the record a rational basis for the exercise of administrative discretion. See CPLR 7803; Cowan v. Kern, 41 N.Y.2d 591, 599 (1977); Fiore v. Zoning Board of Appeals, 21 N.Y.2d 393, 396 (1968); Matter of Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974); V.R. Equities v. New York City Conciliation and Appeals Board, 118 A.D.2d 459 (1st Dep't 1986); Shell Creek Sailing Club, Inc. v. Board of Zoning Appeals of the Town of Hempstead, 20 N.Y.2d 841 (1967); Purdy v. Kreisburg, 46 N.Y.2d 354, 358 (1979); 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 181 (1987); Mandell v. Purcell, 54 A.D.2d 935 (2d Dep't 1976); and Conley v. Town of Brookhaven Zoning Board of Appeals, 40 N.Y.2d 309, 314 (1976). If so, the challenged determination must be sustained. Guggenheim Neighbors v. Board of Estimate, 6/20/88 NYLJ at 23, col. 4 (Sup. Ct. N.Y. Co.), aff'd, 145 A.D.2d 998 (1st Dep't 1988), leave to appeal denied, 74 N.Y.2d 603 (1989); Conley, supra at 314.

As the Court of Appeals stated in Cowan,

> [w]here there is a rational basis for the local decision, that decision should be sustained. It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them. supra at 599.

Accordingly, "[t]he Courts may set aside a Zoning Board determination only where the record reveals illegality, arbitrariness or abuse of discretion. Phrased another way, the determination of

the responsible officials in the affected community will be sustained if it has a rational basis and is supported by substantial evidence in the record." Conley, supra at 314 (citations omitted). See also Soho Alliance v. New York City Board of Standards and Appeals, 264 A.D.2d 59, 62-63 (1st Dep't), aff'd 95 N.Y.2d 437 (2000), citing Fuhst v. Foley, 45 N.Y.2d 441, 444 (1978).

B. The Five Findings.

As detailed above, the Congregation applied to BSA for "waivers of zoning regulations for lot coverage and rear yard to develop a community facility that can accommodate its religious mission," and "waivers of zoning regulations pertaining to base height, total height, front setback, and rear setback to accommodate a market rate residential development that can generate a reasonable financial return" [R. 2 (¶30)].[5] After reviewing voluminous submissions by both the Congregation and Opposition, holding four hearings,[6] and considering the applicable law, the BSA rationally granted the Congregation's application because it had met each of the five specific findings of fact.

a. Religious and Educational Institution Deference

[5] 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].

[6] The public hearing on Calendar Number 74-07-BZ was held by the BSA on November 27, 2007, and thereafter continued on February 12, 2008, April 15, 2008, and June 14, 2008 [R. 1 (¶ 14)].

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

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

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

(a) Unique Characteristics

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

The Zoning Resolution effectuates this purpose by requiring that the physical condition be "peculiar to and inherent in" the zoning lot – "peculiar" to distinguish it from other zoning lots in the district and "inherent" to insure the condition's inseparability from the zoning lot. In this way the task of addressing district-wide conditions at odds with the Zoning Resolution is reserved for the legislature.

The requirement of Z.R. §72-21(a) that the unique physical condition causing the practical difficulty must be "peculiar to and inherent in the particular zoning lot" does not mean that the peculiarity be singular. For example, in Douglaston Civic Assn. v. Klein, 51 N.Y.2d 963 (1980), the applicant's alleged difficulty in developing his lot was caused by its swampy nature. The petitioners argued that, since other neighboring lots were swampy, the lot in question was not unique. The Court of Appeals disagreed:

> Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship. What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed. What is involved, therefore, is a comparison between the entire district and the similarly situated land.

Id. at 965 (Citations omitted). See also Galin v. Board of Estimate, 52 N.Y.2d 869 (1981) (upholding BSA's unique physical condition finding where there were other plots in the district

as narrow as petitioner's); and Albert v. Board of Estimate, 101 A.D.2d 836 (2d Dep't), appeal denied 63 N.Y.2d 607 (1984).

Moreover, unique physical conditions of the "zoning lot," include an evaluation of the existing building on that lot. Fuhst, supra at 445 (finding that a practical difficulty presented by a building, rather than the zoning lot on which it rests, satisfies the (a) finding for uniqueness). Indeed, while many cases examine the unique characteristics of the land itself, Courts have repeatedly found that zoning boards may consider and rely upon the uniqueness of a structure on the land, including its physical obsolescence, to satisfy the uniqueness requirement. Fiore, supra at 395 (finding of uniqueness examined the structure on the zoning lot); UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248 (1st Dep't 2002) (rejecting "petitioners' contention that the requirement of 'unique physical conditions' in New York City Zoning Resolution § 72-21 (a) refers only to land and not buildings"); West Broadway Associates v. Board of Estimate, 72 AD2d 505 (1st Dep't 1979), leave to appeal denied, 49 N.Y.2d 702 (1980) (reinstating a variance and sustaining the BSA's uniqueness finding based on the unique qualities of the building, not the zoning lot); 97 Columbia Heights Housing Corp. v. Board of Estimate, 111 AD2d 1078 (1st Dep't 1985), aff'd, 67 NY2d 725 (1986) (reinstating a variance and finding that the uniqueness requirement was satisfied by the demolition of a building, resulting in increased costs); Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dep't 1985) (finding that "[t]he requirement that the hardship be due to unique circumstances may be met by showing that the difficulty complained of relates to existing improvements on the land which are obsolete or deteriorated"); Dwyer v. Polsinello, 160 A.D. 2d 1056, 1058 (3d Dep't 1990); and Dwyer v. Poisinello, Sr., 160 AD2d 1056, 1058 (3d Dep't 1990) (finding of unique circumstances based on the obsolete building on the zoning lot).

Community Facility Variances

The BSA properly determined that a combination of the programmatic needs of the Congregation, and the unique physical conditions at the Property, including the physical obsolescence and poorly configured floor plates[7] of the existing Community House, created an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations" [R. 5 (¶ 74)].

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

[7] A floor plate is the total area of a single floor of a building.

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

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

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

plates of a compliant building would be small and inefficient with a significant portion of both space, and floor area allocated toward circulation space, egress and exits [R. 4 (¶ 48)].

After assessing the Congregation's assertions regarding its programmatic needs and the physical characteristics of the property, the BSA rationally concluded that the Congregation satisfied the (a) finding with regard to the community facility use. Specifically, the BSA stated:

> **WHEREAS,** . . . the Board finds that the aforementioned physical conditions, when considered in conjunction with the programmatic needs of [the] Synagogue, create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations [R. 5 (¶ 74)].

In coming to this conclusion, the BSA also rationally rejected arguments raised by the Opposition[9], including arguments asserted by petitioners herein [R. 4-6 (¶¶ 51-81)].

First, the BSA considered the Opposition's argument that the Congregation cannot satisfy the (a) finding based solely on its programmatic need and must still demonstrate that the site is burdened by a unique physical hardship in order to qualify for a variance [R. 4-5 (¶¶ 51-4, 75-6)].[10]

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[9] As detailed above, references to the Opposition are to the group of people who testified before the BSA in opposition to the Congregation's application, including counsel for the petitioners herein. Many of the arguments raised by the Opposition before the BSA are the same as those raised in the petition.

[10] Petitioners' complaints about BSA's discussion of the Congregation's use of the property and programmatic needs miss the mark. Petition, ¶¶ 103-106. As is clear from the Resolution itself, the BSA discusses these issues solely to respond to the Opposition's assertions that programmatic needs cannot constitute a hardship in support of the (a) finding for a bulk variance. The BSA does not in any way assert that the Congregation is seeking a use variance, nor does it mischaracterize the Opposition as saying that the Congregation's programs are not proper accessory uses. Rather, in discussing the Congregation's use of its community facility, the BSA simply responded to the Opposition's assertions regarding the ability of an applicant to cite to programmatic needs as the justification for the (a) finding.

In response to this objection, the BSA pointed out that not only did the Congregation assert that the site is burdened with a physical hardship that constrains an as-of-right development (e.g. limited development areas and obsolete existing Community House with poorly constructed floor plates), but that in accordance with cases such as Diocese of Rochester v. Planning Board, 1 N.Y.2d 508 (1956), Westchester Reform Temple, supra and Islamic Soc. of Westchester v. Foley, 96 A.D.2d 536 (2d Dept. 1983), zoning boards must accord religious institutions a presumption of moral, spiritual and educational benefit in evaluating applications for zoning variances and, therefore, religious institutions need not demonstrate that the site is also encumbered by a physical hardship [R. 4 (¶ 52)].

Moreover, the BSA pointed out that the cases relied upon by the Opposition in support of their argument that the Congregation must establish a physical hardship [e.g. Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710 (2d Dept. 1988) and Bright Horizon House, Inc. v. Zng. Bd. Of Appeals of Henrietta, 121 Misc.2d 703 (Sup. Ct. 1983)] are inapposite here because both of the cases concerned situations where the zoning boards determined that the variance requests were not related to religious uses and were not ancillary uses to a religious institution in which the principal use was a house of worship [R. 4 (¶ 53-4)].

In contrast, here the BSA concluded that "the proposed Synagogue lobby space, expanded toddler program, Hebrew school and adult education program, caretaker's apartment and accommodation of Beit Rabban day school constitute religious uses in furtherance of the Synagogue's program and mission" [R. 4 (¶ 55)]. Indeed, it is well-settled that day care centers and preschools have been found to constitute uses reasonably associated with the overall purpose of a religious institution [R. 5 (¶ 64), citing, Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)]. The BSA also properly concluded that the operation of the Beit Rabban school

constitutes a religious activity [R. 5 (¶ 66), citing, Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971)]. Thus, the BSA rationally rejected the Opposition's argument because: 1) the Congregation established that there are physical hardships in developing the site with a conforming building; and 2) it was not necessary for the Congregation to establish such physical hardship in order for the Congregation to satisfy the (a) finding.

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

Third, BSA rationally rejected the Opposition's argument that the Congregation's programmatic needs could be accommodated within an as-of-right building, or within the existing parsonage house already on the Congregation's campus [R. 4 (¶ 58-9)]. See also, Petition, ¶¶ 109-10. In this regard, the Board noted that the Congregation represented that an as-of right development would not meet its needs because the narrow width of the existing parsonage house (i.e. 24 feet) would make as-of-right development subject to the "sliver"

limitations of Z.R. §23-692 which would limit the height of the as-of-right development.[11] The combination of this limit in height and the need to deduct area for an elevator and stairs would result in an as-of-right development generating little additional floor area [R. 4 (¶ 60)]. Moreover, the Congregation further represented that an as-of-right development would not address the circulation deficiencies of the Synagogue, and would block several dozen windows on the north elevation of 91 Central Park West [R. 4 (¶ 61)].

As the BSA correctly recognized, where a nonprofit organization has established the need to place its program in a particular location, it is not appropriate for a zoning board to second guess that decision [R. 4-5 (¶ 62), citing, Guggenheim Neighbors, supra and Jewish Recons. Syn. of No. Shore, supra].

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.

Fourth, the BSA rationally rejected the Opposition's suggestion that the Beit Rabban School is not a programmatic need of the Congregation because it is not operated for or by the Synagogue [R. 5 (¶ 65)]. See also, Petition, ¶¶ 82-86. As the BSA correctly noted, the operation of an educational facility on the property of a religious institution is construed to be a

[11] The "sliver law" generally limits the height of new buildings and enlargements to existing narrow buildings in certain residence zoning districts, including R8 and R10 districts, in situations where the width of the street wall of a new building or the enlarged portion of an existing building is 45 feet or less. See Z.R. §23-692.

religious activity, and a valid extension of the religious institution for zoning purposes even if the school is operated by a separate corporate entity [R. 5 (¶ 66), citing, Slevin, supra]. Additionally, the Congregation noted that the siting of the Beit Rabban School on the premises helps the Synagogue to attract congregants and thereby enlarge its congregation. As the BSA correctly recognized, "enlarging, perpetuating and strengthening itself" is a valid religious activity [R. 5 (¶ 67), citing, Community Synagogue v. Bates, 1 N.Y.2d 445, 448 (1958)].

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

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

In rejecting this theory, the BSA pointed to a variety of cases in which New York State courts have found that unique physical conditions under Z.R. §72-21(a) can refer to buildings as well as land, and that obsolescence of a building is a proper basis for a finding of uniqueness [R. 5 (¶ 76), citing, Guggenheim, supra, UOB Realty (USA), supra, Matter of Commco, Inc., supra and Dwyer v. Polsinello, supra].

Finally, the Board rationally found that, contrary to the Opposition's assertions, it was not necessary for the Congregation to establish a financial need for the development project in order to establish its entitlement to the requested variances. Indeed, as the BSA properly noted, "to be entitled to a variance, a religious or educational institution must establish that

existing zoning requirements impair its ability to meet its programmatic needs; neither New York State law, nor Z.R. §72-21, require a showing of financial need as a precondition to the granting of a variance to such an organization" [R. 5-6 (¶ 78)].

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

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

Residential Variances

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

In support of its assertion that there are unique physical conditions that create practical difficulties and unnecessary hardship proceeding with an as-of-right development (i.e. a development that complies with all zoning requirements), the Congregation pointed to: 1) the development site's location on a Zoning Lot that is divided by a zoning district boundary (i.e. that is partially in an R8B zoning district and partially in an R10A zoning district; 2) the existence and dominance of a landmarked synagogue on the Zoning Lot; and 3) the limitations on development imposed by the site's contextual zoning district regulations[12] [R. 6 (¶ 86)].

i. <u>Lot Division</u>

As to the development site's location on a zoning lot that is divided by a zoning district boundary, the Congregation explained that this division constrains an as-of-right development by imposing different height limitations on the two respective portions of the lot. In this regard, in the R10A portion of the Zoning Lot (approximately 73% of the lot), a building may have a total height of 185'-0" and a maximum base height of 125'-0",[13] while in the R8B portion of the lot (approximately 27% of the lot) a building is limited to a total height of 75'-0" and a maximum base height of 60'-0" with a required front setback of 15'-0" at the maximum 60'-0" base height and a required rear setback of 10'-0". A complying development would, therefore, be forced to set back from the street line at the mid-point between the fifth and sixth floors [R. 6 (¶¶ 88-92)].

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

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

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

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

In response to the Congregation's assertions of uniqueness, the Opposition argued that the presence of a zoning district boundary within a lot is not a "unique physical condition" under the language of Z.R. §72-21. In addition, the Opposition represented that there are four other properties owned by religious institutions and characterized by the same R10A/R8B zoning district boundary division within the area bounded by Central Park West and Columbus Avenue and 59th Street and 110th Street [R. 7 (¶ 103)].

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

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

ii. Synagogue

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

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

Further, as explained by the Congregation, the site is unique because it is presently the only underdeveloped site overlapping the R10A/R8B district boundary line within a 20-block area to the north and south of the subject site [R. 7 (¶¶ 100-01)]. Moreover, the Congregation explained that all the properties within the 22-block neighboring area and bisected

by the district boundary line are developed to a Floor Area Ratio ("FAR")[14] exceeding 10.0, while the subject zoning lot is currently developed to a FAR of 2.25 [R. 7 (¶ 102)].

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

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

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

However, the Congregation represented that because of the existing Synagogue and parsonage house, height limits, setback requirements and sliver limitations, the Congregation would be permitted to use only 28,274 square feet to construct an as-of-right development [R. 8 (¶ 114)]. In addition, the Congregation represented that the averaged permissible FAR should

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

result in 144,511 square feet of zoning floor area; after development of the proposed building the Zoning Lot would only be built to a floor area of 70,166 square feet and a FAR of 4.36, and that approximately 74,345 square feet of floor area will remain unused [R. 8 (¶ 115)].[15]

In response, the Opposition asserted that the Congregation's inability to use its development rights is not a hardship under Z.R. §72-21 because: 1) as recognized in Matter of Soc. for Ethical Cult. v. Spatt, 51 N.Y.2d 449 (1980), unlike a private owner, a religious institution does not have a protected property interest in earning a return on its air rights; and 2) there is no fixed entitlement to use air rights contrary to the bulk limitations of a zoning district [R. 8 (¶ 116-17)].

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

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[15] Contrary to petitioners' allegations, the BSA's discussion and consideration of the Congregation's inability to use all of its development rights is neither wholly irrelevant nor improper. Petition, ¶¶ 102, 107, 108. Indeed, the fact that the Congregation does not need to transfer development rights in order to meet its needs and realize a reasonable return illustrates the reasonable scope and scale of the proposed project.

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

To the extent petitioners, citing various cases regarding unconstitutional takings, argue that the BSA improperly granted the Congregation variances based on a finding that the landmarking of the Synagogue and division of the subject property constituted unconstitutional takings, petitioners misrepresent the BSA's finding. Petition at pp. 43-47, 74-76. Nowhere in the Resolution does the BSA hold that either the landmarking of the Synagogue, or the division of the subject property constituted an unconstitutional taking. Rather, as provided above, the BSA, in considering Spatt, found that the concept was not applicable [R. 8 (¶ 118). Thus, to the extent petitioners raise such an argument, it is of no moment.

(b) **Financial Hardship**

Zoning Resolution § 72-21(b) requires an applicant to establish that, "because of such [unique] physical conditions, there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of [the Zoning] Resolution will bring a reasonable return . . . ." BSA's finding pursuant to Z.R. §72-21(b) is reasonable and supported by the record.

The applicant submitted to the BSA specific "dollars and cents" proof that they could not realize a reasonable return with a conforming use. See generally, Village Board of

Fayetteville v. Jarrold, 53 N.Y.2d 254 (1981); Sheeley v. Levine, 147 A.D.2d 871 (3rd Dep't 1989).

Residential Variances

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

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

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

At the November 27, 2007 hearing, the Board questioned why the analysis included the community facility floor area, and asked the Congregation to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the

site value and to evaluate an as-of-right development [R. 9 (¶ 128), 1753-56]. In response, the Congregation revised its financial analysis to also include an as-of-right community facility/residential tower building using the modified site value [R. 9 (¶ 129), 1968-2008]. The feasibility study indicated that the as-of-right scenarios, and lesser variance community facility/residential building would not result in a reasonable financial return, and that, of the five scenarios, only the original proposed building would result in a reasonable return [R. 9 (¶ 130), 1968-2008].

After this analysis, it was determined that a tower configuration in the R10A portion on the Zoning Lot was contrary to the sliver law and, as a result, the as-of-right community facility/residential tower building used in the feasibility study did not actually represent an as-of-right development [R. 9 (¶ 131)]. In addition, at the February 12, 2008 and April 15, 2008 hearings, the Board questioned the basis for the Congregation's valuation of its development rights and requested that the Congregation recalculate the value of the site using only sales in R8 and R8B districts [R. 9 (¶ 131), 3653-758, 4462-515]. Finally, the Board requested that the Congregation evaluate the feasibility of providing a complying court to the rear above the fifth floor of the original proposed building [R. 9 (¶ 132), 3653-758, 4462-515].

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

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

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

In its July 8, 2008 submission, Freeman Frazier provided a chart identifying the efficiency ratios for each respective scenario, and explained that the architects had calculated the sellable area for each by determining the overall area of the building, and then subtracting the exterior walls, the lobby, the elevator core and stairs, hallways, elevator overrun, and terraces from each respective scenario [R. 9 (¶ 137), 5171-81]. Freeman Frazier also submitted a revised analysis of the as-of-right building using the revised estimated value of the property which showed that the revised as-of-right alternative would result in a substantial loss of return [R. 9 (¶ 138), 5171-81].

In response to the Congregation's feasibility analysis, the Opposition questioned: 1) the use of comparable sales prices based on property values established for the period of mid-2006 to mid-2007, rather than using more recent comparable sales prices; 2) the adjustments

made by the applicant to those sales prices; 3) the choice of methodology used by the Congregation, which calculated the financial return based on profits, contending that it should have been based instead on the projected return on equity, and further contended that the applicant's treatment of the property acquisition costs distorted the analysis; and 4) the omission of the income from the Beit Rabban school from the feasibility study [R. 9-10 (¶¶ 139, 141, 145)].

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

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

basis is the customary model used to evaluate the feasibility of market-rate residential condominium developments [R. 10 (¶ 144)].

Petitioners, in an attempt to challenge the BSA's findings regarding the proper method to calculate the reasonable financial return cite to: 1) Red Hook v. New York City Board of Standards and Appeals, 820 N.Y.S.2d 845 (N.Y. Sup. Ct. June 2, 2006) rev'd in part, appeal dismissed in part 49 A.D.3d 749 (2d Dep't 2008); 2) Kingley v. Bennett, 185 A.D.2d 814 (2d Dep't 1992); 3) Morrone v. Bennett, 164 A.D.2d 887 (2d Dep't 1990), and 4) Lo Guidice v. Wallace, 118 A.D.2d 913 (3d Dep't 1986). Petitioners' reliance is misplaced. Indeed, the cases cited by petitioners comport with the Resolution.

In Red Hook, the owner, seeking to convert its warehouse to luxury apartments, submitted an application to the BSA for a use variance. supra. In support of its application, the owner calculated its financial return utilizing a return on equity. This comports with the Resolution which provided that "a return on equity methodology is characteristically used for income producing residential or commercial rental projects" [R. 10 (¶ 143)]. Here, the Congregation was not required to utilize a return on equity methodology because it was not seeking to develop a rental project. Rather, as held by the BSA, since the Congregation was seeking to develop five market-rate residential condominium units, "a return on profit model which evaluates profit or loss on an unleveraged basis is the customary model used to evaluate the feasibility of market-rate residential condominium developments" [R. 10 (¶ 144)].

Similarly, petitioners' reliance on Kingley, Morrone , and Lo Guidice is misplaced. In all three matters, the owners sought use variances for commercial purposes. In Kingsley, the owner sought a use variance to convert a two-story residence into a commercial office building. supra. In Morrone, the owner sought a use variance to structurally alter its

restaurant/bar in order to expand its eating facilities. supra. In Lo Guidice, the owner sought a use variance to convert a two-family residence into a restaurant. supra. That owners seeking use variances for commercial purposes utilized a return on equity method to calculate their financial return has no bearing on the instant matter, since the Congregation did not seek a use variance for commercial purposes. Further, nothing in the cited cases contradict the BSA's finding that "a return on profit model which evaluates profit or loss on an unleveraged basis is the customary model used to evaluate the feasibility of market-rate residential condominium developments." [R. 10 (¶ 144)]. Accordingly, petitioners' argument fails.

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

There is no question that the BSA adequately assessed the feasibility studies provided by the Congregation as well as the responses provided to the Opposition's questions, and petitioners' suggestion that the BSA did not fully consider the Freeman Frazier submissions, and any flaws in the submissions in rendering its decision is incorrect. For example, at the November 27, 2007 hearing, BSA Chair Srinivasan specifically explained that the Board read through the Freeman Frazier financials, and may disagree with some of the assumptions. In response to those concerns, Chair Srinivasan asked the Congregation to provide an analysis of the property without the 20,000 square feet that's being used for the synagogue. Specifically,

the BSA wanted to see a valuation analysis that did not include a proposed developer having to pay for that portion of the site that is not going to be used by the developer because it is already being used by the synagogue [R. 1753-54]. This type of in-depth discussion of the Freeman Frazier assumptions and conclusions continued throughout the February, April and June public hearings [R. 3653-758, 4462-515, 4937-74].

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

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

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

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

BSA properly did not require the Congregation to submit the alleged additional pages because they were not necessary for its review. BSA, in examining whether construction prices are reasonable, reviews the base unit price, 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. Moreover, as admitted by petitioners, strict rules of evidence do not apply to an administrative hearing. Petition ¶ 193. Thus, there was no requirement for the alleged additional pages to be submitted.

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, 5178].

Accordingly, since petitioners' proposed calculation would not have resulted in a reasonable return, petitioners' argument fails.[16]

Third, petitioners argue that Freeman Frazier and BSA improperly interchanged the phrases "acquisition cost" "'market value' of the land," and "site value." Petition ¶ 132. Petitioners further argue that "[t]he inconsistent use of terms is intended to create complexity and make it difficult for courts to review the assertion of the Congregation or the findings of the BSA." Petition ¶ 133. Petitioners' argument does not merit serious consideration. 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.

Fourth, petitioners argue that the Congregation violated BSA's written guidelines, i.e., BSA's Detailed Instructions For Completing BZ Application Item M(5), because it "failed to provide both the market value of the property or the acquisition cost and date of acquisition as required by Item M." Petition ¶ 232. Petitioners are incorrect in several respects. First, contrary to petitioners' argument, the Congregation submitted both the market value of the property, and acquisition costs and date of acquisition. The dates of acquisition were provided in the deeds [R. 168-181, 1918-1926]. The market value of the property which, as stated above, is synonymous with the acquisition cost, was also provided as part of the Congregation's Economic Analysis

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

Summary [R. 5178].[17] Accordingly, petitioners' argument fails. Second, contrary to petitioners' suggestion, BSA's Detailed Instructions For Completing BZ Application Item M(5) does not set forth absolute requirements. Rather, it sets forth general guidelines for financial submissions. It provides,

> [g]enerally, for cooperative or condominium development proposals, the following information is required: market value of the property, acquisition costs and date of acquisition; hard and soft costs (if applicable); total development costs; construction/rehabilitation financing (if applicable); equity; breakdown of projected sellout by square footage, floor and unit mix; sales/marketing expenses; net sellout value; net profit (net sellout value less total development costs); and percentage return on equity (net profit divided by equity).

Thus, there was no requirement to submit the information and petitioners' argument fails.

Moreover, to the extent, petitioners, citing case law, assert that the Congregation was required to provide the subject property's original acquisition cost, petitioners misapply the cases upon which they rely. Contrary to petitioners' assertion, none of the cited cases require an owner seeking lot coverage, rear yard, height and setback variances to submit its original acquisition costs.

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

In Douglaston Civic Assoc. v. Galvin, 36 N.Y.2d 1 (1874), and Varley v. Zoning Bd. of Appeals, 131 A.D.2d 905 (3d Dep't 1987), the Courts found that the original acquisition cost was relevant where an applicant sought a use variance. Specifically, the Court in Douglaston Civic Assoc. found that "[w]e would note further that the original cost becomes relevant where, despite the prohibition upon converting the land to another use, the land has nevertheless appreciated significantly to the extent that the owner may have suffered little or no hardship." supra at 9. Since, the Congregation neither sought, nor was granted, a use variance, Douglaston Civic Assoc. and Varley are not applicable.

Further, Curtiss-Wright Corp. v. East Hampton 82 A.D.2d 551 (2d 1981), Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267 (2d Dep't 1983), and Sakrel, Ltd. v. Roth 176 A.D.2d 732 (2d Dep't 1991) are inapplicable to the case at hand. In those matters, the Court, in relevant part, considered the constitutionality of zoning restrictions, not whether the BSA properly granted or denied variances. Specifically, in Curtiss-Wright Corp, the Court considered whether a zoning restriction, as applied, resulted in an unconstitutional taking. supra. In Northern Westchester Professional Park Associates, the Court considered whether a zoning ordinance, as applied to the owner's property, was constitutional. supra. In Sakrel, Ltd., the Court, having considered whether the Zoning Board of Appeals properly denied petitioner's variance application, found,

> turning to the claim that the denial of the petitioner's variance application constitutes a confiscatory taking of its property, the failure of the petitioner to divulge its purchase price is fatal. Although it cannot erect a house on its land, the petitioner's adamant and persisting refusal to divulge the amount of its original investment precludes us from determining whether or not all but a bare residue of the economic value of the land has been destroyed. 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. supra at 737.

These issues are not before this Court. Despite petitioners' repeated efforts to incorporate the issue of unconstitutional takings into the Resolution, the BSA simply did not make any findings regarding takings. Consequently, petitioners' argument fails.

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

Sixth, petitioners argue that Freeman Frazier purposefully altered the value/square foot, lot size, and lot value in calculating the Congregation's Scheme A in order to manipulate the return. Petitioner ¶¶ 144-174. Petitioners' argument is without merit. As outlined above, the Congregation implemented the changes in response to questions and issues specifically raised by the BSA. In implementing these changes, the value/square foot, lot size, and lot value changed because the scope of the site to be developed and/or evaluated changed. For example, as provided above, at the November 27, 2007 hearing the BSA "questioned why the analysis

included the community facility floor area and asked the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of-right development" [R. 9 (¶ 128)]. Further, contrary to petitioners' allegation, it was rational for BSA to find that the Congregation satisfied the Z.R. §72.21(b) finding because the final value/square foot, lot size, and lot value were based on comparable property sales and limited to the area which could be developed for residential purposes. [R. 9 (¶¶ 128-129, 131, 133, 139-140), R. 4651-52, 5173-74].

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

Eighth, petitioners argue that BSA improperly used the term "financial return based on profits" in the Resolution because "[t]here is no such concept." Petition ¶ 205. Petitioners' argument runs contrary to basic economics and is of no moment. It is understood that a financial return on an investment is based on profit. Regardless, even assuming arguendo that the BSA did use an incorrect term, such an error does not result in the nullification of an entire Resolution, especially whereas here, the alleged error has no bearing on the BSA's rationale. The

issue before the BSA was whether the methodology utilized by the Congregation in calculating its estimated return was proper. As provided above, the BSA rationally found that the methodology used was proper. Supra ¶ 282. Thus, petitioners' argument fails.

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

(c) Essential Character of the Neighborhood

Z.R. § 72-21(c) requires the applicant to establish that if a variance is granted, it will not alter the essential character of the neighborhood, will not impair the use of adjacent property, and will not be detrimental to the public welfare. The Record before the BSA establishes that the applicant set forth substantial evidence to prove that the requirements of Z.R. § 72-21(c) have been met.

Community Facility Variances

With regard to the community facility variances (i.e. the lot coverage and rear yard variances), the BSA properly concluded that the proposed rear yard, and lot coverage variances will not negatively affect the character of the neighborhood or adjacent uses [R. 10-11 (¶ 151- 169)]. As set forth in its Resolution, to reach this conclusion, the BSA conducted an

environmental review of the proposed development, and found that it would not have significant adverse impacts on the surrounding neighborhood [R. 10 (¶ 155)].[18]

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

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

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

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

In any event, in response to the substance of the Opposition's concerns regarding traffic impacts, the Congregation explained: 1) the life cycle events will have no impact on traffic because they are held on the Sabbath and, as Congregation Shearith Israel is an Orthodox Synagogue, members and guests would not drive or ride to these events in motor vehicles; 2) significant traffic impacts are not expected from the increased number of weddings because they are generally held on weekends during off-peak periods when traffic is typically lighter; and 3) significant traffic impacts are not expected from the expanded toddler program because it is not expected to result in a substantial number of new vehicle trips during peak hours [R. 10 (¶¶ 159-161)].

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

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

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

Residential Variances

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

As detailed above, the height and setback variances requested by the Congregation would result in a building that rises to a height of approximately 94'-10" along West 70th Street before setting back by 12'-0" and continuing to a total height of 105"-10'. A compliant building in an R9B zone would have a maximum height of 60'-0" before being required to set back 15'-0" and could rise to a total height of 75'-0". In addition, the requested variances would result in a rear setback of 6'-8" instead of the required 10'-0" [R. 11 (¶¶ 171-74)].

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

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

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

Similarly, the BSA properly concluded that the Opposition's assertion that the proposed building disrupts the mid-block character of West 70th Street, and thereby diminishes the visual distraction between the low-rise mid-block area, and the higher scale along Central Park West missed the mark [R. 11 (¶ 182)]. Indeed, the Congregation submitted a streetscape of West 70th Street indicating that the street wall of the proposed building matches that of the

adjacent building at 18 West 70th Street, and that, as a result, the proposed building would not disrupt midblock character [R. 11 (¶ 183), 2022].

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

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

Specifically, the Opposition asserted that: 1) unlike an as-of-right building, because the proposed building abuts the easterly wall and court of the building located at 18 West 70th Street it will eliminate natural light and views from seven eastern facing apartments; and 2) the proposed building will cut off natural light to apartments in the building located at 91 Central Park West, and diminish light to apartments in the rear of the building located at 9 West 69th Street which will result in reducing the market values for the affected apartments [R. 11-12 (¶¶ 187-89)].

In response, the BSA noted that the Congregation correctly explained that as to the lot-line windows at 18 West 70th Street, the Opposition's arguments are of no moment

because lot line windows cannot be used to satisfy light and air requirements.[19] As a result, rooms which depend solely on lot line windows for light and air were necessarily created illegally and the occupants lack a legally protected right to their maintenance [R. 12 (¶ 190)]. Likewise, the Congregation correctly explained that a property owner has no protected right in a view [R. 12 (¶ 191)].

However, notwithstanding these arguments, the BSA nonetheless directed the Congregation to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows than originally proposed [R. 12 (¶¶192-93)]. The BSA directed the Congregation to do so, not because the Congregation had a legal obligation to avoid blocking adjoining lot line windows but, rather, as a compromise to lessen the impact of the project. Thus, contrary to petitioners' argument [Petition, ¶ 280-82], there was absolutely nothing improper about the BSA not requiring the Congregation to salvage the four lot line windows in the front of the adjoining lot.

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

As explained in the BSA's Resolution, CEQR regulations provide that shadows on streets and sidewalks or on other buildings are not considered significant under CEQR. Rather, an adverse shadow impact is only considered to occur when the shadow from a proposed project falls upon a publicly accessible open space, a historic landscape, or other historic

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

resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation. Here, however, a submission by the Congregation states that no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street. As a result, any incremental shadows in this area would not constitute a significant impact on the surrounding community [R. 12 (¶¶ 195-196)].

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

As a result the Board correctly stated as follows in its Resolution:

> **WHEREAS**, based upon the above, the Board finds that neither the proposed community facility use, nor the proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare [R. 12 (¶ 200)].

(d) Non-self created hardship

Zoning Resolution § 72-21(d) requires that the evidence support a finding that the hardship claimed was not created by the owner of the premises or a predecessor in title. In this

case, the BSA properly found that the hardship the applicant faced in developing the property was not a self-created hardship within the meaning of the Zoning Resolution.

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

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

(e) Minimum Variance Necessary to Afford Relief

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

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

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

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

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

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

the BSA properly concluded that "the Opposition has not established such impacts" [R. 13 (¶¶ 214-15)].

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

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

In conclusion, the Record amply supports the BSA's granting of a variance. All of the criteria set forth in Z.R. §72-21 have been met and the BSA's findings are supported by substantial evidence in the Record as to each of the five necessary findings.[20] Indeed, contrary to petitioners' allegations [Petition, ¶¶ 325-37] the BSA made specific findings with regard to each of the Z.R. §72-21 criteria.

Contrary to petitioners' allegations [Petition, ¶ 321], the BSA did not run afoul of City Charter Section 663 in voting on the Congregation's variance application on August 26, 2008. Indeed, that section simply requires that the BSA keep minutes of its proceedings and record the vote of each member upon the questions presented. Here the BSA recorded the minutes of its proceedings in the transcripts provided herewith [R. 1726-1823, 3653-758, 4462-

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

515, 4937-74] and recorded the vote of each member of the Board on the question presented to it which was whether to grant the Congregation's application for the requested variances [R 5784-95]. That the vote did not break out each specific variance request is simply of no moment because the Resolution adopted by the Board set out the Board's specific findings on each variance request [R. 1-14]. That the Resolution was not presented to the public at the August 26, 2008 hearing is also of no moment because, as required by 2 RCNY § 1-02(d), following the August 26, 2008 vote, the Board's determination was "incorporated in a resolution formally adopted and filed at the office of the Board," and was "made available to the public" within several days thereafter.

POINT II

THE CONGREGATION WAS NOT REQUIRED TO APPLY TO THE LANDMARKS PRESERVATION COMMISSION FOR A Z.R. §74-711 SPECIAL PERMIT PRIOR TO APPLYING TO THE BSA FOR A VARIANCE.

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

First, petitioners misapply the law surrounding exhaustion of administrative remedies. Under the theory of exhaustion, a party is required to exhaust their available administrative remedies before seeking relief from the Courts. See Young Men's Christian Assn, supra at 375 (citations omitted) (holding "[t]he doctrine of exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals, rather

than to the courts, and . . . to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts"; Abreu v. New York City Police Dep't, 182 A.D.2d 414 (1st Dep't 1992) (finding "[i]t is well settled that a person aggrieved by an administrative determination must exhaust all available administrative remedies before maintaining a judicial challenge")(citations omitted). Since BSA is not a Court, but rather an administrative agency itself, the law is inapplicable. Second, there is no legal requirement that a party seek a Z.R. §74-711 special permit before seeking a variance from BSA. Rather, a BSA variance and Landmarks Preservation Commission special permit are two separate forms of administrative remedies available to parties. A party may, at its choice, seek a Z.R. §74-711 special permit from Landmarks Preservation Commission, or seek a variance from BSA pursuant to Z.R. §72-21(a). The only pre-requisite the Congregation had to satisfy in order to seek a variance was to apply for, and obtain a Certificate of Appropriateness from the Landmarks Preservation Commission. As admitted by petitioners, the Congregation obtained the requisite Certificate of Appropriateness. Thus, petitioners' argument fails.

POINT III

THE BSA'S PRE-APPLICATION MEETING WITH THE CONGREGATION WAS PROPER.

We turn next to petitioners' suggestion that it was improper for the BSA to meet with representatives of the Congregation in November 2006, six months in advance of their filing their application before the BSA.[21] In this regard, in their petition, petitioners complaint that "[o]n November 8, 2006 Respondents Srinivasan and Collins held an ex parte meeting with the Congregation's lawyers and consultants at BSA headquarters, did not notify opponents of the project, and has since refused to provide information to opponents as to what occurred at said meeting." Petition, ¶¶ 27, 289-303. Contrary to petitioners' allegations, there was absolutely nothing improper about this meeting.

Pre-application meetings are a routine part of practice before the BSA, and the procedures for the conduct of such meetings are clearly outlined in a publication entitled "Procedures for Pre-Application Meetings and Draft Applications" which is available on the Board's website (and provided herewith as Exhibit E). As explained in that document, pre-application meetings,

> are designed to facilitate discussion between potential applicants and the BSA of development proposals that may require discretionary relief.
>
> Such meetings are conducted on an informal basis, and have no bearing on the ultimate outcome of the case if subsequently filed.

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

....

> Draft applications, which are adjunct to the Pre-application Meeting process, are submitted for staff-level review prior to formal filings. This review is designed to reduce the number of comments on the Notice of Objections, and to ensure that filed applications, which are later sent to community boards, elected officials and neighbors, have fewer deficiencies.

The point of these meetings is not to pre-judge or improperly influence potential applications, but, rather to streamline the BSA's review process. In this regard, the Procedures document further explains as follows:

> [t]he BSA historically has offered some form of pre-application meeting process to potential applicants. However, many major cases have been filed without any pre-application review. Some of these cases have been poorly presented, and were deficient in both substance and form. This causes unnecessarily protracted technical review and undue delay in calendaring.
>
> When such cases come to public hearing, the Board often is compelled to remedy problems that could have been easily avoided prior to filing. Additionally, the Board must guide the applicant through the process of meeting the findings required for the grant, which usually necessitates numerous continued hearings.
>
> Through the Pre-application meeting process, the BSA seeks to:
>
> - Facilitate a more efficient and expeditious technical and public review process;
> - Provide technical and procedural advice to both inexperienced and experienced applicants on the formulation and execution of potential applications;
> - Provide substantive feedback on the merits of the proposal;
> - Ensure better quality of submissions, and reduce or eliminate the review of unnecessary or poor quality submissions;
> - Establish case-to-case consistency in materials submitted for review;

- Identify early in the process the need for additional analyses, technical data, modifications, substantive discussion, and corrections; and

- Suggest alternative routes to achieve the desired outcome.

At the start of the November 27, 2007 public hearing, Chair Srinivasan explained the routine nature and propriety of the pre-application meeting. Specifically, the Chair stated:

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

Indeed, contrary to petitioners' allegations, the Citywide Administrative Procedures Act ("CAPA") simply does not apply to proceedings before the BSA. Unlike an adjudicatory hearing, the purpose of these public hearings is not to make an "evidentiary finding," as that terms is understood in the context of an adjudication, but rather to permit comment and the submission of documents upon which the BSA commissioners base their exercise of discretion within the regulatory framework. See 2 RCNY §§ 1-01 (6); 1-01.1 (b), (k). See also Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm's of NY, 62 A.D. 2d 188, (1st Dep't 1978) (hearing before Tax Commission concerned information gathering and was non-adversarial in that the commissioners asked questions and witnesses were not

interrogated or cross-examined and not pursuant to direction of law), appeal denied, 45 N.Y.2d 706 (1978), appeal after remand, 81 A.D. 2d 64, (1st Dep't 1981), motion to dismiss appeal denied, 55 N.Y.2d 823, (1981), rev'd on other grounds, 55 N.Y.2d 512 (1982); Matter of John F. Poster v. Scott A. Strough, 299 A.D.2d 127 (2d Dep't 2002) (hearing where the only papers before the Town Board of Trustees were those submitted in support of the permit application, and thus were not evidentiary in form, was informational and not an adjudicatory hearing).

A BSA hearing also differs from an adjudicatory hearing in that there is neither a judge nor a standard of proof. Rather, a determination is made by means of a vote by members of the Board. See NYCRR § 1-10(a) ("Any appeal...must receive the three affirmative votes to be granted. If an application fails to receive the three affirmative votes, the action will be denied"); City Charter §663 ("a concurring vote of at least three members shall be necessary to grant...an appeal"). Compare New York Public Interest Research Group, Inc. v. Williams, 127 A.D.2d 512 (1st Dep't 1987) (ALJ in adjudicatory hearing removed in face of possible financial interest in outcome); Matter of Samuel W v. Family Court, 24 N.Y.2d 196(1969) (under the Family Court Act, determination at the conclusion of an adjudicatory hearing must be based on the preponderance of the evidence).

Even if CAPA did apply, at the time of the pre-application meeting there is simply no "adjudication" before the BSA such that it is in any way improper for the Board to meet with an applicant outside the presence of anyone who may be opposed to such an application.[22] Indeed, potential applicants who attend pre-application hearings may elect to

[22] As defined in Section 1041 of the Citywide Administrative Procedures Act, an "adjudication" is a "proceeding in which the legal rights, duties or privileges of named parties are required by law to be determined by an agency on a record and after an opportunity for a hearing."

either not file applications with the Board, or substantially modify that which they initially contemplate filing. Thus, in many instances that which the Board looks at during the pre-application meeting never even becomes the subject of an actual application.

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

Second, following the BSA's November 2006 meeting with the Congregation petitioners' counsel sent BSA FOIL requests seeking information about this meeting, to which the BSA responded and provided petitioners' counsel with copies of documents that had been submitted by the Congregation. Copies of this correspondence are provided herewith as Exhibit C-I.[23] Third, upon learning that petitioners' counsel was upset about this pre-meeting, the BSA offered petitioners' counsel the opportunity for his own pre-meeting, he refused. Fourth, all those opposed to the Congregation's application were given ample time to submit documents and testimony during the course of the Board's lengthy review of the Congregation's application.

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

POINT IV

THE BSA FOLLOWED THE PROPER PROCEDURES IN CONDUCTING ITS REVIEW OF THE CONGREGATION'S VARIANCE APPLICATION.

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

First, contrary to petitioners' allegations, there was nothing improper about BSA going ahead with the November 27, 2007 hearing [Petition, ¶¶ 94-96]. In support of its argument in this regard, petitioners assert that the BSA should not have held a hearing on November 27, 2007 because it provided the Congregation with only 29 days (rather than 30 days) notice of this hearing, and because the application was not substantially complete because the Community Board had not yet opined on the application.[24] As a preliminary matter, petitioners do not have standing to assert an objection to the notice given by the BSA to the Congregation as they are not suggesting that they were not provided with the required 20 days notice of the BSA's first hearing. Moreover, the application was substantially complete at the time the hearing was

[24] 2 RCNY 1-06(g) provides as follows: "after examiner(s) have determined the application to be substantially complete, the applicant shall be notified by the Executive Director, on the appropriate form, of the date set for the public hearing, which shall be at least thirty (30) days after the mailing of said notice. With this notice, the applicant shall be supplied with an official copy of the appropriate forms, which he or she is required to send not less than twenty (20) days prior to the date of such hearing to: (1) The affected Community Board(s) (or Borough Board); (2) The affected City Councilmember; (3) The affected Borough President; (4) The City Planning Commission; and (5) Affected property owners.

scheduled, and the fact that the Community Board had not yet voted on the application is simply irrelevant as there is no dispute that they provided their recommendation to the BSA in December 2007, well in advance of the August 2008 decision [R. 1886-92].[25]

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

Third, it was not improper for the BSA to take testimony without swearing in witnesses [Petition, ¶ 309], or allowing the Opposition to ask direct questions of the Congregation at the hearing [Petition, ¶¶ 308, 312]. As discussed above, the proceedings before the BSA are simply not adversarial proceedings, and those opposed to the application have no

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

due process right to examine the applicant. In any event, here, the Opposition did effectively "examine" the Congregation in its written submissions to which the Congregation responded.

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

CONCLUSION

For all the above reasons, as well as those set forth in the verified answer, the determination of the BSA should be upheld and the petition dismissed.

Dated: Brooklyn, New York
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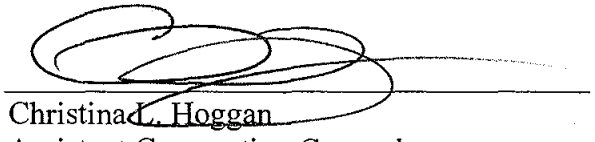
By: 

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