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

- x

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,	:	Index No. 650354/08
Petitioners,	:	
- against -	:	
CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,	:	
Respondents.	:	

- x

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR LEAVE TO REARGUE

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Petitioners
488 Madison Avenue
17th Floor
New York, New York 10022
(212) 755-7500

Certified pursuant to § 130-1.1(a)
of the Rules of the Chief Administrator

By: _____
Rachelle Rosenberg

Dated: October 29, 2009

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

- x

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,	:	Index No. 650354/08
Petitioners,	:	
- against -	:	
CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,	:	
Respondents.	:	

- x

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR LEAVE TO REARGUE

PRELIMINARY STATEMENT

This memorandum of law is submitted in support of the motion by Petitioners Landmark West!, Inc., 91 Central Park West Corporation and Thomas Hansen (together, the "Petitioners"), pursuant to CPLR 2221(d), for leave to reargue this Court's decision and order dated August 4, 2009, served with notice of entry dated October 6, 2009 (the "Decision") [Exhibit A], and upon granting of reargument,

withdrawing the Decision and vacating the judgment incorporated in the Decision pursuant to CPLR 5015.[1]

Petitioners' Second Amended Verified Petition (the "Petition") [Exhibit B] sought to vacate the August 26, 2008 resolution (the "Resolution") [Exhibit C] of Respondent City of New York Board of Standards and Appeals ("BSA") which granted all requests made in the application of Respondent Congregation Shearith Israel ("CSI") for seven variances from important requirements of the New York City Zoning Resolution (the "Zoning Resolution"), which are intended to "promote the public health and welfare, including provisions for adequate light, air [and] convenience of access." General City Law, § 20.

It is respectfully suggested that, due to the presentation to the Court of two separate cases,[2] raising a plethora of issues -- some overlapping and others not -- the Court misconstrued the facts and failed to address factual and legal issues raised by Petitioners.

---

[1] All exhibits are annexed to the October 23, 2009 affirmation of David Rosenberg (the "Rosenberg Aff."). Unless otherwise indicated, all emphasis herein is added and all internal citations are omitted.

[2] In addition to this case, the Court was confronted with Kettaneh *v.* Board of Standards and Appeals of the City of New York, Index No. 113227/08 ("*Kettaneh*"), which the Court dismissed a month before the Decision, by decision dated July 10, 2009, entered July 24, 2009 (the "*Kettaneh* Decision") [Exhibit D].

It is also respectfully suggested that the deference accorded by the Court to BSA's Resolution went beyond that required or permitted by well-established precedent, warranting reconsideration.

STATEMENT OF FACTS

The following facts are relevant to this motion. A more complete recitation of the facts is set forth in the Petition [Exhibit B].

The March 31 Preliminary Hearing

On March 31, 2009, Petitioners and Respondents appeared for a preliminary hearing before this Court together with the *Kettaneh* petitioners. At that time, issue had not been joined in this action. Rather, it was subject to a motion to dismiss, by all Respondents, on the ground that it should have been brought as an Article 78 proceeding.

The discussion of the two matters at the preliminary hearing, with a less than perfectly recorded transcript [Exhibit E], apparently led the Court to believe that the facts and legal arguments presented by Petitioners -- with the exception of two issues -- were the same as those presented by the *Kettaneh* petitioners. To the contrary, Petitioners' arguments as to BSA's lack of jurisdiction and violation of express legal

standards were not the same as those raised and rejected in *Kettaneh* and should be reconsidered by the Court.

At the hearing, the Court questioned the attorney for Petitioners, David Rosenberg, about the differences between this action and *Kettaneh*, to which, Mr. Rosenberg responded [Exhibit E, p. 5, l. 17-23 - p. 6, l. 4]:

> Well I don't know everything that's in their papers. Yesterday I received from Mr. Sugarman, the attorney for the plaintiff[s] in the other case, I think a couple thousand pages of documents, which I had not seen previous[ly]. So I'm not fully familiar with their case. I wasn't served with the papers in that case.
>
> * * *
>
> I don't know what the differences between their cases are.

When the Court asked BSA's attorney to describe the differences, even she first replied [Exhibit E, p. 6, l. 11], "If you will give me a minute." After an intervening colloquy with Kettaneh's attorney, BSA's attorney noted two differences between *Kettaneh* and this proceeding [Exhibit E, p. 27, l. 17-26], to which CSI's attorney added his understanding of the issues [Exhibit E, p. 28, l. 7 - p. 29, l. 23].

Finally, the Court asked Mr. Rosenberg to address those comments, which he did [Exhibit E, p. 30, l. 12 - p. 33, l. 19].

In response to the Court's repeated inquiry about the differences between the two actions, Mr. Rosenberg stated "I think the rest of the issues are probably encompassed in [*Kettaneh*'s] petition" [Exhibit E, p. 33, l. 22-23].

Following the March 31 preliminary hearing, the Court issued an April 17, 2009 order [Exhibit F] converting this case into an Article 78 proceeding.

The Decision

After the parties exchanged further papers, the Court issued its Decision which recites [Exhibit A, p. 2]: "At the March 31 oral argument, the court questioned counsel for petitioners as to the differences between the instant proceeding and the Kettaneh proceeding. Petitioners' counsel articulated two specific claims . . . that were not raised by petitioners in Kettaneh."

In fact, as set forth above, Mr. Rosenberg stated he was not fully aware of the extent of the issues raised in *Kettaneh*. Rather, only the attorneys for the other parties attempted to identify all of the differences, since each of them, but not Mr. Rosenberg, had served, or had been served with, the *Kettaneh* papers.

The Decision incorporated the *Kettaneh* Decision and only discussed two of the claims raised in the Petition.

Focusing only on those two issues, the Court failed to address the other issues raised by Petitioners, which had not been raised or decided in *Kettaneh*.

Solely due to the significance of the jurisdictional issue, it will be discussed first, followed by a discussion of the issues not addressed by the Court.

ARGUMENT

Point I

The Court Accorded Undue Deference To BSA's Determination Of Its Own Jurisdiction -- Jurisdiction Was Not Established Pursuant To § 666(6)(a) of the New York City Charter

The DOB Notice of Objections Was Not Issued By One Of The Two Officials Required by the City Charter

CSI's variance application to BSA [Exhibit G] expressly sought review of an October 28, 2005 Notice of Objections (the "2005 DOB Notice of Objections") [Exhibit H][3] issued by the New York City Department of Buildings ("DOB"), which refused to approve CSI's plans for a new building.

---

[3] The Notice of Objections is dated, at the top, October 28, 2005, the date of its original issuance. Two years later, on March 27, 2007, it was presented to DOB for a final denial to permit the appeal to the BSA.

Neither the 2005 DOB Notice of Objections [Exhibit H], nor a later issued August 24, 2007 Notice of Objections (the "2007 DOB Notice of Objections") [Exhibit I] was issued by the Commissioner of Buildings or the Manhattan Borough Commissioner as required by § 666(6)(a) of the New York City Charter (the "Charter"):

> **§ 666 Jurisdiction**
>
> The board shall have power:
>
> * * *
>
> 6. To hear and decide appeals from and review,
>
> (a) except as otherwise provided by law, any order, requirement, decision or determination the commissioner of buildings or any borough superintendent of buildings acting under written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five. . . .

Rather, as Petitioners established, without contest, the 2005 and 2007 DOB Notices of Objections were issued by Kenneth Fladen, a "provisional Administrative Borough Superintendent" [Exhibit J], who also signed on the line for "Examiner's Signature" [Exhibits H and I], thereby eliminating the two step review normally required.

In concluding that BSA had jurisdiction pursuant to another provision of the Charter, § 668, the Decision [Exhibit A, p. 4] cited solely to footnote 2 on page 1 of the BSA Resolution [Exhibit C], stating:

> [2] A letter dated January 28, 2008 to Chair Srinivasan from David Rosenberg, an attorney representing local residents, claims that a

> purported failure by the [DOB] Commissioner or the Manhattan Borough Commissioner to sign the above-referenced August 28, 2007 objections, as allegedly required by Section 666 of the [Charter], divests the Board of jurisdiction to hear the instant application. However, the jurisdiction of the Board to hear an application for variances from zoning regulations, such as the instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner.

The Decision then cited Matter of Salvati *v.* Eimicke, 72 N.Y.2d 784, *reargd. denied*, 73 N.Y.2d 995 (1969), and New York City Council *v.* City of New York, 4 A.D.3d 85, 97 (1st Dep't 2004), for the proposition that an agency's construction of a statute it administers will be accorded deference, if not unreasonable or irrational, where the statutory language suffers from some "fundamental ambiguity" or requires special knowledge or understanding.

Here, there was no ambiguity; to the contrary, the statute is clear and precise.

As the Court of Appeals held in Kurcsics *v.* Merchants Mutual Insurance Company, 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454, 458 (1980):

> Where . . . the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.

See also, KSLM-Columbus Apartments, Inc. *v.* New York State Division of Housing and Community Renewal, 5 N.Y.3d 303, 312, 801 N.Y.S.2d 783, 787 (2005).

This rule was reiterated and reaffirmed by the Court of Appeals just this week in Roberts *v.* Tishman Speyer Properties, L.P., ___ N.Y.2d ___, ___ N.Y.S.2d ___, 2009 Slip Op. 07480 (October 22, 2009), 2009 N.Y. LEXIS 3953.

Section 666(6)(a) of the Charter expressly sets forth the requirements for BSA jurisdiction to hear and decide appeals from determinations made by DOB.

BSA's own website explains [Exhibit K]:

> The Board can only act upon specific applications brought by . . . parties who have received prior determinations from one of the enforcement agencies noted above. The Board cannot offer opinions or interpretations generally and it cannot grant a variance or a special permit to any property owner who has not first sought a proper permit or approval from an enforcement agency.

The Zoning Handbook, published by the New York City Department of City Planning (January 2006), describes the role of the Department of Buildings in the process of administering the Zoning Resolution in the following terms [Exhibit L]:

> The NYC Department of Buildings has primary responsibility for enforcing the Zoning Resolution and for interpreting its provisions. Among its responsibilities, the Department of Buildings:

- Grants applications for building permits when the provisions of the Zoning Resolution, the Building Code and other applicable laws are met;

* * *

- Interprets the provisions of the Zoning Resolution, subject to appeal to the BSA, and promulgates procedures and guidelines for its administration. . . .

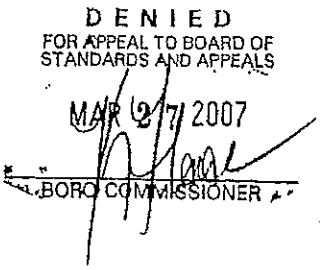
Similarly, the Zoning Handbook, in describing BSA's role, states [Exhibit L, p. 101]:

> The BSA . . . is empowered to hear and decide requests for variances from property owners whose applications to construct or alter buildings have been denied by the Department of Buildings or another enforcement agency as contrary to the Zoning Resolution or other building ordinances. . . .

Finally, this Court, itself, in the *Kettaneh* Decision, stated [Exhibit D, p. 3, *footnote omitted*]:

> The Application Process
>
> In order to develop a property that has a non-conforming use of non-complying bulk, the applicant must submit an application to the [DOB]. After the DOB issues its denial of the non-conforming or non-complying proposal, the property owner may then apply to the BSA for a variance.

CSI's Application to BSA [Exhibit G] was jurisdictionally premised on the 2005 DOB Notice of Objections [Exhibit H], itself, which was presented to, and stamped by, DOB as follows:



In affirming a dismissal of a challenge to denial of a variance, the Court of Appeals has held that a board of appeals (such as BSA) has no authority to hear an application for a variance in the first instance. It may only do so on an appeal from a designated agency or officer. Any determination made by such a board not based upon an appeal is a nullity. Mamaroneck Commodore, Inc. *v.* Bayly, 260 N.Y. 528 (1932); *see also,* Von Elm *v.* Zoning Bd. Of App., 258 A.D. 989, 17 N.Y.S.2d 548 (2d Dep't 1940).

Section 668 of the Charter, cited by BSA's footnote to which the Court deferred, merely sets forth the procedures to be followed after an application properly is before BSA; it does not, either expressly or by implication, set forth the jurisdictional predicate for BSA review.

The 2005 DOB Notice of Objections Was
Not Issued With Respect To The Plans
Attached To CSI's Variance Application

As previously discussed, CSI's variance application [Exhibit G] was based upon the 2005 DOB Notice of Objections [Exhibit H], which listed eight items, the last of which was:

> PROPOSED SEPARATION BETWEEN BUILDINGS IN R10A DOES NOT COMPLY. 0.00' PROVIDED INSTEAD OF 40.00' CONTRARY TO SECTION 24-67 AND 23-711.

In response to the Application, BSA issued a June 15, 2007 notice of objections [Exhibit M], which required CSI to address, individually, 48 BSA Objections.

Among the BSA objections, the following three required CSI to address objection No. 8 to the 2005 DOB Notice of Objections:

> 20. Page 24: Please correct the title of the first full paragraph by replacing "Building Separation" with "Standard Minimum Distance Between Building."
>
> 21. Page 24: Please note that ZR § 23-711 prescribes minimum distance between a residential building and any other building on the same zoning lot. Therefore, with the first full paragraph, please clarify that the DOB objection for ZR § 23-711 is due to the lack of distance between the residential portion of the new building and the existing community facility building to remain.
>
> 25. It appears that the "as-of-right" scenario would still require a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings) given that it contains residential use (see Objection # 21). Please clarify.

CSI's September 10, 2007 response [Exhibit N] failed to address these three BSA Objections, stating:

> N/A: DOB Objection #8 omitted by DOB upon reconsideration (See, DOB Objection Sheet and Proposed Plans, dated August 28, respectively).

CSI claimed that it filed an application with "Proposed Plans, dated August 28, 2007" with DOB for reconsideration of the 2005 DOB Notice of Objections and the 2007 DOB Notice of Objections omitted Objection No. 8 from the 2005 DOB Notice of Objections.

DOB issued the 2007 DOB Notice of Objections even though there is no indication that the "Proposed Plans" submitted with the reconsideration application were revised to comply with the noted provisions of the Zoning Resolution.

CSI did not produce to BSA or to Petitioners its alleged reconsideration application or the documents allegedly submitted therewith, nor are they on file at DOB.

When Landmark West! raised this issue at the February 12, 2008 BSA public hearing [Exhibit O, p. 73, l. 1619 - p. 74, l. 1644], the following colloquy took place:

MR. ROSENBERG: There's been no explanation required as to the difference between the original plans which formed the basis for the application to this Board and the subsequent plans which they claim were provided to DOB.

VICE-CHAIR COLLINS: I don't understand the relevance of that.

The Buildings Department has given an objection sheet. They told us where these filed plans don't meet the zoning. That's what we're here to rule on.

MR. ROSENBERG: They're not filed plans.

VICE-CHAIR COLLINS: Now, do you think that there should be further objections based on the plans that you have access to?

MR. ROSENBERG: As far -- this Board should ask for the answers to its 8th objection that it raised.

VICE-CHAIR COLLINS: But that objection is not before us anymore because revised plans were filed and a new objection sheet was filed. It's a common practice. We see it all the time. I think you're seeing demons where none exist.

MR. ROSENBERG: No, we haven't been told what the difference is between the revised plans and the original plans, if there is any.

VICE-CHAIR COLLINS: All of our files are completely open. You can make an appointment to come and see them. It's my understanding that they've been made available to you from the beginning. I think it is a bogus issue you're raising.

I don't think there's any legal basis for it.

MR. ROSENBERG: Well, with all due respect, what is the difference between the original plans and the revised plans?

CHAIR SRINIVASAN: It doesn't matter. We have a set of objections which is what we're reviewing.

CSI's attorney, Shelly Friedman, later admitted that the plans claimed to be the basis for the various applications to BSA were not the plans presented to or reviewed by DOB [Exhibit O, p. 92, l. 2046 - p. 93, l. 2072]:

> MR. FRIEDMAN: With regard to the issues raised by counsel to the building regarding the objection sheet, I'm prepared to give you an explanation, if you wish now, of what that situation is all about. It's really up to the Board.
>
> CHAIR SRINIVASAN: Why don't you just tell us what the situation is.
>
> MR. FRIEDMAN: Fine. I would be happy to do so.
>
> CHAIR SRINIVASAN: It seems like you can put it to rest after that.
>
> MR. FRIEDMAN: The original objection sheet that was obtained at the request of the counsel at the Landmarks Commission when this matter was before the Landmarks Commission, which is kind of unusual, because you're in gross schematics at that stage. You haven't really submitted anything to the Buildings Department but the Landmarks Commission wants to know what the Building Department feels are the zoning waivers requested. We submitted that.
>
> Originally, the building, the tower had a slot between the residential building and the synagogue. There was a physical space there that several of the Landmark's Commissioners wanted us to explore. They thought some separation between the two were important.
>
> That gave rise to an objection regarding the separation of buildings.
>
> Now, that zoning -- that envelope did not emerge from Landmarks, although, by that time, nobody was thinking about the objection sheet that had been asked about in 2003.
>
> So, when we got to the Building's Department and it was submitted for zoning review, we recognized that the zoning objection sheet was in error because the building no longer contained the

separation issue between the buildings because the two buildings were -- now the new and the old were now joined. That was amended.

In other words, until the February 12, 2008 hearing, CSI had represented that the plans which:

- CSI filed to commence its Application; and
- CSI represented under penalty of perjury to be the plans which resulted in the 2005 DOB Notice of Objections from which BSA's jurisdiction was sought

were not the plans filed at DOB or the ones resulting in the 2005 DOB Notice of Objections. Rather, the DOB Objections were issued on "gross schematics" of a different structure prepared in 2003.

The representation which was the basis of CSI's application to BSA was untrue. More importantly, since CSI's variance application to BSA was premised upon an application for a new building and plans which were not reviewed by DOB and not rejected by DOB, they could not serve as a basis for BSA jurisdiction pursuant to Charter § 666.

As the Court of Appeals reiterated in Raritan Development Corp. *v.* Silva, 91 N.Y.2d 98, 102, 667 N.Y.S.2d 327, 328-329 (1997):

> [T]his Court has consistently applied the same standard of review for agency determinations. Where "the question is one of pure legal interpretation of statutory terms, deference to the BSA is not required" (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419). On the other hand, when applying its special expertise in a particular field to interpret statutory language, an agency's rational construction is entitled to deference (*see, Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239, *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459). Even in those situations, however, a determination by the agency that "runs counter to the clear wording of a statutory provision" is given little weight (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d, at 459; *see also*, *Matter of Toys "R" Us v Silva*, 89 NY2d at 418-419).

The Court of Appeals has explained that there is a fundamental difference between the deference accorded to an agency in making a determination within its jurisdiction and that accorded to an agency's determination of its jurisdiction, in the first instance:

> Where interpretation of statutory terms is involved, two standards of review are applicable. As the agency charged with implementing the Landmarks Law, the Commission is presumed to have developed an expertise that requires us to accept its interpretation of that law if not unreasonable (*see, Kurcsics v Merchants Mut. Ins. Co.*, 48 N.Y.2d 451, 459, 426 N.Y.S.2d 454, 403 N.E.2d 159). Such deference to the commission, however, is not required where the question is one of pure legal interpretation (*see, Matter of Moran Towing & Transp. Co. v. New York State Tax Commn.*, 72 N.Y.2d 166, 173, 531 N.Y.S.2d 885, 527 N.E.2d 763). The distinction between these standards is perhaps best understood by reference to the statutory term "special historical or aesthetic interest" -- as to which courts should defer to the expertise of the Commission -- and the jurisdictional predicate, "customarily open or accessible to the public" -- a matter of pure legal interpretation as to which no deference is required.

Teachers Ins. and Ann. Assoc. *v.* City of New York, 82 N.Y.2d 35, 41-42, 603 N.Y.2d 399, 401 (1993).

Since the 2005 DOB Notice of Objections upon which BSA predicated its jurisdiction was not signed by the legally required official and not based upon the plans submitted to BSA, CSI's application did not comply with Charter § 666.

Applying these standards, BSA's interpretation of the clear and unambiguous requirements for it to exercise its "jurisdiction" -- an interpretation which would give it jurisdiction to grant variances with no prior DOB review -- must not be afforded deference. To the contrary, the Court must enforce the precise and specific terms of the Charter or render them meaningless. Doing so requires that the BSA Resolution be vacated for lack of jurisdiction.

Point II

The Court Failed To Address Other Issues Raised By Petitioners, Which Were Neither Raised In *Kettaneh* Nor Decided In The *Kettaneh* Decision

As explained in the Statement of Facts, the preliminary conference was within hours of Petitioners' receipt of thousands of pages of documents served by *Kettaneh*'s attorney. Issue had not even been joined in this matter and the only motion pending was to dismiss it for not having been commenced as an Article 78 proceeding.

Unfortunately, as discussed above, the resulting colloquy apparently led the Court to believe that all of the other issues raised by Petitioners had been raised by *Kettaneh* and that the Court's dismissal of *Kettaneh* resolved those issues.

The issues which follow were raised by Petitioners, but not addressed in the Decision or the *Kettaneh* Decision.

BSA Applied An Unprecedented Standard
-- With No Basis In The Law -- In
Granting CSI's Application

The *Kettaneh* Decision discusses in detail the five factors under Zoning Resolution § 72-21, but does not mention the substituted standard applied by BSA for mixed purpose variance applications. This standard was adopted after CSI's application had been reviewed by the Community Board and after the parties had made their submissions to BSA.

CSI had argued that the construction and sale of a five-floor luxury residential condominium apartment building on top of the proposed addition to its synagogue and classrooms were needed to generate income to finance the addition [Exhibit G, Statement in Support of Certain Variances, p. 2 ("residential use is to be developed as a partial source of funding to remedy the programmatic . . . shortfalls on the other portions of the zoning lot")].

BSA rejected this argument. Instead, BSA considered the revenue generating residential portion of the proposed development separately from the community facility portion [Exhibit C, p. 3 ("[T]he Board subjected this application to the standard of review required under ZR § 72-21 for the discrete community facility and residential uses, respectively, . . . notwithstanding [the residential development's sponsorship by a religious institution]").

Even CSI questioned the basis for such bifurcated review [Exhibit P, p. 4].

No statutory, regulatory or decisional basis for CSI's decision was submitted to this Court and, for this reason, alone, the Resolution should be vacated. *See*, Van Deusen *v.* Jackson, 35 A.D.2d 58, 312 N.Y.S.2d 853 (2d Dep't 1970), *aff'd*, 28 N.Y.2d 608, 319 N.Y.S.2d 855 (1971) ("A zoning board of appeals cannot under the semblance of a variance exercise legislative powers").

BSA, itself, previously rejected such a test in connection with another religious institution, Yeshiva Imrei Chaim Viznitz, Calendar No. 290-05-BZ [Exhibit Q], in which a Jewish religious school sought a variance to operate a catering establishment to serve its religious community and to generate income to support its school and synagogue. As noted by BSA, in rejecting the application [Exhibit Q, p. 5]:

> [W]ere [BSA] to adopt Applicant's position and accept income generation as a legitimate programmatic need sufficient to sustain a variance, then any religious institution could ask the Board for a commercial use variance

> in order to fund its schools, worship spaces, or other legitimate accessory uses. . . .

See also, BSA decision in 739 East New York Avenue, Brooklyn, BSA Calendar No. 194-03-BZ [Exhibit R, p. 2], discussed in 290-05-BZ.

BSA's conclusion in Yeshiva Imrei Chaim Viznitz is equally applicable here. Since BSA did not establish any basis for departing from its own prior determinations, the Resolution must be found to be arbitrary and capricious as a matter of law. Charles A. Field Delivery Service, Inc. *v.* Roberts, 66 N.Y.2d 516, 518, 498 N.Y.S.2d 111, 114 (1985) ("[A]bsent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determinations is 'arbitrary and capricious'").

There was no basis – nor has BSA offered one – for applying a new and illogical standard here.

BSA Illegally Usurped The Exclusive Jurisdiction Of The Landmarks Preservation Commission And The City Planning Commission When It Based The Zoning Resolution § 72-21(a) Finding On The Presence Of CSI's Landmarked Synagogue

As BSA's Resolution expressly recognized [Exhibit C, p. 4] and as the *Kettaneh* Decision discusses [Exhibit D, p. 16], § 72-21(a) of the Zoning Resolution

requires BSA to find, as a prerequisite for a variance, that "there are unique physical conditions in the Zoning Lot which create practical difficulties or unnecessary hardship in strictly complying with the requirements."

Here, there were no "unique physical conditions". Instead, CSI argued that the fact that its adjoining synagogue was a landmarked structure and that the entire property was in an historic district designated by the Landmarks Preservation Commission satisfied § 72-21.

BSA accepted that argument, as evidenced by its Resolution [Exhibit C, pp 9-10]:

> WHEREAS, as to the impact of the landmarked Congregation Shearith Israel synagogue building on the ability to develop an as-of-right development on the same zoning lot, the applicant states that the landmarked synagogue occupies nearly 63 percent of the Zoning Lot footprint; and
>
> * * *
>
> WHEREAS, the Board notes that the . . . location of the landmark synagogue limits the developable portion of the site to the development site; and
>
> * * *
>
> WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of development rights from a landmark building within the lot on which it is located or to an adjacent lot; and
>
> * * *

> WHEREAS, the Board agrees that the unique physical conditions cited above . . . create . . . unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a). . . .

Pursuant to Zoning Resolution § 74-711, where a zoning lot contains a building designated as a landmark by the Landmarks Preservation Commission or where the zoning lot is located within an Historic District designated by the Landmarks Preservation Commission -- both of which apply to CSI's property -- "the City Planning Commission may permit modification of the use and bulk regulations."

Zoning Resolution § 74-711 does not similarly authorize BSA to modify use and bulk regulations due to the presence of a landmarked structure.

The Landmarks Law, NYC Administrative Code § 25-309 (formerly § 207-7.0), provides for remedies when the existence of a landmarked structure creates hardships for a property owner. *See generally*, Church of St. Paul and St. Andrew *v.* Barwick, 67 N.Y.2d 510, 505 N.Y.S.2d 24 (1986) (dismissing claims that the Landmark Law is unconstitutional because the church had not availed itself of the specific hardship remedy of the Landmarks Law, by applying to the Landmarks Preservation Commission for relief pursuant to NYC Administrative Code § 25-309.)

The *Kettaneh* Decision discussed [Exhibit D, p. 29] the argument of the petitioners in that proceeding that CSI was required to submit an application to the

Landmarks Preservation Commission for a special permit, pursuant to Zoning Resolution § 74-711, prior to seeking a variance from BSA.

The *Kettaneh* Decision [Exhibit D, p. 29] then held that a party had the right to seek a special permit pursuant to § 74-711 or a variance from BSA and concluded that CSI "fulfilled the prerequisite before applying to the BSA for a variance." The argument addressed in *Kettaneh* is not the one raised by Petitioners here. Rather, the Petition [Exhibit B, pp. 21-22] asserts that BSA had no right to consider the landmarked synagogue structure to satisfy the requirements of Zoning Resolution § 72-21(a). This argument was not addressed in the Decision.

If CSI elected to seek a variance from BSA and not pursue its relief under § 74-711, this does not give the BSA jurisdiction to consider the landmark status.

The right to permit modifications of "use and bulk regulations" for a landmarked building lies solely with the Landmarks Preservation Commission and the City Planning Commission. *See, e.g.*, Windsor Plaza Co. *v.* Deutsch, 110 A.D.2d 531, 487 N.Y.S.2d 773 (1st Dep't), *aff'd*, 66 N.Y.2d 874, 498 N.Y.S.2d 791 (1985).

The legislature has not authorized BSA to assume the jurisdiction of either Commission. BSA cannot, by means of a variance resolution, change statutory law. *See, e.g.*, Van Deusen *v.* Jackson, *supra*. For this reason, alone, the Resolution must be vacated.

CONCLUSION

For each of these reasons, reargument should be granted, the Court's Decision should be withdrawn and the judgment thereon should be vacated.

Dated: New York, New York
October 23, 2009

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Petitioners

By: _____
David Rosenberg
Rachelle Rosenberg
488 Madison Avenue
New York, New York 10022
(212) 755-7500