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

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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,	:	NOTICE OF MOTION FOR LEAVE TO REARGUE
Respondents.	:	

- x

PLEASE TAKE NOTICE that, upon the October 23, 2009 affirmation of David Rosenberg, the exhibits thereto, and the memorandum of law submitted herewith, Petitioners will move this Court at the Motion Submission Part thereof, Room 130, at the Courthouse, 60 Centre Street, New York, New York, on December 7, 2009, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order:

(1) Pursuant to CPLR 2221(d), granting reargument of this Court's decision and order dated August 4, 2009, served with notice of entry dated October 6, 2008, dismissing the proceeding; and

(2) Upon reargument, withdrawing the decision and order and, pursuant to CPLR 5015, vacating the judgment issued thereon; and

(3) Granting to Petitioners such other and further relief as is appropriate.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served so as to be received by Petitioners' attorneys at least seven (7) days prior to the return date of this motion.

Dated: New York, New York
October 23, 2009

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Petitioners

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Commission
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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
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(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

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LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,	:	Index No. 650354/08
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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.

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[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.

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[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. . . .

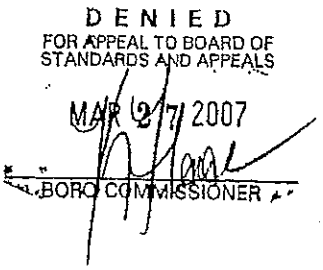
Similarly, the Zoning Handbook, in describing BSA's role, states [Exhibit L, p. 101]:

> 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

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,	:	AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO REARGUE
Respondents.	:	

- x

DAVID ROSENBERG, an attorney admitted to practice in the courts of New York, under penalty of perjury, affirms:

1. I am a member of Marcus Rosenberg & Diamond LLP, attorneys for Petitioners.

2. I submit this affirmation on personal knowledge in support of Petitioners' motion 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, and upon granting of reargument, the Court's decision should be withdrawn and the judgment issued thereon vacated pursuant to CPLR 5015.

3. Rather than burdening the Court with a separate document setting forth such matters, I incorporate all of the statements made in the memorandum of law, the truth of which I hereby affirm.

4. I further submit this affirmation to present to the Court the following exhibits to which reference is made in the memorandum of law submitted herewith:

Exhibit A	August 4, 2009 Decision and Order of Justice Joan B. Lobis, entered October 6, 2009;
Exhibit B	May 12, 2009 Second Amended Verified Petition;
Exhibit C	August 26, 2008 Board of Standards and Appeals ("BSA") Resolution; Calendar No. 74-07-BZ;
Exhibit D	July 10, 2009 Decision and Order of Justice Joan B. Lobis, in Kettaneh *v.* Board of Standards and Appeals of the City of New York, Index No. 113227/08, entered July 24, 2009;
Exhibit E	Transcript of March 31, 2009 hearing before Justice Joan B. Lobis;
Exhibit F	April 17, 2009 Decision and Order of Justice Joan B. Lobis, entered April 21, 2009;

Exhibit G	Congregation Shearith Israel ("CSI") April 1, 2007 application to BSA for a variance pursuant to Section 72-21 of the New York City Zoning Resolution [drawings omitted];
Exhibit H	October 28, 2005 New York City Department of Buildings ("DOB") Notice of Objections;
Exhibit I	August 24, 2007 DOB Notice of Objections;
Exhibit J	July 12, 2004 letter from Ida Bohmstein, DOB Director of Human Resources, confirming the appointment of Kenneth Fladen as a provisional Administrative Borough Superintendent;
Exhibit K	Copy of page entitled "About BSA" appearing on BSA's website (http://www.nyc.gov/html/bsa/html/mission/mission.shtml);
Exhibit L	Copies of pages 97 through 102 of the January 2006 New York City Department of City Planning publication entitled "Zoning Handbook";
Exhibit M	June 15, 2007 BSA Notice of Objections;
Exhibit N	September 10, 2007 response from CSI counsel, Lori G. Cuisinier, to the June 15, 2007 BSA Notice of Objections;
Exhibit O	Cover page and pages 73, 74, 92 and 93 of Transcript of February 12, 2008 BSA hearing;
Exhibit P	June 17, 2008 response from CSI counsel, Shelly S. Friedman, to material submitted on June 10, 2008 in opposition to CSI's application for a variance;
Exhibit Q	January 9, 2007 BSA resolution in Yeshiva Imrei Chaim Viznitz, Calendar No. 290-05-BZ; and
Exhibit R	December 14, 2004 BSA resolution in 739 East New York Avenue, Brooklyn, Calendar No. 194-03-BZ.

5. For the reasons stated in the memorandum of law, reargument should be granted, this Court's decision and order dismissing the proceeding should be withdrawn and the judgment issued thereon should be vacated.

Dated: New York, New York
October 23, 2009

David Rosenberg

Exhibit A August 4, 2009 Decision and Order of Justice Joan B. Lobis, entered October 6, 2009.

Exhibit B May 12, 2009 Second Amended Verified Petition.

Exhibit C August 26, 2008 Board of Standards and Appeals ("BSA") Resolution. Calendar No. 74-07-BZ.

Exhibit D July 10, 2009 Decision and Order of Justice Joan B. Lobis, in Kettaneh v. Board of Standards and Appeals of the City of New York, Index No. 113227/08, entered July 24, 2009.

Exhibit E Transcript of March 31, 2009 hearing before Justice Joan B. Lobis.

Exhibit F April 17, 2009 Decision and Order of Justice Joan B. Lobis, entered April 21, 2009.

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Exhibit R December 14, 2004 BSA resolution in 739 East New York Avenue, Brooklyn, Calendar No. 194-03-BZ.

EXHIBIT A

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

PRESENT: HON. JOAN B. LOBIS PART 6
Justice

LANDMARK WEST! INC., et al.,

Petitioners,

- V -

NYC BD. OF STANDARDS & APPEALS, et al.,

Respondents.

INDEX NO. 650354/08

MOTION DATE 6/23/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 17, were read on this Article 78 petition.

	PAPERS NUMBERED
Stipulation and second amended petition (see county clerk file)	1, 1A
Answers – Exhibits	4,5 (Ans.), 6-17 (Exh.)
Replying Affidavits	Reply: 2,3

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, this Article 78 petition is decided in accordance with the accompanying decision, order, and judgment.

Dated: 8/4/09

JOAN B. LOBIS, *J.S.C.*

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Petitioners,

Index No. 650354/08

Decision, Order and Judgment

-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

JOAN B. LOBIS, J.S.C.:

In this Article 78 proceeding, which was converted from a declaratory judgment action pursuant to this court's April 17, 2009 decision and order (the "April 2009 Order"), petitioners Landmark West! Inc. (Landmark West!"), 91 Central Park West Corporation ("91 CPW"), and Thomas Hansen (collectively referred to as "petitioners"), challenge the August 26, 2008 determination of the Board of Standards and Appeals of the City of New York (the "BSA" or the "Board"). The determination is set forth in Resolution 74-07-BZ (the "BSA Resolution"), which was filed on August 29, 2008. The BSA Resolution approved the application of respondent Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel (the "Congregation"), a not-for-profit religious institution, for a variance for the property located at 8-10 West 70th Street in Manhattan (the "Property"), which is adjacent to the Congregation's sanctuary, located at 6 West 70th Street.

The above-captioned proceeding was assigned to this Part as related to a previously-commenced Article 78 proceeding, Kettaneh v. Board of Standards and Appeals, Index No. 113227/08 ("Kettaneh"), which was also brought to challenge the BSA Resolution. Both matters were heard together at oral argument on March 31, 2009. The Kettaneh matter was fully submitted at that time, and was argued on the merits. The issue before the court in the instant matter concerned the BSA's and the Congregation's motions to dismiss on the ground that this matter should have been brought as an Article 78 proceeding. In the April 2009 Order, this court denied the motions to dismiss and ordered that the declaratory judgment action brought by petitioners herein be converted to an Article 78 proceeding. The parties were directed to serve and file additional papers.

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—essentially, that the BSA lacked jurisdiction and otherwise proceeded illegally—that were not raised by petitioners in Kettaneh. First, petitioners argued that the application that was presented to the BSA was not properly "passed on" by the Department of Buildings ("DOB"), in that the rejection was not issued by the commissioner or deputy commissioner, or the borough supervisor or borough commissioner, as required by the New York City Charter. Rather, petitioners assert, the document was signed by an individual in a Civil Service position, who is not authorized to sign-off on an application. Put another way, counsel argued that the "ticket" to get to the BSA was invalid. Second, petitioners argued that the plans that were presented to and rejected by the DOB were not the same as the plans that were presented to the BSA. Counsel for petitioners then stated on the record that "I think the rest of the issues are probably encompassed in [Kettaneh's] petition," to which counsel for the BSA agreed.

Therefore, except as to these two arguments, the parties agree that all of the other issues are essentially encompassed in the Kettaneh case. In a thirty-three (33) page decision, order and judgment dated July 10, 2009, this court denied the request to annul and vacate the BSA's determination and dismissed the petition in Kettaneh. The Kettaneh decision is specifically incorporated by reference herein; the factual recitations and determinations shall not be repeated, but are incorporated as if more fully set forth herein. Only those facts that are expressly required for the additional issues raised by petitioners will be set forth below.

At the outset, respondent Congregation argues that petitioners lack standing. This court finds that petitioners have standing since the claims asserted raise an "injury in fact" and the claims "fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." New York State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). The Court of Appeals has held that property holders in the immediate vicinity of the premises which are the subject of a zoning determination have standing to challenge zoning determinations without their having to plead and prove special damages or injury in fact. Matter of Sun-Brite Car Wash v Board of Zoning & Appeals, 69 N.Y.2d 406, 409-10 (1987). Since Thomas Hansen, the individual property owner, and 91 CPW are in close proximity to the Property, they have standing. Accordingly, petitioners collectively have standing. This court need not reach the issue of whether Landmark West!, as an organization, has standing.

Claim that the BSA Lacked Jurisdiction

Turning to the merits of the petition, petitioners assert that the BSA lacked

jurisdiction to entertain the Congregation's application because the plans were not approved properly, in that the plans were no "passed on" by the DOB in the matter required by the City Charter. To invoke the BSA's jurisdiction, petitioners assert, the application must be an appeal from a determination of the DOB Commissioner or Manhattan Borough Superintendent. Petitioners cite to § 666(6)(a) of the City Charter, which, they assert, sets forth the jurisdiction of the BSA. Section 666(6)(a) provides that the BSA has the power

> [t]o hear and decide appeals from and review, (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five, or a not-for-profit corporation acting on behalf of the department of buildings pursuant to section 27-228.6 of the code, ...

But, as the BSA itself pointed out in a footnote to the BSA Resolution, the BSA has jurisdiction pursuant to § 668 of the Charter. The footnote sets forth that:

> an attorney representing local residents, claims that a purported failure by the . . . DOB Commissioner or the Manhattan Borough Commissioner to sign the above-referenced 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

Section 668 sets forth the procedure for variances and special permits. This section is referenced in § 665 of the Charter, which provides that the BSA has the power "[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to section six hundred sixty-eight."

An agency's construction of a statute or regulation it administers, "if not unreasonable or irrational, is entitled to deference." Matter of Salvati v. Eimicke, 72 N.Y.2d 784, 791 (1988), rearg. denied, 73 N.Y.2d 995 (1989). The BSA's interpretation that it has jurisdiction under § 668 is rational and will not be disturbed. Given the interplay in the Charter between the different ways for the BSA to acquire jurisdiction over a matter, it is appropriate to defer to the agency's interpretation. "[W]here the statutory language suffers from some 'fundamental ambiguity' . . . , or 'the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices' . . . , courts routinely defer to the agency's construction of a statute it administers." New York City Council v. City of New York, 4 A.D.3d 85, 97 (1st Dep't 2004) (internal citations omitted). The BSA's interpretation that a review under §668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner is entitled to deference and will not be disturbed.

The Change in the Plans Renders the Application Flawed

Petitioners argue that the plans that were presented to and rejected by the DOB were not the same as the plans that were presented to the BSA, which, they contend, defeats the BSA's jurisdiction. As set forth in the Kettaneh decision, the Congregation submitted its application to the DOB, and on or about March 27, 2007, the DOB denied the application, citing eight objections. After the application was revised, the DOB issued a second determination, which eliminated one of the prior eight objections. The DOB's second determination, issued on or about August 27, 2007, was the basis for the variance application. This chronology is also set forth in the first footnote in the BSA Resolution.

Although the plan submitted to the BSA was not identical to the first plan submitted to the DOB, the footnote in the BSA Resolution reflects that the revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight objections. There is no indication in the record that the Congregation bypassed the DOB in any way. Moreover, as set forth more fully in the Kettaneh decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the Kettaneh decision notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria that the variance is the minimum variance necessary, which is the fifth required finding under Z.R. § 72-21.

Petitioners have failed to demonstrate that the BSA acted illegally and without legal authority in considering the Congregation's application. For the reasons set forth herein, and for the reasons set forth in this court's decision in Kettaneh, the request to annul and vacate the BSA's determination is denied, and the petition is dismissed. The decision of the BSA is confirmed in all respects. This constitutes the decision, order and judgment of the court.

Dated: August 4, 2009

JOAN B. LOBIS, J.S.C.

Norman Goodman
CLERK

Index No. 650354/08

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

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN

Plaintiffs,

- 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,

Defendants.

JUDGMENT

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for City Defendants
100 Church Street
New York, N.Y. 10007

Of Counsel: Christina L. Hoggan
Tel: (212) 788-0461
NYCLIS No.

Due and timely service is hereby admitted.

New York, N.Y. ....., *200* . . .

.....*Esq.*

Attorney for .....

EXHIBIT B

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

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,	:	Index No. 650354/08
Petitioners,	:	
- against -	:	SECOND AMENDED VERIFIED PETITION
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.	:	

Petitioners, by their attorneys, Marcus Rosenberg & Diamond LLP, as their amended verified petition, upon information and belief, state:

As And For A First Cause Of Action

Overview

1. This action is brought to challenge an extraordinary and unprecedented resolution (the "Resolution") of respondent the New York City Board of Standards and Appeals ("BSA").

2. Pursuant to § 20 of the General City Law, the express purpose of the zoning regulations relating to the height, bulk and location of buildings, including rear yards and other open space, is "to promote the public health and welfare, including . . . provision for adequate light, air [and] convenience of access."

3. The challenged BSA Resolution would permit respondent Congregation Shearith Israel, also referred to as the Trustees of Congregation Shearith Israel (together, "CSI"), to violate important zoning regulations in order to construct a new building (the "New Building"), with a residential tower containing five luxury condominium apartments.

4. The luxury condominium apartments are not for CSI's religious mission or "programmatic needs". They are simply to be sold to generate a cash windfall or, in the words of CSI's attorney, to "monetize" the violation of the New York City Zoning Resolution (the "Zoning Resolution").

5. The BSA Resolution granted CSI other unwarranted benefits, including the right to violate height, bulk, setback and other regulations adopted by the City to protect the neighborhood and its residents.

6. In so doing, BSA permitted CSI to violate the New York City Charter (the "Charter"), the Zoning Resolution and BSA's own rules, to the extent that

BSA was deprived of jurisdiction to entertain CSI's application (the "Application") for zoning variances.

7. Throughout the process, BSA ignored the factual presentations of Petitioners and others, affording complete and utter "deference" to CSI's factual claims, thereby illegally abdicating its statutory responsibility.

The Parties

8. Petitioner Landmark West! Inc. ("Landmark West!") is a New York not-for-profit corporation. Since 1985, Landmark West! has worked with other individuals and grassroots community organizations to protect the historic architecture and development patterns of the Upper West Side and to improve and maintain the community for all of its members.

9. Intentionally omitted.

10. Intentionally omitted.

11. Petitioner 91 Central Park West Corporation ("91 CPW") is the owner of the cooperative apartment building located at 91 Central Park West, at the northwest corner of Central Park West and West 69th Street, in the County, City and State of New York.

12. Petitioner Thomas Hansen is the owner of the shares allocated to, and is the occupant of, an apartment in the cooperative apartment building at 11 West 69th Street, in the County, City and State of New York.

13. Respondent BSA is the governmental body of the City of New York charged by the General City Law, the Charter and the Zoning Resolution with the authority to entertain and decide applications for variances from the requirements of the Zoning Resolution.

14. Respondent New York City Planning Commission ("City Planning Commission") is named as a respondent due to the obligation to enforce and maintain the objectives of the Zoning Resolution and to prevent "spot zoning".

15. Respondent, Hon. Andrew Cuomo, as Attorney General of the State of New York, is named by reason of the fact that issues as to violations of the New York State Constitution are raised by this action.

16. Respondent CSI is a religious organization, which owns the synagogue building (the "Synagogue") and adjacent parsonage (the "Parsonage") at 99 Central Park West, at the southwest corner of Central Park West and West 70th Street, in the County, City and State of New York, and the four-story school building (the

"Community House") and a vacant parcel identified as 6-10 West 70th Street, adjacent to the Synagogue on the west (with the Community House, the "Development Site").

17. 91 CPW is adjacent to the south side of the Synagogue, Parsonage and the Development Site.

18. Intentionally omitted.

19. Intentionally omitted.

20. Mr. Hansen occupies an apartment in the building adjacent to the south side of the Development Site.

21. 91 CPW (the "Co-op") is a taxpayer with assessments exceeding $1,000.

22. The Co-op contain the homes and major assets of the owners of the individual apartments, who are taxpayers and members of the community represented by Landmark West!

23. All Petitioners are suing to enforce their rights, to prevent illegal actions and to prevent waste of City property and assets, pursuant to General Municipal Law, § 51, and their other statutory and common law rights.

24. All Petitioners are within a zone immediately and directly impacted by the New Building proposed to be constructed in the Development Site.

25. All Petitioners will experience a reduction of the light, air and convenience of access which the Zoning Resolution is required to protect.

BSA Lacked Jurisdiction Because
The Department of Buildings ("DOB")
Objections Were Not Issued By The
DOB Commissioner Or The Manhattan
Borough Commissioner

26. Charter § 666 states:

§ 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. . . .

27. Petitioners provided indisputable proof that the October 28, 2005 DOB Notice of Objections (the "Original Notice of Objections"), which formed the basis of CSI's Application to BSA, was not issued by the then Commissioner of Buildings, Patricia J. Lancaster, or the then Manhattan Borough Commissioner, Christopher Santulli, as expressly required by Charter § 666, but by Kenneth Fladen, a "provisional Administrative Borough Superintendent, who also signed on the line for "Examiner's Signature".

28. CSI did not deny this or offer an explanation.

29. In its Resolution, BSA claims that jurisdiction is not required by Charter § 666 because this is an application for a variance pursuant to Charter § 668.

30. Charter § 666 expressly defines the jurisdiction and power of BSA. Section 668 merely describes the added requirements for a variance or a special permit.

31. BSA's own website describes its authority as follows:

> The majority of the Board's activity involves reviewing and deciding applications for variances and special permits, as empowered by the Zoning Resolution, and applications for appeals from property owners whose proposals have been denied by the City's Department of Buildings, Fire or Business Services. The Board also reviews and decides applications from the Departments of Buildings and Fire to modify or revoke certificates of occupancy.

> The Board can only act upon specific applications brought by landowners or interested 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. Further, in reaching its determinations, the Board is limited to specific findings and remedies as set forth in state and local laws, codes, and the Zoning Resolution, including, where required by law, an assessment of the proposals' environmental impacts.*

32. The failure of CSI to have obtained objections issued by the Commissioner of Buildings or the Borough Superintendent of DOB deprived BSA of jurisdiction to entertain CSI's Application, requiring that the Resolution be vacated.

BSA Lacked Jurisdiction Because The Plans Filed With BSA Were Not The Plans Filed With Or Reviewed By DOB

33. On April 2, 2007, CSI submitted its Application for a variance to BSA, based upon the Original DOB Notice of Objections, which included eight DOB objections to plans submitted by CSI for the New Building under DOB application No. 104250481. Objection No. 8 stated:

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

* Unless otherwise indicated, all emphasis herein is added.

34. In response to the Application, BSA issued a June 15, 2007 Notice of Objections (the "Original BSA Objections"), which required CSI to address, individually, 48 BSA Objections.

35. Among the BSA Objections, the following three required CSI to address objection No. 8 to the Original 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.

36. CSI's September 10, 2007 response 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).

37. CSI has claimed that it filed an application with "Proposed Plans, dated August 28, 2007" with DOB for reconsideration of the Original DOB Notice of

Objections and the August 28, 2007 DOB Notice of Objections (the "Revised DOB Notice of Objections") omitted Objection No. 8 from the Original DOB Notice of Objections.

38. DOB issued the Revised 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.

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

40. When Landmark West! raised this issue at the February 23, 2008 BSA public hearing, 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.

41. In fact, 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:

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.

42. 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 Original DOB Notice of Objections from which BSA's jurisdiction was sought

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

43. The representation which was the basis of CSI's Application to BSA was untrue. More importantly, it deprived BSA of jurisdiction, requiring that the Resolution be vacated.

BSA Improperly Authorized A Variance
Solely For Income Generation

44. CSI admitted, and BSA's Resolution held, that the New Building will violate Zoning Resolution parameters for:

> (1) Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to Section 24-11/77-24. Proposed interior portion lot coverage is 0.80;
>
> (2) Proposed rear yard in R8B does not comply. 20'.00 provided instead of 30.00' contrary to Section 24-36;
>
> (3) Proposed rear yard in R10A interior portion does not comply. 20.--' provided instead of 30.00' contrary to Section 24-36;
>
> (4) Proposed initial setback in R8B does not comply. 12.00' provided instead of 25.00' contrary to Section 24-36;
>
> (5) Proposed base height in R8B does not comply . . . contrary to Section 23-633;
>
> (6) Proposed maximum building height in R8B does not comply . . . contrary to 23-66;

(7) Proposed rear setback in an R8B does not comply. 6.67' provided instead of 10.00' contrary to Section 23-633. . . .

45. CSI admitted, and BSA's Resolution held, that CSI's Application for waivers of four of seven zoning requirements (items 4 through 7 above) was required solely "to accommodate a market rate residential development that can generate reasonable financial return".

46. CSI admitted, and BSA's Resolution held, that more than 50% of the New Building -- the upper five stories, entrance, elevators and related space, containing 22,352 of 42,406 square feet of the total floor area -- will consist of five condominium apartments and related space to be sold to the public at market rates.

47. In its Resolution, BSA noted:

> [CSI] proposed the need to generate revenue for its mission as a programmatic need, [but] New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization, notwithstanding an intent to use the revenue to support a school or worship space. . . . [F]urther, in previous decisions, [BSA] has rejected the notion that revenue generation could satisfy the (a) finding for a variance application by a not-for-profit organization (see BSA Cal. No. 72-05-BZ, denial of use variance permitting operation by a religious institution of a catering facility in a residential district) and, therefore, requested that [CSI] forgo such justification in its submissions.

48. Moreover, it has been held repeatedly that a zoning board of appeals, such as BSA, may not grant a variance solely on the ground that the use will yield a higher return than permitted by the zoning regulations.

49. As admitted in CSI's Application, "the addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough compiled funds to correct the programmatic deficiencies described. . . . "

50. Thus, the Application "[seeks to produce] capital fundraising that includes a one-time monetization of zoning floor area through developing a moderate amount of residential space. . . . "

51. In spite of this, BSA concluded "that while a nonprofit organization is entitled to no 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."

52. Ignoring its own prior determinations that unrelated revenue generation for a not-for-profit organization does not warrant the granting of a variance, BSA granted the variance for the residential portion of the New Building solely for this purpose.

53. The Resolution, which permits CSI to construct a residential tower with five luxury apartments solely for the purpose of generating income, violates the Zoning Resolution and BSA's own precedents, requiring that it be vacated.

BSA Applied Improper Methods
For Determining Financial Return

54. Since the construction and sale of five apartments was not proposed to meet CSI's programmatic needs, BSA directed CSI to perform a financial feasibility study of CSI's ability to realize a reasonable financial return from an as-of-right residential development.

55. In calculating the financial return of the proposed and as-of-right residential development, CSI employed a rate of return on "project expense", rather than on the basis of invested equity, claiming that such methodology is "characteristically used" for condominium or home sales.

56. Other than the opinion of CSI's witness, no support was offered for this claim.

57. In response, Petitioners pointed out that BSA's instructions for a variance application for condominium development [Item M(5)] requires that the applicant

state the amount of equity invested and the return on equity, where the project expense is the sum of borrowed funds and the development's equity.

58. Without citing to any contrary authority, and ignoring its own stated requirements and prior determinations, BSA's Resolution concluded:

> [BSA] notes 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 development.

59. In fact, "return on profit" is a nonsensical term and not a recognized methodology.

60. Thus, the financial underpinning of the Resolution is defective and the Resolution must be vacated.

CSI Failed To Demonstrate That An As-Of-Right Building Was Financially Infeasible

61. By applying improper methodology, CSI sought to demonstrate that an as-of-right building would be financially infeasible, thereby justifying the requested variances.

62. To the contrary, Petitioners demonstrated that, applying well-recognized and accepted methodology, an as-of-right building would be financially feasible.

63. By refusing to apply well-recognized and accepted methodology -- and the methodology expressly required by BSA's application instructions -- BSA reached an erroneous determination, which must be vacated.

64. Moreover, in violation of its own application instructions [Item M(6)], BSA accepted from CSI unsealed construction cost estimates from an unqualified source.

65. CSI's Application was based, in large part, on its "need" to provide space for an unrelated school, which paid rent to CSI.

66. In spite of BSA's request that CSI set forth the amount of such rental income, CSI failed and refused to do so, thereby failing to establish the required element of financial infeasibility.

67. For all of these reasons, the Resolution must be vacated.

CSI Failed To Satisfy § 72-21(e)
Of The Zoning Resolution

68. As acknowledged by the BSA Resolution "as pertains to the (e) finding under ZR § 72-21, [BSA] is required to find that the variance sought is the minimum necessary to afford relief."

69. In two respects, CSI failed to establish this required element.

70. The BSA Resolution acknowledges that the residential tower is not necessary for CSI's programmatic needs.

71. Moreover, BSA's Resolution found that the addition of the residential tower on top of CSI's community facility required:

- An undefined amount of mechanical space and accessory storage space on the cellar level of the community facility;
- Approximately 1,018 square feet of lobby and elevator space on the first floor of the community facility; and
- Approximately 325 square feet of elevator, stair and core building space on each of the second, third and fourth floors of the community facility.

72. The construction of the residential tower, admittedly not required to meet CSI's programmatic needs, would eliminate over 2,000 square feet from the approximately 20,000 square foot community facility, or about 10% of that space.

73. Thus, it cannot be said that the Application established that the proposed community facility variances were the minimum necessary, since their need indisputably would be reduced were not the residential tower to be constructed on top of the community facility.

74. It also is a fundamental principle that, in order to obtain a variance, the applicant must exhaust all other administrative and other remedies to obtain relief before seeking a variance.

75. Pursuant to § 74-711 of the Zoning Resolution, where a zoning lot contains a building designated as a landmark by the Landmarks Preservation Commission or where the zoning lot is located within a 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."

76. Here, CSI admittedly could have obtained relief pursuant to an application to the City Planning commission for a special permit, pursuant to Zoning Resolution § 74-711.

77. CSI's election not to pursue this relief, which would have eliminated the need for all or part of the variances sought, requires a finding that CSI failed to comply, as a matter of law, with Zoning Resolution § 72-21(e).

78. By reason of all of the foregoing, CSI failed to establish a required element for the variance it sought and BSA's Resolution must be vacated.

BSA's "Deference" to CSI Constituted An Improper
Unconstitutional Delegation Of Its Authority

79. In its Resolution, BSA concluded that CSI, as a religious institution, is entitled to substantial deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs in support of the subject variance application, citing Cornell University *v.* Bagnardi, 68 N.Y.2d 583 (1986), a case which merely held that the courts will not review a nonprofit institution's need to expand into a particular neighborhood, not its alleged need to a particular configuration of its building.

80. Similarly, the BSA Resolution cites Guggenheim Neighbors *v.* Board of Estimate (unreported) and Jewish Reconstructionist Synagogue of the North Shore *v.* Roslyn Harbor, 38 N.Y.2d 283 (1975), both of which are limited to the same issue as decided in Bagnardi.

81. In fact, BSA "deferred" to CSI's determination as to the need and propriety of each of the seven variances granted in the Resolution.

82. As noted previously, BSA is charged by the General City Law, the City Charter and the Zoning Resolution with the sole and exclusive authority to determine variance applications.

83. By deferring to CSI for such determinations, BSA abrogated its duty and responsibility and improperly and illegally delegated its authority to CSI.

84. In so doing, BSA refused to consider Petitioners' factual presentation that CSI's programmatic needs could be accommodated within an as-of-right building, especially if the space required for the residential tower's entrance, elevators, stairs and other features were included in the base building.

85. Moreover, by applying different standards to CSI as a religious institution, BSA violated the First, Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 11, of the New York State Constitution.

86. BSA's refusal to consider opposing presentations and its delegation of its authority to CSI require that the Resolution be vacated.

BSA Improperly Considered The
Landmarking Of The CSI Synagogue
As A Unique Physical Condition

87. CSI admitted, and BSA's Resolution expressly recognizes, that § 72-21(a) of the Zoning Resolution requires BSA to find (the "a finding"), 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".

88. However, BSA's Resolution states that CSI, as a religious institution, need not comply with the "a finding".

89. The Resolution then recites that CSI "represents that the variance request is necessitated not only by its programmatic needs, but also by physical conditions on the subject site -- namely -- the need to retain and preserve the existing landmarked Synagogue . . . [and CSI] states that as-of-right development of the site is constrained by the existence of the landmarked Synagogue building which occupies 63 percent of the Zoning Lot footprint".

90. BSA's Resolution notes:

> 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 applicant further states that because so much of the Zoning Lot is occupied by a building that cannot be disturbed, only a relatively small portion of the site is available for development. . . .

91. The BSA Resolution concludes:

WHEREAS, the Board notes that the site is significantly underdeveloped and that the location of the landmark Synagogue limits the developable portion of the site to the development site; and

* * *

WHEREAS, the Opposition contends that the inability of the Synagogue to use its development rights is not a hardship under ZR § 72-21 because a religious institution lacks the protected property interest in the monetization of its air rights that a private owner might have, citing Matter of Soc. for Ethical Cult. *v.* Spatt, 51 N.Y.2d 449 (1980); and

WHEREAS, the Opposition further contends that the inability of the Synagogue to use its development rights is not a hardship because there is no fixed entitlement to use air rights contrary to the bulk imitations of a zoning district; and

WHEREAS, the Board notes that Spatt concerns 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 case in which a religious institution merely seeks the same entitlement to develop its property possessed by any other private owner; and

* * *

WHEREAS, the Board further notes that while a nonprofit organization is entitled to no 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; and

WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and

unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a). . . .

92. Section 74-711 of the Zoning Resolution provides:

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

93. In its Application, CSI expressly disavowed reliance on this provision.

94. Pursuant to the Charter, the Landmarks Preservation Commission and the City Planning Commission are the sole agencies authorized and empowered to consider and resolve claims of prejudice to an owner caused by landmarking.

95. There is no authority in the General City Law, the Charter or the Zoning Resolution for BSA to entertain or decide such claims or to afford relief.

96. Thus, BSA's action, in considering the effect of the landmark status of the Synagogue was *ultra vires*. To the degree that such considerations cannot simply be excised from the Resolution, the entire Resolution is infirm and must be vacated.

Conclusion

97. Each of the foregoing material violations of applicable law and procedures requires that the Resolution be vacated; together, they conclusively require that result.

98. By reason of the foregoing, a dispute exists among the parties as to whether BSA's Resolution, and the procedures employed in considering and deciding CSI's Application, comply with applicable statutory and common law and precedent established by BSA.

99. Lacking other adequate remedies, Petitioners seek a judgment from this Court vacating the BSA Resolution and declaring it to be null and void and without force or effect.

As and For a Second Cause of Action

100. Petitioners repeat all prior allegations.

101. A balancing of the equities favors Petitioners, who will be irreparably harmed, and applicable law will be violated, unless the Court issues a judgment enjoining the Respondents from proceeding pursuant to the Resolution.

102. Lacking other adequate remedies, Petitioners seek a judgment from this Court enjoining any action based upon the BSA Resolution.

WHEREFORE, Petitioners demand judgment:

(1) Vacating the BSA Resolution and declaring it to be null and void and without force or effect;

(2) Enjoining Respondents from taking any action based upon the BSA Resolution; and

(3) Granting to Petitioners such other and further relief as is appropriate.

Dated: New York, New York
May 12, 2009

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Petitioners

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

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Kate Wood, being duly sworn, deposes and says:

1. I am Executive Director of plaintiff Landmark West! Inc. and make this verification on behalf of Landmark West! Inc.

2. I have read the foregoing second amended complaint and the contents thereof and I know the same to be true to my own knowledge, except as to matters therein stated upon information and belief, as to which latter matters, my belief is based upon documents and records in our office.

Kate Wood

Sworn to before me this
12 day of May, 2009

Notary Public

BABOR A AHMED
Notary Public - State of New York
NO. 01AH6139536
Qualified in Queens County
My Commission Expires 01-09-10

EXHIBIT C

MEETING OF: August 26, 2008
CALENDAR NO.: 74-07-BZ
PREMISES: 6-10 West 70th Street, 99-100 Central Park West, Manhattan, Block 1122, Lots 36 & 37

ACTION OF THE BOARD: Application granted on condition.

THE VOTE TO GRANT:
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson, Commissioner Montanez and Commissioner Ottley-Brown 5
Negative:.....0

THE RESOLUTION:

WHEREAS, the decision of the Manhattan Borough Commissioner, dated August 28, 2007,[1] acting on Department of Buildings Application No. 104250481, reads, in pertinent part:

1. "Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to Section 24-11/77-24. Proposed interior portion lot coverage is 0.80;
2. Proposed rear yard in R8B does not comply. 20'.00 provided instead of 30.00' contrary to Section 24-36;
3. Proposed rear yard in R10A interior portion does not comply. 20.—' provided instead of 30.00' contrary to Section 24-36;
4. Proposed initial setback in R8B does not comply. 12.00' provided instead of 15.00' contrary to Section 24-36;
5. Proposed base height in R8B does not comply. . . contrary to Section 23-633;
6. Proposed maximum building height in R8B does not comply. . . contrary to 23-66;
7. Proposed rear setback in an R8B does not comply. 6.67' provided instead of 10.00' contrary to Section 23-633;"[2] and

WHEREAS, this is an application under ZR § 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 yard setback contrary to ZR §§ 24-11, 77-24, 24-36, 23-66, and 23-633; and

WHEREAS, this application is brought on behalf of Congregation Shearith Israel, a not-for-profit religious institution (the "Synagogue"); and

WHEREAS, a public hearing was held on this application on November 27, 2007, after due notice by publication in the *City Record*, with continued hearings on February 12, 2008, April 15, 2008 and June 24, 2008, and then to decision on August 26, 2008; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

WHEREAS, Community Board 7, Manhattan, recommends disapproval of this application; and

WHEREAS, a number of members of the Synagogue testified in support of the application; and

[1] The referenced August 28, 2007 decision supersedes a March 27, 2007 decision by the Department of Buildings which included eight objections, one of which was eliminated after the applicant modified the plans.
[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 Department of Buildings ("DOB") Commissioner or the Manhattan Borough Commissioner to sign the above-referenced August 28, 2007 objections, as allegedly required by Section 666 of the New York City Charter (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.

WHEREAS, a representative of New York State Senator Thomas K. Duane testified at hearing in opposition to the application; and

WHEREAS, a representative of New York State Assembly Member Richard N. Gottfried testified at hearing in opposition to the application; and

WHEREAS, a number of area residents testified in opposition to the application; and

WHEREAS, additionally, Landmark West! and a group of neighbors represented by counsel testified at hearing and made submissions into the record in opposition to the application (the "Opposition"); the arguments made by the Opposition related to the required findings for a variance, and are addressed below; and

WHEREAS, the subject zoning lot on which the Synagogue is located consists of Lots 36 and 37 within Block 1122 (the "site"); and

WHEREAS, the site has a total lot area of 17,286 square feet, with 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage on Central Park West; and

WHEREAS, the portion of the site that extends 125 feet west of Central Park West is located in an R10A zoning district; the remainder of the site is located within an R8B district; and

WHEREAS, the site is also located within the Upper West Side/ Central Park West Historic District; and

WHEREAS, Tax Lot 36 is occupied by the Synagogue, with a height of 75'-0", and a connected four-story parsonage house located at 99-100 Central Park West, with a total floor area of 27,760 sq. ft.; and

WHEREAS, Tax Lot 37 is occupied in part by a four-story Synagogue community house with 11,079 sq. ft. of floor area located at 6-10 West 70th Street (comprising approximately 40 percent of the tax lot area); the remainder of Lot 37 is vacant (comprising approximately 60 percent of the tax lot area) (the "Community House"); and

WHEREAS, the Community House is proposed to be demolished; and

WHEREAS, the applicant represents that Tax Lot 36 and Tax Lot 37 together constitute a single zoning lot under ZR § 12-10, as they have been in common ownership since 1965 (the "Zoning Lot"); and

WHEREAS, Tax Lot 37 is divided by a zoning district boundary, pursuant to 1984 zoning map and text amendments to the Zoning Resolution that relocated the former R8/R10 district boundary line to a depth of 47 feet within the lot; and

WHEREAS, the applicant further represents that the formation of the Zoning Lot predates the relocation of the zoning district boundary, and that development on the site is therefore entitled to utilize the zoning floor area averaging methodology provided for in ZR § 77-211, thereby allowing the zoning floor area to be distributed over the entire Zoning Lot; and

WHEREAS, the applicant states that as 73 percent of the site is within an R10A zoning district, which permits an FAR of 10.0, and 27 percent of the site is within an R8B zoning district, which permits an FAR of 4.0, the averaging methodology allows for an overall site FAR of 8.36 and a maximum permitted zoning floor area of 144,511 sq. ft.; and

WHEREAS, the applicant states that the site is currently built to an FAR of 2.25 and a floor area of 38,838 sq. ft.; and

WHEREAS, the applicant proposes a nine-story and cellar mixed-use building with community facility (Use Group 3) uses on two cellar levels and the lower four stories, and residential (Use Group 2) uses on five stories including a penthouse (the "proposed building"), which will be built on Tax Lot 37; and

WHEREAS, the applicant states that the community facility uses include: Synagogue lobby and reception space, a toddler program, adult education and Hebrew school classes, a caretaker's unit, and a Jewish day school; the upper five stories are proposed to be occupied by five market-rate residential condominium units; and

WHEREAS, the proposed building will have a total floor area of 42,406 sq. ft., comprising 20,054 sq. ft. of community facility floor area and 22,352 sq. ft. of residential floor area; and

WHEREAS, 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 (30"-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); and

WHEREAS, the Synagogue initially proposed a nine-story building with a total floor area of 42,961 sq. ft., a residential floor area of 22,966 sq. ft., and no court above the fifth floor (the "original proposed building"), and

WHEREAS, the Synagogue 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 eighth floors of the building by approximately 556 sq. ft. and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in the variance of the rear yard setback by 25 percent and a reduction in the residential floor area to 22,352 sq. ft.; and

WHEREAS, the Synagogue is seeking waivers of zoning regulations for lot coverage and rear yard to develop a community facility that can accommodate its religious mission, and is seeking 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; and

WHEREAS, as a religious and educational institution, the Synagogue is entitled to significant deference under the laws of the State of New York pertaining to proposed changes in zoning and is able to rely upon programmatic needs in support of the subject variance application (see Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968)); and

WHEREAS, under ZR § 72-21(b), 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; and

WHEREAS, however, the instant application is for a mixed-use project in which approximately 50 percent of the proposed floor area will be devoted to a revenue-generating residential use which is not connected to the mission and program of the Synagogue; and

WHEREAS, 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 accorded to such an organization when it seeks to develop a project that is in furtherance of its mission (see Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) and Roman Cath. Dioc. of Rockville Ctr v. Vill. Of Old Westbury, 170 Misc.2d 314 (1996); and

WHEREAS, consequentl y, prior Board decisions regarding applications for projects sponsored by not-for-profit religious or educational institutions which have included commercial or revenue-generating uses have included analysis of the hardship, financial return, and minimum variance findings under ZR § 72-21 (see BSA Cal. No. 315-02-BZ, applicant Touro College; BSA Cal. No. 179-03-BZ, applicant Torah Studies, Inc.; BSA Cal. No. 349-05-BZ, Church of the Resurrection; and BSA Cal. No. 194-03-BZ, applicant B'nos Menachem School); and

WHEREAS, therefore, as discussed in greater detail below, the Board subjected this application to the standard of review required under ZR § 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 ZR § 72-21, notwithstanding its

sponsorship by a religious institution; and

ZR § 72-21 (a) – Unique Physical Conditions Finding

WHEREAS, under § 72-21 (a) of the Zoning Resolution, the Board must find that there are unique physical conditions inherent to the Zoning Lot which create practical difficulties or unnecessary hardship in strictly complying with the zoning requirements (the "(a) finding"); and

Community Facility Use

WHEREAS, the zoning district regulations limit lot coverage to 80 percent and require a rear yard of 30'-0"; and

WHEREAS, the proposed building will have the following program: (1) a multi-function room on the sub-cellar level with a capacity of 360 persons for the hosting of life cycle events and weddings and mechanical space; (2) dairy and meat kitchens, babysitting and storage space on the cellar level; (3) a synagogue lobby, rabbi's office and archive space on the first floor; (4) toddler classrooms on the second floor; (5) classrooms for the Synagogue's Hebrew School and Beit Rabban day school on the third floor; and (6) a caretaker's apartment and classrooms for adult education on the fourth floor; and

WHEREAS, the first floor will have 5,624 sq. ft. of community facility floor area, the second and third floor will each have 4,826.5 sq. ft. of community facility floor area, and the fourth floor will have 4,777 sq. ft. of community facility floor area, for a total of 20,054 sq. ft. of community facility floor area; and

WHEREAS, the applicant represents that the variance request is necessitated by the programmatic needs of the Synagogue, and by the physical obsolescence and poorly configured floor plates of the existing Community House which constrain circulation and interfere with its religious programming; and

WHEREAS, the applicant represents that the programmatic needs and mission of the Synagogue include an expansion of its lobby and ancillary space, an expanded toddler program expected to serve approximately 60 children, 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, a residence for an onsite caretaker to ensure that the Synagogue's extensive collection of antiquities is protected against electrical, plumbing or heating malfunctions, and shared classrooms that will also accommodate the Beit Rabban day school; and

WHEREAS, the applicant states that the proposed building will also permit the growth of new religious, pastoral and educational programs to accommodate a congregation which has grown from 300 families to 550 families; and

WHEREAS, to accommodate these programmatic needs, the Synagogue is seeking lot coverage and rear yard waivers to provide four floors of community facility use in the proposed building; and

WHEREAS, the Board acknowledges that the Synagogue, as a religious institution, is entitled to substantial deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs in support of the subject variance application (see Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986)); and

WHEREAS, however, in addition to its programmatic needs, the applicant also represents that the following site conditions create an unnecessary hardship in developing the site in compliance with applicable regulations as to lot coverage and yards: if the required 30'-0" rear yard and lot coverage were provided, the floor area of the community facility would be reduced by approximately 1,500 sq. ft.; and

WHEREAS, the applicant states that the required floor area cannot be accommodated within the as-of-right lot coverage and yard parameters and allow for efficient floor plates that will accommodate the Synagogue's programmatic needs, thus necessitating the requested waivers of these provisions; and

WHEREAS, the applicant represents that a complying building would necessitate a reduction in the size of three classrooms per floor, affecting nine proposed classrooms which would consequently be too narrow to accommodate the proposed students; the resultant floor plates would be small and inefficient with a significant portion of both space and floor area allocated toward circulation space, egress, and exits; and

WHEREAS, the applicant further states that the reduction in classroom floor area would consequently 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; and

WHEREAS, the applicant represents that the requested yard and lot coverage waivers would enable the Synagogue to develop the site with a building with viable floor plates and adequate space for its needs; and

WHEREAS, the Opposition has argued that the Synagogue 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; and

WHEREAS, notwithstanding that the applicant has asserted that the site is also burdened with a physical hardship that constrains an as-of-right development, discussed below, the Board notes that the Opposition ignores 50 years of unwavering New York jurisprudence holding that zoning boards must accord religious institutions a presumption of moral, spiritual and educational benefit in evaluations of applications for zoning variances (see e.g.; Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508 (1956) (zoning board cannot wholly deny permit to build church in residential district; because such institutions further the morals and welfare of the community, zoning board must instead seek to accommodate their needs); see also Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968); and Islamic Soc. of Westchester v. Foley, 96 A.D. 2d 536 (2d Dep't 1983)), and therefore need not demonstrate that the site is also encumbered by a physical hardship; and

WHEREAS, in support of its proposition that a religious institution must establish a physical hardship, the Opposition cites to decisions in Yeshiva & Mesivta Toras Chaim v. Rose (137 A.D.2d 710 (2d Dep't 1988)) and Bright Horizon House, Inc. v Zng. Bd. of Appeals of Henrietta (121 Misc.2d 703 (Sup. Ct. 1983)); and

WHEREAS, both decisions uphold the denial of variance applications based on findings that the contested proposals constituted neither religious uses, nor were they ancillary or accessory uses to a religious institution in which the principal use was as a house of worship, and are therefore irrelevant to the instant case; and

WHEREAS, the Board finds 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; and

WHEREAS, the Opposition contends that the Synagogue's programmatic needs are too speculative to serve as the basis for an (a) finding; and

WHEREAS, in response to a request by the Board to document demand for the proposed programmatic floor area, the applicant submitted a detailed analysis of the program needs of the Synagogue on a space-by-space and time-allocated basis which confirms that the daily simultaneous use of the overwhelming majority of the spaces requires the proposed floor area and layout and associated waivers; and

WHEREAS, the Opposition argues, nonetheless, that the Synagogue's programmatic needs could be accommodated within an as-of-right building, or within existing buildings on the Synagogue's campus and that the proposed variances for the community facility use are unmerited and should consequently be denied; and

WHEREAS, specifically, the Opposition has contended that the Synagogue's programmatic needs could be accommodated within the existing parsonage house; and

WHEREAS, the applicant represents that the narrow width of the parsonage house, at approximately 24'-0", would make it subject to the "sliver" limitations of ZR § 23-692 which limit the height of its development and, after deducting for the share of the footprint that would be dedicated to elevator and stairs, would generate little floor area; and

WHEREAS, the applicant further represents that development of the parsonage house would not address the circulation deficiencies of the synagogue and would block several dozen windows on the north elevation of 91 Central Park West; and

WHEREAS, the Board notes that 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 (see Guggenheim Neighbors v. Bd. of Estimate, June 10, 1988, N.Y. Sup. Ct., Index No. 29290/87), see also Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

WHEREAS, 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 (see Islamic Soc. of Westchester v. Foley, 96 A.D.2d 536 (2d Dep't 1983); and

WHEREAS, religious institutions are entitled to locate on their property facilities for other uses that are reasonably associated with their overall purposes and a day care center/ preschool has been found to constitute such a use (see Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)); and

WHEREAS, in submissions to the Board, the Opposition argues that the Beit Rabban school does not constitute a programmatic need entitled to deference as a religious use because it is not operated for or by the Synagogue; and

WHEREAS, however, it is well-established under New York law that religious use is not limited to houses of worship, but is defined as conduct with a 'religious purpose;' the operation of an educational facility on the property of a religious institution is construed to be a religious activity and a valid extension of the religious institution for zoning purposes, even if the school is operated by a separate corporate entity (see Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971); and

WHEREAS, the applicant further states that the siting of the Beit Rabban school on the premises helps the Synagogue to attract congregants and thereby enlarge its congregation, which the courts have also found to constitute a religious activity (see Community Synagogue v. Bates, 1 N.Y.2d 445, 448 (1958)), in which the Court of Appeals stated, "[t]o limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation"); and

WHEREAS, the Board notes that the applicant has provided supportive evidence showing that, even without the Beit Rabban school, the floor area as well as the waivers to lot coverage and rear yard would be necessary to accommodate the Synagogue's programmatic needs; and

WHEREAS, the applicant represents that the variance request is necessitated not only by its programmatic needs, but also by physical conditions on the subject site – namely – the need to retain and preserve the existing landmarked Synagogue and by the obsolescence of the existing Community House; and

WHEREAS, the applicant states that as-of-right development of the site is constrained by the existence of the landmarked Synagogue building which occupies 63 percent of the Zoning Lot footprint; and

WHEREAS, the applicant represents that because so much of its property is occupied by a building that cannot be disturbed, a relatively small portion of the site is available for development – largely limited to the westernmost portion of the Zoning Lot; and

WHEREAS, the applicant further represents that the physical obsolescence and poorly configured floorplates of the existing Community House constrain circulation and interfere with its religious programming and compromise the Synagogue's religious and educational mission,

and that these limitations cannot be addressed through interior alterations; and

WHEREAS, the applicant states that the proposed building will provide new horizontal and vertical circulation systems to provide barrier-free access to its sanctuaries and ancillary facilities; and

WHEREAS, based upon the above, the Board finds that the aforementioned physical conditions, when considered in conjunction with the programmatic needs of Synagogue, create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations; and

WHEREAS, the Opposition argues that uniqueness is limited to the physical conditions of the Zoning Lot and that the obsolescence of an existing building or other building constraints therefore cannot fulfill the requirements of the (a) finding, while citing no support for such a proposition; and

WHEREAS, to the contrary, New York courts have found that unique physical conditions under Section 72-21(a) of the Zoning Resolution can refer to buildings as well as land (see Guggenheim Neighbors v. Board of Estimate, June 10, 1988, N.Y. Sup. Ct. Index No. 29290/87; see also, Homes for the Homeless v. BSA, 7/23/2004, N.Y.L.J. citing UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248 (1st Dep't 2002;); and, further, obsolescence of a building is well-established as a basis for a finding of uniqueness (see Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dep't 1985), and Polsinello v. Dwyer, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (condition creating hardship was land improved with a now-obsolete structure)); and

WHEREAS, in submissions to the Board, the Opposition has also contended that the Synagogue had failed to establish a financial need for the project as a whole; and

WHEREAS, the Board notes that 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 ZR § 72-21, require a showing of financial need as a precondition to the granting of a variance to such an organization; and

WHEREAS, the applicant proposed the need to generate revenue for its mission as a programmatic need, New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization, notwithstanding an intent to use the revenue to support a school or worship space; and

WHEREAS, further, in previous decisions, the Board has rejected the notion that revenue generation could satisfy the (a) finding for a variance application by a not-for-profit organization (see BSA Cal. No. 72-05-BZ, denial of use variance permitting operation by a religious institution of a catering facility in a residential district) and, therefore, requested that the applicant forgo such a justification in its submissions; and

WHEREAS, however, in numerous prior instances the Board has found that unique physical conditions, when considered in the aggregate and in conjunction with the programmatic needs of a not-for-profit organization, can create practical difficulties and unnecessary hardship in developing a site in strict conformity with the current zoning (see, e.g., BSA Cal. No, 145-07-BZ, approving variance of lot coverage requirements to permit development of a medical facility; BSA Cal. No. 209-07-BZ, approving bulk variance to permit enlargement of a school for disabled children; and 215-07-BZ, approving bulk variance to permit enlargement of a YMCA); and

Residential Use

WHEREAS, the building is proposed for a portion of the Zoning Lot comprised of Lot 37, with a lot area of approximately 6,400 sq. ft. (the "development site"); and

WHEREAS, proposed residential portion of the building is configured as follows: (1) mechanical space and accessory storage on the cellar level; (2) elevators and a small lobby on the first floor; (2) core building space on the second, third and fourth floors; and (3) a condominium unit on each of the fifth through eighth, and ninth (penthouse) floors, for a total of five units; and

WHEREAS, the first floor is proposed to have approximately 1,018 sq. ft. of residential floor area, the second through fourth floors will each have 325 sq. ft. of residential floor area, the fifth floor will have 4,512 sq. ft. of residential floor area, the sixth through eighth floors will each have approximately 4,347 sq. ft. of residential floor area and the ninth (penthouse) floor will have approximately 2,756 sq. ft., for a total residential floor area of approximately 22,352 sq. ft.; and

WHEREAS, the applicant represents that compliance with the zoning requirements for base height, building height, and front and rear setback would allow a residential floor area of approximately 9,638 sq. ft.; and

WHEREAS, the applicant states that the following unique physical conditions create practical difficulties and unnecessary hardship in developing the subject site in compliance with underlying district regulations: (1) the development site's location on a Zoning Lot that is divided by a zoning district boundary; (2) the existence and dominance of a landmarked synagogue on the footprint of the Zoning Lot; and (3) the limitations on development imposed by the site's contextual zoning district regulations; and

WHEREAS, as to the development site's location on a zoning lot that is divided by a zoning district boundary, the applicant states that the development site is split between an eastern portion, comprising approximately 73 percent of the Zoning Lot, which is located within an R10A zoning district, and a western portion, comprising approximately 27 percent of the Zoning Lot, which is located in an R8B zoning district; and

WHEREAS, applicant represents that the division of the development site by a zoning district boundary constrains an as-of-right development by imposing different height limitations on the two respective portions of the lot; and

WHEREAS, in the R10A portion of the Zoning Lot, a total height of 185'-0" and maximum base height of 125'-0" are permitted; and

WHEREAS, in the R8B portion of the development site, a building is limited to a total height of 75'-0" and a maximum base height of 60'-0" with a setback of 15'-0"; and

WHEREAS, the applicant further represents that the requirements of the R8B district also limit the size of floor plates of a residential development; and

WHEREAS, in the R8B portion of the development site, a setback of 15'-0" is required at the 60 ft. maximum base height, and a 10'-0" rear setback is required; the applicant represents that a complying development would therefore be forced to set back from the street line at the mid-point between the fifth and sixth floors; and

WHEREAS, in the R10A portion of the development site, a 15'-0" setback is not required below the maximum base height of 125'-0", and a total height of 185'-0" is permitted, which would otherwise permit construction of a 16-story residential tower on the development site; and

WHEREAS, the applicant is constrained from building to the height that would otherwise be permitted as-of-right on the development site by the "sliver law" provisions of ZR § 23-692, which operate to limit the maximum base height of the building to 60'-0" because the frontage of the site within the R10A zoning district is less than 45 feet; and

WHEREAS, a diagram provided by the applicant 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; and

WHEREAS, the Board notes that several Zoning Resolution provisions recognize the constraints created by zoning district boundaries where different regulations apply to portions of the same zoning lot; and

WHEREAS, specifically, the Board notes that the provisions of ZR § 77-00, permitting the transfer of zoning lot floor area over a zoning district boundary for zoning lots created prior

to their division by a zoning district boundary, recognize that there is a hardship to a property owner whose property becomes burdened by a district boundary which imposes differing requirements to portions of the same zoning lot; and

WHEREAS, the Board further notes that that the special permit provisions of ZR § 73-52 allow the extension of a district boundary line after a finding by the Board that relief is required from hardship created by the location of the district boundary line; and

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

WHEREAS, the applicant further represents that the site is unique in being 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; and

WHEREAS, the applicant further represents that 17 other residential zoning lots overlap the R10A/ R8B district boundary line between West 65th Street and West 86th Street, but that none were characterized by a similar amount of surplus development rights; and

WHEREAS, the applicant states that all the properties within the 22-block study area bisected by the district boundary line are developed to an FAR exceeding 10.0, while the subject Zoning Lot is developed to an FAR of 2.25; and

WHEREAS, the Opposition argues that the presence of a zoning district boundary within a lot is not a "unique physical condition" under the language of ZR § 72-21 and represents that four other properties are 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 owned by religious or nonprofit institutions, identified as: (i) First Church of Christ Scientist, located at Central Park West at West 68th Street; (ii) Universalist Church of New York, located at Central Park West at West 76th Street; (iii) New-York Historical Society, located at Central Park West at West 77th Street; and (iv) American Museum of Natural History, located at Central Park West at West 77th Street to West 81st Street; and

WHEREAS, the Board notes that it has recognized that the location of 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 (see 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); and

WHEREAS, the Board further notes that the incidence of four sites within a 51-block area sharing the same "unique conditions" as the subject site would not, in and of itself, be sufficient to defeat a finding of uniqueness; and

WHEREAS, under New York law, a finding of uniqueness does not require that a given parcel be the only property so burdened by the condition(s) giving rise to the hardship, only 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 (see Douglaston Civ. Assn. v. Klein, 51 N.Y.2d 963, 965 (1980)); and

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 applicant further states that because so much of the Zoning Lot is occupied by a building that cannot be disturbed, only a relatively small portion of the site is available for development; and

WHEREAS, the applicant represents that only the area occupied by the parsonage house, located directly to the south of the Synagogue on Tax Lot 36, and the development site are available for development; and

WHEREAS, the applicant represents that the narrow width of the parsonage house makes its development infeasible; and

WHEREAS, the applicant states that the area of development site, at approximately 6,400 sq. ft., constitutes only 37 percent of Zoning Lot area of the site; and

WHEREAS, the Board notes that the site is significantly underdeveloped and that the location of the landmark Synagogue limits the developable portion of the site to the development site; and

WHEREAS, as to the limitations on development imposed by the site's location within the R8B contextual zoning district, the applicant represents the district's height limits and setback requirements, and the limitations imposed by ZR § 23-692, result in an inability to use the Synagogue's substantial surplus development rights; and

WHEREAS, the applicant represents that, as a result of these constraints, the Synagogue would be permitted to use a total of 28,274 sq. ft. for an as-of-right development, although it has approximately 116,752 sq. ft. in developable floor area; and

WHEREAS, the Synagogue further represents that, after development of the proposed building the Zoning Lot would be built to a floor area of 70,166 sq. ft. and an FAR of 4.36, although development of 144,511 sq. ft. of floor area and an FAR of 8.36 would be permitted as-of-right, and that approximately 74,345 sq. ft. of floor area will remain unused; and

WHEREAS, the Opposition contends that the inability of the Synagogue to use its development rights is not a hardship under ZR § 72-21 because a religious institution lacks the protected property interest in the monetization of its air rights that a private owner might have, citing Matter of Soc. for Ethical Cult. v. Spatt, 51 N.Y.2d 449 (1980); and

WHEREAS, the Opposition further contends that the inability of the Synagogue to use its development rights is not a hardship because there is no fixed entitlement to use air rights contrary to the bulk limitations of a zoning district; and

WHEREAS, the Board notes that Spatt concerns 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 case in which a religious institution merely seeks the same entitlement to develop its property possessed by any other private owner; and

WHEREAS, furthermore, Spatt does not stand for the proposition that government land use regulation may impose a greater burden on a religious institution than on a private owner; indeed, the court noted that the Ethical Culture Society, like any similarly situated owner, retained the right to generate a reasonable return from its property by the transfer of its excess development rights (see 51 N.Y.2d at 455, FN1); and

WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of available development rights from a landmark building within the lot on which it is located or to an adjacent lot, and

WHEREAS, the Board further notes that while a nonprofit organization is entitled to no 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; and

WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a); and

ZR § 72-21 (b) – Financial Return Finding

WHEREAS, under ZR § 72-21 (b), the Board must establish that the physical conditions of the site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return, and that the grant of a variance is therefore necessary to realize a reasonable return (the "(b) finding"), unless the applicant is a nonprofit organization, in

which case the (b) finding is not required for the granting of a variance; and

Community Facility Use

WHEREAS, the applicant represents that it need not address the (b) finding since it is a not-for-profit religious institution and the community facility use will be in furtherance of its not-for-profit mission; and

Residential Development

WHEREAS, 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 accorded to such an organization when it seeks to develop a project that is in furtherance of its mission (see Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); (municipal agency was required to make the variance findings because proposed use would be operated solely by and for the benefit of a private entrepreneur); Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) (variance upheld permitting office and limited industrial use of former school building after district established inability to develop for a conforming use or otherwise realize a financial return on the property as zoned); and Roman Cath. Dioc. of Rockville Ctr v. Vill. Of Old Westbury, 170 Misc.2d 314 (1996) (cemetery to be operated by church was found to constitute a commercial use)); and

WHEREAS, the residential development was not proposed to meet its programmatic needs, the Board therefore directed the applicant to perform a financial feasibility study evaluating the ability of the Synagogue to realize a reasonable financial return from as-of-right residential development of the site, despite the fact that it is a not-for-profit religious institution; and

WHEREAS, the applicant initially submitted a feasibility study 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 4.0 FAR; (3) the original proposed building; and (4) a lesser variance community facility/residential building; and

WHEREAS, at hearing, the Board questioned why the analysis included the community facility floor area and asked the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of-right development; and

WHEREAS, in response, the applicant revised the financial analysis to analyze: (1) the as-of-right building; (2) the as-of-right residential building with 4.0 FAR; (3) the original proposed building; (4) the lesser variance community facility/residential building; and (5) an as-of-right community facility/residential tower building, using the modified the site value; and

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

WHEREAS, it was subsequently determined that a tower configuration in the R10A portion of the Zoning Lot was contrary to ZR § 73-692 (the "sliver law") and therefore that the as-of-right community facility/residential tower building could not represent an as-of-right development; the Board then questioned the basis for the previous valuation of the development rights and requested that the applicant recalculate the site value using only R8 and R8B sales; and

WHEREAS, the Board also requested the applicant to evaluate the feasibility of providing a complying court to the rear above the fifth floor of the original proposed building; and

WHEREAS, applicant subsequently analyzed the financial feasibility of: (i) the proposed building (the original proposed building with a complying court); (ii) an eight-story building with a complying court (the "eight-story building"); and (iii) a seven-story building with penthouse and complying court (the "seven-story building"), using the revised site value; the modified analysis concluded that of the three scenarios, only the proposed building was feasible; and

WHEREAS, at hearing, the Board raised questions as to the how the space attributable to the building's rear terraces had been treated in the financial feasibility analysis; and

WHEREAS, in a written response, the applicant stated 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; the applicant provided an alternative analysis considering the rear terraces as sellable outdoor terrace area and revised the sales prices of the two units accordingly; and

WHEREAS, at hearing, the Board also asked the applicant 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; and

WHEREAS, in a subsequent submission, the applicant 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; and

WHEREAS, the applicant also submitted a revised analysis of the as-of-right building using the revised estimated value of the property; this analysis showed that the revised as-of-right alternative would result in substantial loss; and

WHEREAS, in a submission, the Opposition questioned 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, and questioned the adjustments made by the applicant to those sales prices; and

WHEREAS, in a written response, the applicant pointed out that, 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; the applicant also stated that 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; and

WHEREAS, the Opposition also questioned the choice of methodology used by the applicant, 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

WHEREAS, in response to the questions raised by the Opposition concerning the methodology used to calculate the rate of return, the applicant states 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; and

WHEREAS, the applicant further stated 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; and

WHEREAS, the Board notes 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; and

WHEREAS, the Opposition also raised concerns as to the omission of the income from the Beit Rabban school from the feasibility study; and

WHEREAS, in response to concerns raised by the Opposition as to why the feasibility study omitted the income from the Beit Rabban school, a submission by the applicant states that the projected market rent for community facility use was provided to the Board in an earlier submission and that the cost of development far exceeded the potential rental income from the community facility portion of the development; and

WHEREAS, further, the Board notes that it requested that costs, value and revenue attributable to the community facility be eliminated from the financial feasibility analysis to allow a clearer depiction of the feasibility of the proposed residential development and of lesser variance and as-of-right alternatives; and

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

ZR § 72-21 (c) – Neighborhood Character Finding

WHEREAS, as pertains to the (c) finding under ZR § 72-21, the Board is required to find that the grant of the variance will not alter the essential neighborhood character, impair the use or development of adjacent property, or be detrimental to the public welfare; and

WHEREAS, because the variances sought to permit the community facility use differ from the variances sought to permit the proposed residential use, the potential affects on neighborhood character of each respective set of proposed variances are discussed separately below; and

Community Facility Use

WHEREAS, the applicant represents that the proposed rear yard and lot coverage variances permitting the community facility use will not negatively affect the character of the neighborhood, nor affect adjacent uses; and

WHEREAS, the applicant states that the proposed waivers would allow the community facility to encroach into the rear yard by ten feet, to a height of approximately 49 feet; and

WHEREAS, the applicant states that, as a community facility, the Synagogue would be permitted to build to the rear lot line up to a height of 23 feet; and

WHEREAS, the applicant represents that the affect of the encroachment into the rear yard is partly offset by the depths of the yards of the adjacent buildings to its rear; and

WHEREAS, the Board conducted an environmental review of the proposed action and found that it would not have significant adverse impacts on the surrounding neighborhood; and

WHEREAS, the Opposition disputes the findings of the Environmental Assessment Statement ("EAS") and contends that the expanded toddler program, and the life cycle events and weddings held in the multi-purpose room of the lower cellar level of the proposed community facility would produce significant adverse traffic, solid waste, and noise impacts; and

WHEREAS, the Board notes that the additional traffic and noise created by the expanded toddler program – which is projected to grow from 20 children to 60 children daily – falls below the CEQR threshold for potential environmental impacts; and

WHEREAS, the Board further notes that the waivers of lot coverage and rear yard requirements are requested to meet the Synagogue's need for additional classroom space and that the sub-cellar multi-purpose room represents an as-of-right use; and

WHEREAS, the applicant states that the proposed multi-function room would result in an estimated 22 to 30 life cycle events and weddings over and above those currently held; and

WHEREAS, with respect to traffic, the applicant states that life cycle events would generate no additional traffic impacts 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; and

WHEREAS, the applicant further states that 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, or from the expanded toddler program, which is not expected to result in a substantial number of new vehicle trips during the peak hours; and

WHEREAS, with respect to solid waste, the EAS estimated the solid waste attributable to the entirety of the proposed building, including the occupants of the residential portion and the students in the school, and conservatively assumed full occupancy of the multi-function room (at 360 persons); and

WHEREAS, the estimates of solid waste generation found that the amount of projected additional 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

WHEREAS, the Synagogue states that trash from 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; and

WHEREAS, at the Board's direction, the applicant submitted revised plans showing the cellar location of the refrigerated trash storage area; and

WHEREAS, with respect to noise, as the multi-purpose room is proposed for the sub-cellar of the proposed building, even at maximum capacity it is not expected to cause significant noise impacts; and

WHEREAS, as held in Westchester Reform Temple v. Brown (22 N.Y.2d 488 (1968)), a religious institution's application is entitled to deference unless significant adverse effects upon the health, safety, or welfare of the community are documented (see also Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

WHEREAS, the Opposition has raised general concerns about disruption to the character of the surrounding neighborhood, but has presented no evidence to the Board supporting the alleged traffic, solid waste and noise impacts of the proposed community facility; and

WHEREAS, the detrimental effects alleged by the Opposition largely concern the purported impact of events held in the multi-purpose room which, as noted above, is permitted as-of-right; and

Residential Use

WHEREAS, the applicant represents that the proposed variances to height and setback permitting the residential use will not negatively affect the character of the neighborhood, nor affect adjacent uses; and

WHEREAS, the applicant states that the proposed base height waiver and front setback waivers of the R8B zoning requirements allow the building to rise to a height of approximately 94'-10" along the West 70th Street street-line, before setting back by 12'-0"; and

WHEREAS, the applicant further states that the R8B zoning regulations limit the base height to 60 feet, at which point the building must set back by a minimum of 15'-0"; and

WHEREAS, the applicant states that the proposed waiver of maximum building height will allow a total height of approximately 105'-10", instead of the maximum building height of 75'-0" permitted in an R8B district; and

WHEREAS, the applicant also seeks a rear setback of 6'-8", instead of the 10'-0" rear setback required in an R8B district; and

WHEREAS, the applicant represents that the front and rear setbacks are required because the enlargement would rise upward and extend from the existing front and rear walls; and

WHEREAS, the applicant represents that the proposed base height, wall height and front and rear setbacks are compatible with neighborhood character; and

WHEREAS, the applicant states that a Certificate of Appropriateness approving the design for the proposed building was issued by the Landmarks Preservation Commission on March 14, 2006; and

WHEREAS, the Opposition raised issues at hearing concerning the scale of the proposed building and its compatibility to the neighborhood context; and

WHEREAS, the applicant represents that the proposed bulk and height of the building is consistent with the height and bulk of neighboring buildings, and that the subject site is flanked by a nine-story building at 18 West 70th Street which has a base height of approximately 95 ft. with no setback, and an FAR of 7.23; and

WHEREAS, the applicant further represents that the building located at 101 Central Park West, directly to its north, has a height of 15 stories and an FAR of 13.92; and that the building located directly to its south, at 91 Central Park West, has a height of 13 stories and an FAR of 13.03; and

WHEREAS, the Board notes that, at nine stories in height, the building would be comparable in size to the adjacent nine-story building located at 18 West 70th Street, while remaining shorter than the 15-story and 13-story buildings located within 60 feet of the site; and

WHEREAS, the Opposition also contends that the proposed nine-story building disrupts the mid-block character of West 70th Street and thereby diminishes the visual distinction between the low-rise mid-block area and the higher scale along Central Park West; and

WHEREAS, the applicant submitted a streetscape of West 70th Street indicating that the street wall of the subject building matches that of the adjacent building at 18 West 70th Street and that no disruption to the midblock character is created by the proposed building; and

WHEREAS, the Opposition also contends that approval of the proposed height waiver will create a precedent for the construction of more mid-block high-rise buildings; and

WHEREAS, as discussed above, the Opposition has identified four sites within a 51-block area bounded by Central Park West and Columbus Avenue, and 59th Street and 110th Street that purportedly could seek variances permitting midblock buildings which do not comply with the requirements of the R8B zoning district; and

WHEREAS, an analysis submitted by the applicant in response found that none of the four sites identified by the Opposition shared the same potential for mid-block development as the subject site; and

WHEREAS, the Opposition argues that the proposed building will significantly diminish the accessibility to light and air of its adjacent buildings; and

WHEREAS, the Opposition contended specifically that the proposed building abuts the easterly wall and court of the building located at 18 West 70th Street, thereby eliminating natural light and views from seven eastern facing apartments which would not be blocked by an as-of-right building; and

WHEREAS, the Opposition further argues that the proposed building will cut off natural lighting 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, and that the consequentially diminished light and views will reduce the market values of the affected apartments; and

WHEREAS, in response the applicant noted that lot line windows cannot be used to satisfy light and air requirements and, therefore, 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; and

WHEREAS, the applicant further notes that an owner of real property also has no protected right in a view; and

WHEREAS, nonetheless, the Board directed the applicant to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows than originally proposed; and

WHEREAS, the applicant submitted revised plans in response showing a compliant outer court; and

WHEREAS, the Opposition asserts that the proposed building would cast shadows on the midblock of West 70th Street; and

WHEREAS, CEQR regulations provide that an adverse shadow impact is considered to occur when the shadow from a proposed project falls upon a publicly accessible open space, a historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation, and that shadows on streets and sidewalks or on other buildings are not considered significant under CEQR; and

WHEREAS, a submission by the applicant states that that no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street; thus any incremental shadows in this area would not constitute a significant impact on the surrounding community; and

WHEREAS, a shadow study submitted by the applicant compared the shadows cast by the existing building to those cast by the proposed new building to identify incremental shadows that would be cast by the new building that are not cast presently; and

WHEREAS, the EAS analyzed the potential shadow impacts on publicly accessible open space and historic resources and found that no significant impacts would occur; and

WHEREAS, the applicant evaluated shadows cast over the course of a full year, with particular attention to December 21, when shadows are longest, March 21 and September 21 (vernal and autumnal equinoxes) and June 21, when shadows are shortest, disregarding the shadows cast by existing buildings, and found that the proposed building casts few incremental shadows, and those that are cast are insignificant in size; and

WHEREAS, 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; and

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; and

ZR § 72-21 (d) - Self Created Hardship Finding

WHEREAS, as pertains to the (d) finding under ZR § 72-21, the Board is required to find that the practical difficulties or unnecessary hardship burdening the site have not been created by the owner or by a predecessor in title; and

WHEREAS, the applicant states that the unnecessary hardship encountered by compliance with the zoning regulations is inherent to the site's unique physical conditions: (1) the existence and dominance of a landmarked synagogue on the footprint of the Zoning Lot, (2) the site's location on a zoning lot that is divided by a zoning district boundary; and (3) the limitations on development imposed by the site's contextual zoning district; and

WHEREAS, the applicant further states that these conditions originate with the landmarking of its Synagogue building and with the 1984 rezoning of the site; and

WHEREAS, based on the above, the Board therefore finds that the hardship herein was not created by the owner or by a predecessor in title; and

ZR § 72-21 (e) – Minimum Variance Finding

WHEREAS, as pertains to the (e) finding under ZR § 72-21, the Board is required to find that the variance sought is the minimum necessary to afford relief; and

WHEREAS, the original proposed building of the Synagogue had no rear court above the fifth floor, and

WHEREAS, in response to concerns raised by the residents of the adjacent building, the Board directed the applicant to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining access to light and air of three additional lot line windows; and

WHEREAS, the applicant 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 eighth floors of the building by approximately 556 sq. ft. and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in the variance of the rear yard setback of 25 percent; and

WHEREAS, during the hearing process, the Board also directed the applicant to assess the feasibility of several lesser variance scenarios; and

WHEREAS, financial analyses submitted by the applicant established that none of these alternatives yielded a reasonable financial return; and

WHEREAS, however, the Opposition argues that the minimum variance finding is no variance because the building could be developed as a smaller as-of-right mixed-use community facility/ residential building that achieved its programmatic mission, improved the circulation of its worship space and produced some residential units; and

WHEREAS, the Synagogue has fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission; and

WHEREAS, the Board notes again that a zoning board must accommodate a proposal by a religious or educational institution for a project in furtherance of its mission, unless the proposed project is shown to have significant and measurable detrimental impacts on surrounding residents (See Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968); Islamic Soc. of Westchester v. Foley, 96 A.D. 2d 536 (2d Dep't 1983); and Jewish Recons. Synagogue of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

WHEREAS, the Opposition has not established such impacts; and

WHEREAS, the 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; and

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; and

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

WHEREAS, the project is classified as a Type I action pursuant to 6NYCRR, 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 ZR § 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 ZR §§ 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 ZR § 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.

Adopted by the Board of Standards and Appeals, August 26, 2008.

CERTIFICATION

This copy of the Resolution dated August 26, 2008 is hereby filed by the Board of Standards and Appeals dated August 29, 2008

Jeff Mulligan
Executive Director

EXHIBIT D

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

PRESENT: Joan B. Lobis PART 6

Index Number : 113227/2008
KETTANEH, NIZAM PETER
VS.
BOARD OF STANDARDS AND APPEALS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.
MOTION DATE 3/31/09
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

7-13-09 C

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-27
Answering Affidavits — Exhibits	28-71; 72
Replying Affidavits	73-103

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/10/09

J.S.C.

Check one: ✓ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

Index No. 113227/08

-against-

Decision, Order and Judgment

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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JOAN B. LOBIS, J.S.C.:

Nizam Peter Kettaneh and Howard Lepow bring this petition, pursuant to Article 78 of the C.P.L.R., seeking to annul and reverse the August 26, 2008 determination of the Board of Standards and Appeals of the City of New York and its chair and vice-chair, Meenakshi Srinivasan and Christopher Collins, respectively (collectively referred to as the "BSA" or the "Board"). The determination is set forth in Resolution 74-07-BZ (the "BSA Resolution"). The BSA Resolution approved the application of respondent Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel (the "Congregation"), a not-for-profit religious institution, for a variance for the property located at 8-10 West 70th Street in Manhattan (the "Property"), which is adjacent to the Congregation's sanctuary, located at 6 West 70th Street. The Congregation seeks to build a structure containing four floors of community space and five floors of luxury condominiums (the "proposed building" or the "Project"). The Board found that the Congregation had satisfied the criteria set forth in New York City Zoning Resolution § 72-21 for a variance. Respondents BSA and the Congregation oppose the petition.

The Property is located within the Upper West Side/Central Park West Historic District and is in a residential zoning district. Petitioner Kettaneh owns and resides in a townhouse located at 15 West 70th Street, which is opposite the Congregation's sanctuary. Petitioner Lepow resides at 6 East 79th Street. Mr. Lepow owns ten (10) cooperative apartments in a building located at 18 West 70th Street (the "West 70th Building"), which is the building adjoining the Property.

The Property is comprised of two tax lots—Block 1122, Lots 36 and 37—with a total lot area of 17,286 square feet. The lots constitute a single zoning lot because the tax lots have been in common ownership since 1984, which is the date of the adoption of the existing zoning district boundaries. The bulk of the site is in the R8B zoning district, known as contextual mid-block zoning, with height and setback limitations. The remainder of the Property is in the R10A zoning district, which has less restrictive zoning requirements. 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. Lot 36 consists of the synagogue building, an historic landmark, which was constructed in 1896. Adjacent to the south side of the synagogue, on Central Park West, is a townhouse known as the Parsonage, which was also constructed in 1896. The Parsonage is 75 feet tall and holds 27,760 square feet. Lot 37, which is on West 70th Street, just off Central Park West, is 64 feet by 100 feet. This lot is the combination of three residential house lots, once owned by the Congregation, but sold in 1896 to private owners for the construction of private residences, with the restriction that no structure would exceed the height of the Synagogue building itself. In 1949, two of these lots were conveyed back to the Congregation and in 1954, row houses were constructed on this portion of the Property, creating the Community House. The third lot was conveyed back to the Congregation in 1965. While there were three structures originally, in 1970, the building on the lot acquired in 1965 was

demolished, leaving a vacant lot. Presently, this vacant part of Lot 37 contains a trailer that is used for classrooms. The other part of the lot contains the four-story Community House, which totals 11,079 square feet, and occupies approximately 40% of the tax lot area; the remaining 60% is vacant. The Beit Rabban Day School, a private, nonsectarian Jewish day school that is not affiliated with the Congregation, is the primary user of the Community House, and pays rent to the Congregation.

The Application Process

In order to develop a property that has a non-conforming use or non-complying bulk, the applicant must submit an application to the Department of Buildings ("DOB"). After the DOB issues its denial of the non-conforming or non-complying proposal, the property owner may then apply to the BSA[1] for a variance. The BSA is required to hold hearings and comply with other statutory procedures. Specific findings must be made in the BSA determination to grant or deny a variance. (See below.) Each of the five criteria must be satisfied before a variance may be granted. If the BSA does not grant a variance, the property owner may only develop the property in conformance with the use and bulk regulations for the particular zoning district.

The Zoning Regulations as to the Granting or Denial of a Variance

In determining whether or not to grant a variance, Z.R. § 72-21 requires the BSA to make "each and every one" of five specific findings of fact, as follows: (1) that the subject property

[1] The BSA is empowered to hear, decide and determine whether to grant or deny requests to vary the zoning laws. New York City Charter (the "Charter") §§ 666(5), 668; Z.R. §§ 72-01(b) and 72-20 et seq. The BSA is comprised of five commissioners, who are appointed by the Mayor of the City of New York, each for a term of six years. Pursuant to § 659 of the Charter, at least one member must be a planner with professional qualifications; another member is required to be a licensed professional engineer; and, another member is required to be a registered architect. All three of these professionals must have at least ten years' experience.

has "unique physical conditions" which create "practical difficulties or unnecessary hardship in complying strictly" with the permissible zoning uses and that such practical difficulties are not due to the general conditions of the neighborhood; (2) that the physical conditions of the property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a reasonable return" from the property; (3) that the variance "will not alter the essential character of the neighborhood" or "substantially impair the appropriate use or development of adjacent property" and "will not be detrimental to the public welfare"; (4) that the "practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner"; and, (5) that the variance be "the minimum variance necessary to afford relief." The BSA is further required to set forth in its 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.

The Congregation's Application to the BSA

On or about March 27, 2007, the Manhattan Borough Commissioner of the DOB denied the application, citing eight objections.[2] After the application was revised, the DOB issued a second determination, which eliminated one of the prior objections. The DOB's second determination, issued on or about August 27, 2007, was the basis for the variance application.

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[2] Prior to this application, the Congregation submitted an application to the Landmarks Preservation Commission ("LPC"). As set forth at p. 29, infra, the LPC issued a Certificate of Appropriateness in March 2006.

On April 1, 2007, the Congregation submitted its variance application to the BSA. As a result of its growth in membership from 300 families when the synagogue first opened, to its present membership of 550 families, the Congregation asserted that it needed a new facility to accommodate its religious mission. In addition, the Congregation claimed that it needed to update the 110-year-old building to make it more easily handicapped accessible.

To this end, the plan seeks to demolish the existing Community House occupying tax lot 37, and replace it with a nine-story (including penthouse and cellar) mixed-use community facility/residential building. The use of the Property conforms with the zoning regulations (i.e., as-of-right), so no use waivers were requested; the variance request was with respect to non-complying bulk. The Congregation sought a waiver of certain regulations, since the proposed building does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear setback for the zoning district.[3] The proposed building will have a total floor area of 42,406 square feet, which is comprised of 20,054 square feet of community facility floor area and 22,352 square feet of residential floor area. The base height along West 70th Street is 95 feet, 1 inch, which is just over 35 feet higher than the maximum permitted height of 60 feet; the front setback is 12 feet, which is 3 feet short of the minimum permitted distance of 15 feet; the total height is 105 feet, 10 inches, which is just over 30 feet higher than the maximum permitted height; the rear yard is 20 feet for the second through fourth floors, which is equal to the required minimum; the rear

[3] "Lot coverage" is that portion of a zoning lot which, when viewed from above, is covered by a building."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 an open space. "Base height" is the maximum permitted height of the front wall of a building before any required setback. "Building height" is the total height of the building, measured from the curb level or base plane to the roof. 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.

setback is 6 feet, 8 inches, which is more than 3 [redacted] short of the minimum required distance of 10 feet; and, the interior lot coverage is 80%, which is 10% greater than the maximum permitted lot coverage of 70%.

In support of the application, the Congregation submitted a zoning analysis, a statement in support, an economic analysis, drawings, and photographs. The Congregation also submitted an Environmental Assessment Statement. An Economic Analysis Report, dated March 28, 2007 (the "March 2007 Report"), was submitted by the Congregation's consultant, Freeman/Frazier & Associates, Inc. ("Freeman/Frazier"). The March 2007 Report analyzed the feasibility of two alternatives for the development of the site—an as-of-right residential/community facility consisting of a six-story building, with condominium units on the fifth and sixth floors, and a proposed residential/community facility. The latter proposal would require a variance from the BSA, since the proposal called for an eight-story plus penthouse mixed-use building, with condominiums on floors five through eight, plus the penthouse.[4]

On or about June 15, 2007, the BSA issued a Notice of Objections to the variance application, to which Freeman/Frazier responded; the BSA issued a second set of objections on October 12, 2007, comprising twenty-two (22) objections, to which Freeman/Frazier also responded. The crux of the response related to the second prong of the required finding of fact, i.e., the

[4] Freeman/Frazier subsequently made revisions to the March 2007 Report, and submitted letters and/or reports dated September 6, 2007; October 24, 2007; December 21, 2007; January 30, 2008; March 11, 2008; April 1, 2008; May 13, 2008; June 17, 2008; and, July 8, 2008.

reasonable return analysis. Freeman/Frazier also provided a revised as-of-right development, since the prior as-of-right proposal actually violated the rear yard limitations and was not as-of-right. The revised proposal also reduced the floor-to-ceiling heights, which resulted in a seven-story building with a total of six residential units. Freeman/Frazier concluded that an as-of-right building would result in an annualized capital loss in the amount of $23,000, while the revised proposed development would yield an annualized return on total investment of 8.16%.

The Community Board 7 Land Use Committee ("CB7") held hearings on October 17 and November 19, 2007. A number of community residents and elected officials spoke in opposition. The Congregation pointed out that the design had changed slightly after the Congregation appeared before the Landmarks Preservation Commission ("LPC"), with respect to the decrease in size of the proposed building and certain elements of the façade.[5] CB7 expressed concern as to whether all of the residential space in the proposed building was really necessary to finance the Project and the Congregation's programmatic needs. The opposition raised this as a concern, and also questioned the Congregation's use of the Parsonage as rental property rather than as space for its programmatic needs; the excessive garbage that would pile up after events; excessive traffic from the school; and, the shadows that will result from the height of the new building. CB7 questioned the need for five condominiums; whether five condominiums was truly the minimum number necessary for a reasonable return; and, why a Congregation with a large number of wealthy members needed this manner of financing for its programmatic needs.

[5] At the time of the presentation to the LPC, the Congregation sought to construct a fourteen-story building.

The Congregation asserted that it was not required to satisfy the finding of a reasonable rate of return, and that it was optional for the BSA to make that finding. The Congregation stated that the Parsonage was not suitable for community facility use, in that there were too many building code violations for multi-purpose use, so that it is only suitable as a residence. CB7 rejected the variances for the condominiums, but approved the smaller, lower floor variances, essentially approving the horizontal variances but not the vertical variances. On December 4, 2007, the entire Community Board rejected all seven of the variances.

After notice by publication and mailing, the BSA held its first hearing on November 27, 2007. Representatives from the Congregation addressed the reasons for the proposed building, which included the need to accommodate the growth in membership and the need to make the building more handicapped accessible. The BSA asked the Congregation to consider only the value of the residential portion of the site in calculating the reasonable return, and eliminate the community facility from the site value.[6] By letter dated December 21, 2007, Freeman/Frazier submitted its revisions. Five development alternatives were set forth: (1) a revised as-of-right community facility/residential development, which is a revision to the proposal submitted in the March 2007 Report; (2) a lesser variance alternative as-of-right community facility/residential development, which is based on the proposal that was submitted in response to the Board's June 15, 2007 Notice of Objections; (3) a claimed as-of-right structure with tower development, which would consist of a tower with floors five through sixteen comprising thirteen residential units, but would have a smaller zoning floor area than the proposed development; (4) the proposed development, which

[6] The term "site value" is used interchangeably with the terms "acquisition cost" and "market value" of the Property.

consists of new construction of an eight-story building, plus penthouse; and, (5) an as-of-right residential development. Also, pursuant to the Board's request, the economic feasibility analysis was performed considering only the value of the residential portion of the site. The first three alternatives all resulted in annualized losses. The fourth proposal of the mixed use building with five condominiums provided an annualized return on total investment in the amount of 12.19%, while the fifth proposal provided an annualized return on total investment in the amount of 3.63%. Freeman/Frazier acknowledged its failure to respond to the opposition's concerns, including not valuing income from the school, Parsonage and basement/banquet space.

The public hearing continued on February 12, April 15, and June 24, 2008. Each date, testimony was presented by opponents to the Project and written submissions were prepared by both the Congregation and the opponents to the Project after each hearing. Freeman/Frazier's March 11, 2008 letter and report responds specifically to concerns raised at the February 12, 2008 hearing, and to the report of Martin Levine, of Metropolitan Valuation Services ("MVS"), the expert for the opposition. The BSA asked Freeman/Frazier to review the estimated property value of the residential development portion of the site, using the as-of-right zoning floor area determined by assuming the building lot to be a single split zoning lot, and to consider the financial feasibility of several new alternatives. Freeman/Frazier re-examined comparable sites for land prices, and examined alternatives such as increasing the courtyard space (which would decrease the sellable area on each floor), and reducing the height of the proposed building by one story. The revised proposals would provide an annualized return on total investment of 8.58% and 1.94%, respectively.

MVS submitted a report in which the principal complaint was with respect to the economic feasibility of the Project. MVS questioned Freeman/Frazier's land value of $750 per square foot of buildable area, claiming that this number was arrived at using "cherry picked" data. Rather, MVS argued that a land value of $500 per buildable square foot was a more probable indicator of the Property's market value. MVS also questioned the construction costs. At the April 15 hearing, the Board focused on the price per foot for development, the comparables that were used, and the programmatic needs of the Congregation. The Chair questioned the credibility of the site value, and questioned whether the current proposal before the Board really was the minimum variance required, which is the fifth required finding. The opposition questioned why the BSA was not scrutinizing the Congregation's financial statements to see what available resources it has, other than potential income from the sale of the condominiums. The BSA concluded the hearing by requesting that the Congregation address the issue of shadows and the implication of a larger building on the surrounding buildings. The BSA also requested clarification to demonstrate that the additional ten-foot encroachment is driven by the Congregation's programmatic needs.

Freeman/Frazier's May 13, 2008 response contained a revised proposal consisting of a building with eight floors and a penthouse, with a complying courtyard in the rear in order to continue providing light and air to three lot line windows in the West 70th Building. The courtyard would start at the sixth floor, which would reduce the size of floors six through eight, and the penthouse. A second revised proposal was the same as above, but eliminated the penthouse. A third alternative eliminated the eighth floor, but retained the penthouse, because the LPC believed the architectural character of the penthouse was an important design feature. The three proposals yielded an annualized return on total investment of 10.66%, 3.82%, and 0.93%, respectively. Although the

BSA specifically requested that the Congregation address the impact of shadows and the programmatic needs of the Congregation, these issues were not addressed.

MVS raised additional objections, to which Freeman/Frazier responded by noting that the same objections were set forth previously. A member of the opposition (petitioners' counsel herein) expressed concern about the practice of measuring return on investment, rather than a return based on equity. Freeman/Frazier responded that it is customary in a condominium development project to use return on investment (see pp. 23-24, infra), and also addressed other concerns raised by opponents to the Project.

At the June 24 hearing, a question arose concerning the failure to account for the terraces in the proposed pricing of the condominiums. The BSA also questioned how the efficiency ratio was calculated, the comparables that were used, and whether the comparables calculated square footage solely based on the interior of an apartment or whether the square footage also included common areas. Freeman/Frazier responded to issues raised at the June 24 hearing, MVS' June 23, 2008 report, and a letter from Mr. Sugarman. Freeman/Frazier's July 8 submission updated the prices for the condominium units, since they now had terraces on the fifth and sixth floors; the proposed apartment prices were still lower than in the March 2007 Report, since there is now less sellable square footage per floor than in the original plan. The additional value as a result of the terrace areas increased the annualized return on investment from 10.66% to 10.93%. The revisions to the as-of-right development resulted in an annualized capital loss of $4,569,000. Freeman/Frazier also responded to the question concerning the efficiency ratio, noting that the variations occurred as the sellable areas change, while the common areas remain the same size. The opponents continued

to question the methodology to determine the acquisition costs, and the decision to utilize a return on investment analysis, rather than a return based on equity. Freeman/Frazier responded by noting that the concerns were repetitive, or rejected the comments outright.

In a decision dated August 26, 2008, the BSA adopted unanimously, by a vote of 5-0, the Resolution granting the variance. The BSA Resolution approved the construction of a new building which will contain both community space and five luxury condominium apartments. The relevant portion of the Resolution provides that the BSA

> permit[s], 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:
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> **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. . .

Other conditions include, inter alia, that the Congregation obtain an updated Certificate of Appropriateness from the LPC prior to any building permit being issued by the DOB; that substantial construction be completed in accordance with Z.R. § 72-23; and, that the DOB ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction. The Resolution was filed on August 29, 2008. This Article 78 proceeding was commenced on September 29, 2008.

As approved, the proposed building includes mechanical space and a multi-function room on the sub-cellar level, with 360-person capacity[7] for a banquet hall for various life cycle events; a cellar level with separate dairy and meat kitchens and childcare space. The first floor consists of the synagogue lobby, small synagogue, rabbi's office, and library and archive space; the second floor contains toddler classrooms; the third floor contains Hebrew School classrooms and the Beit Rabban Day School; and, the fourth floor consists of a caretaker's apartment and adult education classrooms. The residential condominiums are on the fifth through eight and ninth (penthouse) floors. Portions of the ground through fourth floor contain elevators for the synagogue.

Petitioners' Allegations

Petitioners raise numerous objections to the BSA's determination. The primary claim is that there was no need for the zoning variance at all. Petitioners assert that the Congregation stated repeatedly during the course of the proceedings before the BSA that the purpose of the variances was to fund the Congregation's programmatic needs, through income from the condominiums. Petitioners argue that the Congregation failed to demonstrate financial need; indeed, petitioners assert that the historic Congregation can raise the necessary funds from its members. They also object to the BSA's failure to inquire of the Congregation as to the rent being paid by the Beit Rabban Day School; the rent being paid by the residential tenant of the six-bedroom luxury Parsonage residence, which is apparently rented to Lorin Maazel, the Musical Director of Lincoln Center, at a monthly rent of $19,000; and, income from the banquet facilities.

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[7] During the November 19, 2007 CB7 public meeting, a representative of the Congregation stated that the capacity was 440 persons.

Petitioners further allege that a conforming as-of-right mixed-use building could be built, with two floors of luxury condominiums, with setbacks and height limitations of 75 feet, consistent with the brownstones on the block, or, a conforming all-residential building could be built that would allow for seven floors of condominiums, with two sub-basements. The proposed building will adversely affect the light and air in the courtyard that these apartments face. Two of the apartments owned by Mr. Lepow—apartments 7B and 8B—will be "bricked up" by the proposed building as a result of the variances. In a conforming, as-of-right structure, however, his apartments would not be bricked up. Similarly, the other units face a courtyard; in an as-of-right structure, there would be little, if any, adverse impact.

Petitioners allege that on November 8, 2006, before the application was filed, respondents Srinivasan and Collins held what petitioners describe as an "ex parte" meeting with the Congregation's lawyers and consultants at BSA headquarters without notifying the opponents of the project, and refused to provide information concerning what occurred at the meeting.

Finally, petitioners allege that because the Congregation did not exhaust its administrative remedies provided by §74-711, claiming that the Congregation failed to complete the review process before the LPC. Petitioners contend that the BSA should not have entertained the application, since the Congregation is asserting the same landmark hardships and economic need inherent in a § 74-711 application.

Article 78 Standard of Review

"'It is not the function of judicial review in an article 78 proceeding to weigh the facts and merits *de novo* and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis.'" Clancy-Cullen Storage Co., Inc. v. Board of the Elections in City of New York , 98 A.D.2d 635, 636 (1st Dep't 1983) (emphasis in original), quoting Kayfield Const. v. Morris, 15 A.D.2d 373, 378 (1st Dep't 1962). "[A]n agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable." In re Smith v. Donovan, 61 A.D.3d 505 (1st Dep't 2009), citing Seitttelman v. Sabol, 91 N.Y.2d 618, 625 (1998).

Moreover, there is a special deference given to determinations of zoning boards and other bodies. Khan v. Zoning Bd. of Appeals of Village of Irvington, 87 N.Y.2d 344, 351 (1996); Parsons v. Zoning Bd. Of Appeals, 4 A.D.3d 673, 674 (3d Dep't 2004). "Local zoning boards have broad discretion in considering applications for variances and interpretations of local zoning codes, and the scope of judicial review is limited to whether their action was arbitrary, capricious, illegal, or an abuse of discretion." Matter of Marino v. Town of Smithtown, 61 A.D.3d 761 (2d Dep't 2009), citing Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613 (2004); Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 62-63 (1st Dep't 2000). A determination is considered to be rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." Halperin v. City of New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005), lv. dismissed, 6 N.Y.3d 890, lv. denied, 7 N.Y.3d 708 (2006). Furthermore, "[w]hile religious institutions are not exempt from local zoning laws, 'greater flexibility is required in evaluating an application for a religious use than an

application for another use and every effort to accommodate the religious use must be made.'" Halperin, supra, at 773, citations omitted.[8] In challenging any zoning determination as arbitrary, "the burden of establishing such arbitrariness is imposed upon him who asserts it." Robert E. Kurzius, Inc. v. Incorporated Vil. of Upper Brookville, 51 N.Y.2d 338, 344 (1980), cert. denied, 450 U.S. 1042 (1981), quoting Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121 (1951).

The Five Factors

As set forth at pp. 3-4, supra, pursuant to Z.R. § 72-21, the BSA is required to examine five factors before granting a variance. Each of these findings is addressed below.

The First Finding - Unique Physical Conditions

Under § 72-21(a), there must be a finding that the property at issue 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 the result of the general conditions of the neighborhood. The unique physical conditions must be "peculiar to and inherent in the particular zoning lot." The Congregation argued that the site's physical conditions created an unnecessary hardship in developing the site in compliance with the zoning regulations

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[8] Of course, where the proposed use is solely or primarily for religious purposes, flexibility and greater deference must be accorded. Here, the variance is sought for a mixed use building. "Affiliation with or supervision by religious organizations does not, *per se,* transform institutions into religious ones. 'It is the proposed use of the land, not the religious nature of the organization, which must control.'" Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710, 711 (2d Dep't 1988), quoting Bright Horizon House v. Zoning Bd. of Appeals of Town of Henrietta, 121 Misc. 2d 703, 709 (Sup. Ct. Monroe Co. 1983). The record reflects that the BSA gave the Congregation deference with respect to the variance request for the community facility, but did not accord the Congregation deference to the extent that it was seeking a variance for the revenue-generating, residential portion of the Project.

with respect to lot coverage and yards. Were the Congregation required to comply with the 30 foot rear yard and lot coverage, it argued, the floor area of the community facility would be reduced by approximately 1,500 square feet, which would severely restrict the Congregation's programmatic needs. The Congregation argued that it needed to expand the lobby ancillary space; expand the toddler program; develop classroom space for the Hebrew school and adult education program; provide a residence for an onsite caretaker; and, provide classrooms for the Beit Rabban Day School.

The BSA separated its analysis of the first finding into two parts: the community facility portion of the Project and the residential portion of the Project. This separation was necessitated by the fact that the Congregation is not accorded the deference as a non-profit for the residential portion of the Project. With respect to the community facility portion of the Project, the BSA rejected the opposition's claim that the Congregation was required to establish a financial need for the project as a whole, since nothing in the zoning law requires a showing of financial need as a prerequisite for the granting of a variance. Rather, all that is required is that the existing zoning regulations impair its ability to meet its programmatic needs The BSA rejected petitioners' contentions that the Congregation should have sought to raise funds from its members instead of seeking the requested variances, stating that the wealth of the property owner is irrelevant to the hardship finding.

The BSA determined that, when considering the physical conditions together with the programmatic needs of the Congregation, denying the variance would constitute an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations." The BSA rejected petitioners' contention that the programmatic needs were too

speculative; that both the Beit Rabban Day Sch[redacted] and the toddler program were not reasonably associated with the overall religious purpose of the Congregation; and, that the Congregation's programmatic needs could be satisfied within an as-of-right building. In response to the BSA's request, the Congregation submitted a detailed analysis of the programmatic needs on a space- and time-allocated basis, which demonstrated that daily simultaneous use of the majority of the space required waivers of the zoning regulations with respect to floor area. Because of the areas needed for an elevator and stairs, and the height limit of an as-of-right building due to the width of the Parsonage, an as-of-right building would gain little additional floor area. The BSA Resolution cites Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that it is inappropriate for a zoning board to second guess a non-profit organization with respect to the location in which to place its programs.

Turning to the residential portion of the Project, among the unique physical conditions of the site include the fact that the lot is divided by a zoning district boundary, with 73% of the lot in R10A and 27% of the lot in R8B. The total height limitation for R10A is 185 feet, with a maximum base height of 125 feet, while the R8B portion has a total height limit of 75 feet and a maximum base height of 60 feet. Applying the R8B restrictions, less than two full stories of residential floor area would be permitted above the four-story community use facility.

Petitioners argued that the lot was not unique, solely because of the presence of a zoning district boundary within the lot, pointing out that other properties owned by religious institutions and the Museum of Natural History in the areas bounded by Central Park West and Columbus Avenue, and by 59th Street and 110th Street, had the same zoning district boundaries.

The BSA noted that the presence of other lots with the same zoning district boundaries does not defeat the claim of "uniqueness;" rather, the parcel's conditions must be such that they are not generally applicable to other lots in the vicinity.

An applicant's claim of uniqueness necessarily requires a comparison between similarly situated lots in the neighborhood with those of the applicant's lot. Soho Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441 (2000). "Unique physical conditions" may include the idiosyncratic configuration of the lot (Soho Alliance, supra) or unique characteristics of the building itself. UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248, 249 (1st Dep't 2002). A unique consideration here is that a large portion of the lot is occupied by the landmark Synagogue; the BSA noted that the limitations on development on the Synagogue portion of the lot result in that portion being underdeveloped. Because of the landmark status, the Synagogue is permitted to use only 28,274 square feet for an as-of-right development, although it has approximately 116,752 square feet in developable floor area. The unique physical conditions, the BSA concluded, "when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations," which satisfied the requirement of subdivision (a) of the zoning regulations. This finding is sufficient to support the BSA's determination that the Property is unique.

The Second Finding - Inability to Earn a Reasonable Return

Second, the BSA must find that the physical conditions of the Property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a

reasonable return" from the property.[9] Failure to meet the burden of proof that an as-of-right building in conformity with the zoning requirements will not bring a reasonable return requires denial of the variance. Petitioners assert that the BSA failed to properly analyze the reasonable return of a conforming as-of-right building.

The Congregation argued initially that it did not even need to show a reasonable return, since the Congregation is a not-for-profit corporation. Section 72-21(b) sets forth that "this finding shall not be required for the granting of a variance to a non-profit organization." But, the BSA specifically requested that the Congregation submit reasonable return analysis, concluding that the exemption from this requirement did not apply when a non-profit was seeking variances for a total or partial for-profit building. Alternatively, the Congregation argued that even if the Congregation had to satisfy the requirement of the reasonable return analysis, the Congregation demonstrated that a conforming as-of-right structure would not result in a reasonable rate of return.

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[9] The term "reasonable return" is not defined. In its memorandum of law, the Board suggests that "reasonable return" does not mean "any sort of profit whatsoever," but rather a profit margin "substantial enough to actually spurt development." The rate of return for the proposed development, as approved by the BSA, is 10.93%. In SoHo Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441, a reasonable rate of return was found to be 9.9%. In Mt. Lyell Enterprises, Inc. v. DeRooy, 159 A.D.2d 1015, 1016 (4th Dep't 1990), an 11.76% rate of return after three years was found to be "not unreasonably low." But, in Ryan v. Miller, 164 A.D.2d 968 (4th Dep't 1990), a use variance was denied when a conforming use would still earn 5.7%, even though other conservative investments were earning 10-11% return at that time. The Appellate Division decision in SoHo Alliance flatly rejected any effort to determine that a specific percentage is reasonable as a matter of law: "[w]e are unaware of any hard and fast rule as to what constitutes a reasonable rate of return. Each case turns on facts that are dependent upon individualized circumstances." Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 69 (1st Dep't), aff'd, 95 N.Y.2d 437, 441 (2000).

Petitioners assert that although the BSA required the analysis to be performed, the BSA never explicitly addressed how the reasonable return analysis should be conducted, since there is no language in the statute as to how to consider a mixed-use profit and non-profit structure. Freeman/Frazier's March 2007 Report concluded that there is no return on investment provided by the as-of-right development. The first proposed development provided a 6.55% annualized return on total investment. Freeman/Frazier notes that this is at the low end of the range that typical investors would consider for an investment opportunity. The Congregation then submitted a study that analyzed an as-of-right community facility/residential building within an R8B envelope; an as-of-right building with a floor area ratio ("FAR") of 4.0;[10] a proposed building requiring a variance; and, a community facility and residential building that is smaller than the third proposal. In November 2007, the BSA asked the Congregation to revise the evaluation, which it did, by including an as-of-right community facility and residential tower using a modified site value. None of these analyses, other than the original proposed structure, resulted in a reasonable return.

The BSA asked the Congregation to submit additional revisions, after it was determined that the proposed tower on the R10A portion of the lot was contrary to Z.R. § 73-692, the "Sliver Law."[11] At the February 12, 2008 and April 15, 2008 hearings, the BSA questioned the Congregation's basis for the valuation of its development rights, and asked for a recalculation of the value of the site, together with a revised plan with a court to the rear of the building, above the fifth floor. Another revised plan was submitted, which assessed the financial feasibility of: the original proposed building, but with a complying court; an eight-story building with a complying court; and,

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[10] The FAR permitted for district R8B is 4.0; the FAR for district R10A is 10.0.

[11] The Sliver Law applies to lots under 45 feet and limits the height of a building on such a lot to a height of 60 feet.

a seven-story building with a penthouse and comp[redacted]ng court, using revised site values. Once again, only the original proposed building was shown to be financially feasible. The Board asked for further clarifications; in a July 8, 2008 response, Freeman/Frazier recalculated the value of the apartments with the addition of rear outdoor terraces, and revised the sale prices of two units. Again, the revised analysis that was submitted failed to demonstrate a reasonable return.

Petitioners assert that the BSA failed to adhere to its own guidelines because it did not require the Congregation to provide the original acquisition price of the Property. But, the BSA points out that this is not required, since it is contained in the general guidelines. In any event, the Congregation did submit the acquisition costs, which were provided in the deeds to the Property. Petitioners also assert that the Congregation never complied with the request to provide an analysis of an all-residential building, and instead, provided an analysis for a partially residential building, without including basement and sub-basement space. The methodology utilized by the Congregation's expert, petitioners contend, inflated the largest single cost component—the site value—in concluding that the Congregation could not obtain a reasonable return. Petitioners questioned the use of comparable sales prices based on property values from the period of mid-2006 to 2007, rather than more current sales prices, and questioned the methodology of calculating the financial return based on profits, rather than by calculating the projected return on equity. They also questioned the omission of income from the Beit Rabban Day School from the feasibility study. Finally, petitioners' biggest complaint was that the Congregation's expert did not utilize the return on equity analysis in determining the Project's rate of return.

Freeman/Frazier responded that it was more appropriate to use a return on profit model, which evaluated profit or loss on an unleveraged basis, to evaluate the feasability of the Project, rather than to evaluate the Project's return on equity on a leveraged basis. Freeman/Frazier argued that the methodology it used is typically used for condominium or home sale analyses, and is more appropriate for this Project, while the methodology petitioners wanted to use is typically used for income producing residential or commercial rental projects. Petitioners assert, in contrast, that not only do the BSA guidelines ask for an analysis on a leveraged basis, but that many reported decisions show that return on equity is the factor commonly used. Petitioners point out that Freeman/Frazier used the return on equity analysis in the project that was the subject of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 2006 WL 1547635, 1 (Sup. Ct. Kings Co. 2006), rev'd, 49 A.D.3d 749 (2d Dep't 2008). Petitioners contend that both the BSA and Freeman/Frazier were unable and unwilling to explain why a leveraged return on equity analysis was appropriate in the Red Hook project, but not for the Congregation's Project. What neither side points out is that the Red Hook project consisted of both condominiums and retail space; according to one decision, four of the six floors were condominiums, while the other two floors were retail space.[12] See, Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 11 Misc. 3d 1081(A), 2006 WL 1023901, 1 (Sup. Ct. Kings Co. 2006). This mixed-use of commercial rental and residential areas explains why Freeman/Frazier employed the return on equity analysis in the Red Hook case, while here, it used a return on profit model. It cannot be found to be arbitrary and capricious to use a return on profit model for that portion of the Project that consists solely of residential condominiums.

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[12] The Board incorrectly refers to the Red Hook project as a conversion from a warehouse to luxury rental apartments. Petitioners simply refer to the Red Hook project as a residential building.

The other cases cited by petitioners that employed a return on equity analysis were requests for variances for conversions for commercial use. Kingsley v. Bennett, 185 A.D.2d 814 (2d Dep't 1992) (real estate office in a one- and two-family residential zoning district); Morrone v. Bennett, 164 A.D.2d 887 (2d Dep't 1990) (restaurant/bar with cabaret sought to expand its facility in a commercial district mapped within a residential district); Lo Guidice v. Wallace, 118 A.D.2d 913, 915 (3d Dep't 1986) (request to open an Italian restaurant in an area zoned as two-family residential). In contrast, a return on profit analysis was utilized in Cook v. Haynes, 63 A.D.2d 817 (4th Dep't 1978), which concerned a request by a landowner for a variance to build a residence on a lot that was zoned for both residential and agricultural purposes.

Here, the BSA agreed that the return on profit model, which evaluates profit or loss on an unleveraged basis, is the customary model for evaluating market-rate residential condominium development. Using the return on profit model, Freeman/Frazier concluded that the Congregation could not obtain a reasonable return from a conforming, as-of-right structure. Petitioners contend that Freeman/Frazier's reports used inconsistent terms, provided incomplete and unsigned reports by the estimator of construction coats, and used different values for the total square footage. In the petition, petitioners accuse Freeman/Frazier of "transparently manipulating the numbers," by decreasing the number of square feet in each report as the value per square foot increases, thereby allowing the Project to show a loss. The expert retained by the opposition, Martin Levine, of MVS, pointed out the Congregation's faulty approach, which the Congregation never corrected, based on its contention that the BSA did not ask for any additional information concerning the reasonable return for an all-residential building and the Congregation's failure to include the sub-sub-basement. Mr. Levine questioned Freeman/Frazier's non-compliance with BSA guidelines; construction cost

estimate fallacies; incomplete documents; and, exaggerated soft costs. Petitioners contend that the BSA ignored every issue raised by Mr. Levine, except his criticism of the return on equity, which the BSA considered but rejected.

These are but some of the challenges petitioners raise in their attempt to challenge the subdivision (b) finding. This court has considered all of their objections and finds them to be unavailing. The record reflects that the BSA responded to the concerns raised by petitioners during the underlying proceedings, particularly in that the BSA required numerous revisions to the Freeman/Frazier submissions. Contrary to petitioners' contentions, the BSA Resolution does more than merely "indicate" that there would be no reasonable return; the BSA makes the requisite finding. Based on the foregoing, and the deference that must be accorded the BSA's determination that the proposed building is necessary to enable the Congregation to realize a reasonable return from the Property, this court determines that the finding is not arbitrary and capricious.[13]

The Third Finding — Not Altering the Essential Character of the Neighborhood and Not Impairing the Use of Adjacent Property

Petitioners challenge the BSA finding that the granting of a variance will not alter the essential character of the neighborhood; will not "substantially impair the appropriate use or development of adjacent property;" and, "will not be detrimental to the public welfare." Rather, they argue that (1) the variance results in the bricking up of windows in the West 70th Building and (2) the shadows cast on other buildings on the block will have a negative effect on the public welfare and the environment.

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[13] Given the current economic climate, it is uncertain whether the reasonable return as calculated by Freeman/Frazier remains a viable figure.

The initial proposal would have resulted in the closure of seven windows in six cooperative apartment units in the West 70th Building. The BSA required the Congregation to reduce the size of the condominiums in the rear of the building and create a courtyard to prevent the rear windows in the West 70th Building from being bricked up. But, petitioners assert that the BSA and the Congregation "collaborated" to create a record that would obscure the facts as to the number of windows that would be bricked up. Petitioners argue that it was arbitrary and capricious and an abuse of discretion for the BSA to require courtyards in the rear of the building but not to require a courtyard for the identically situated apartments in the front part of the eastern face of the building. As approved, the proposed building results in windows on the eastern face of the West 70th Building losing light and air, together with views of Central Park, while a conforming, as-of-right building would not block any windows in the West 70th Building.

The BSA points out that a property owner has no protected right to a view, and that lot line windows cannot be used to satisfy light and air requirements. Nevertheless, the BSA required the Congregation to provide a fully compliant outer courtyard to the sixth through eighth floors of the Project, which would retain three more lot line windows than had been proposed originally, notwithstanding the fact that there was no requirement to do so. The fact that four lot line windows in the front of the West 70th Building adjacent to the Project will be blocked is not grounds to reject the Project.

As part of the variance application, an environmental review was conducted in accordance with the State Environmental Quality Review Act, Article 8 of the State Environmental Conservation Law ("SEQRA") and the City Environmental Quality Review, Title 62, Chapter 5 of

the Rules of the City of New York ("CEQR") which found that the Project would not have a significant adverse impact on the environment. Once the BSA made this finding, there was no need for the BSA to prepare an Environmental Impact Statement, pursuant to 43 RCNY § 6-07(b). Petitioners criticize the BSA's reliance on CEQR regulations, which provide that shadows on streets and sidewalks or on other buildings generally are not considered significant.[14] Petitioners contend that there is a conflict between CEQR, and the mid-block zoning resolution and subdivision (c). Petitioners further assert that there was no proper analysis of the street shadows and no comparison of the difference in shadows between an as-of-right building and the Project.

The BSA notes that while petitioners argued that the proposed height of the Project was incompatible with the neighborhood character, the West 70th Building has approximately the same base height as the proposed Project and no setback. The West 70th Building also has a FAR of 7.23, while the Project has a FAR of 4.36. Other buildings directly to the north and south on Central Park West have a greater height than the proposed building. Finally, since no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street, any incremental shadows would not constitute a significant impact on the surrounding community.

The Fourth Finding — Practical Difficulties or Unnecessary Hardship Have Not Been Created by the Owner

Subdivision (d) requires that the evidence support a finding that the claimed hardship was not created by the owner of the premises or a predecessor in title. The BSA found that the

[14] An adverse shadow impact occurs when the shadow from a proposed project falls upon a publicly accessible open space, an historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation.

hardship was not self-created, but originated from the fact that the Synagogue building is landmarked. The hardship is a further result of the 1984 rezoning of the site, the site's unique physical conditions, and the site's location on a zoning lot that is divided by a district boundary. This finding has ample support in the record, and is not specifically challenged by petitioners.

The Fifth Finding — Variance is the Minimum Variance Necessary to Afford Relief

Petitioners argued that the minimum variance necessary would actually be no variance at all, claiming that the Congregation could have built an as-of-right structure to meet its programmatic needs. After changes were made to the Project's design, the BSA determined that the Congregation had "fully established its programmatic needs for the proposed building and the nexus of the proposed uses within its religious mission." As to the community use portion of the Project, the BSA again cited to the line of cases, including Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, supra, 38 N.Y.2d 283; Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968); and, Jewish Recons. Synagogue of North Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that a zoning board must accommodate a proposal 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." The BSA found that no such showing had been made.

As to the condominium portion of the Project, the BSA found that the modifications to the proposal, which included adding an outer court and reducing the floor plates of the upper floors, thereby reducing the variance for the rear yard setback, when considered in conjunction with the reasonable return analysis, led to the determination that the variance is the minimum required to afford relief. This finding is supported in the record and is not arbitrary and capricious.

Other Arguments Raised By Petitioners

In addition to their contentions that the Congregation's proposed building did not satisfy the need for a variance, and that the Board's findings under §72-21 were arbitrary and capricious, petitioners raise other challenges to the Board's determination, and contend that the process was flawed. All of these allegations are addressed below.

First, petitioners contend that prior to seeking a variance from the BSA, the Congregation was required to submit an application to the LPC for a special permit under Zoning Resolution § 74-711, and that its failure to do so precludes its application to the BSA for a variance. In 2001, the Congregation applied to the LPC for a special permit under Zoning Resolution § 74-711. A hearing was held on November 26, 2002. The Congregation subsequently withdrew the application and requested a Certificate of Appropriateness, which was considered at a public hearing on February 11, 2003. Following comments at that hearing, the proposal was revised, and a hearing was held on July 1, 2003; additional changes were made, and two additional hearings were held on January 17 and March 14, 2006. At the conclusion of the March 14 hearing, the LPC indicated that it was approving the proposed building, and issued a Certificate of Appropriateness, dated March 21, 2006, solely as to whether the structure would be appropriate for a landmark district. As the BSA points out in its papers, there is no legal requirement that a party seek a special permit from the LPC. A party may elect to seek either a special permit or a variance. The only requirement that the Congregation had to fulfill was to apply for a Certificate of Appropriateness, which the Congregation did. Therefore, the Congregation fulfilled the prerequisite before applying to the BSA for a variance.

Another argument raised by petitioners is that it was improper for the BSA to meet with representatives of the Congregation on November 8, 2006, months before the application was even brought before the BSA. Petitioners assert that the Board had already determined to grant the variances before the hearings had even begun. In response to this claim, the BSA asserts that pre-application meetings are a routine part of practice before the Board. Indeed, annexed as Exhibit E to the Board's answer is a document entitled "Procedure for Pre-Application Meetings and Draft Applications." The document sets forth that "[t]he BSA historically has offered some form of pre-application meeting process to potential applicants." Pre-application meetings are strongly encouraged, so that the application process proceeds more smoothly. After petitioners' counsel complained about the pre-application meeting, the BSA offered counsel the opportunity for his own pre-application meeting, but counsel refused.

At the start of the public hearing in this matter, the Chair of the BSA addressed the concerns of the community that an "ex parte" meeting had been held some months before, and the opposition's request that the BSA members who met with representatives from the Congregation should recuse themselves. The Chair of the BSA explained that pre-application meetings are routine, and that the meeting is not barred under section 1046 of the Charter, Administrative Procedure Act ("APA"), since APA does not apply to proceedings before the BSA.[15] See, Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25

[15] Section 1046 pertains to rules for adjudication when an agency is authorized to conduct an adjudication. The term "adjudication" is defined in § 1041 as "a proceeding in which the legal rights, duties or privileges of named parties are required to be determined by an agency on a record and after an opportunity for a hearing." This section applies to hearings before an administrative law judge or hearing officer, not an agency such as the LPC or BSA. Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25 A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y. 3d 710 (2006).

A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y.3d 71[illegible] (2006); but see, Carroll v. Srinivasan, Index No. 110199/07 (Sup. Ct. N.Y. Co. Jan. 30, 2008) (holding that BSA hearings are subject to § 1046 of the City Charter). Since nothing in the law prohibits the BSA from holding pre-application meetings, petitioners' claim that the meeting was improper is without merit.

Finally, petitioners challenge the manner in which the hearing was conducted and the entire proceeding as arbitrary and capricious. Petitioners challenge the time limits on their presentations at the hearing; the BSA's failure to question some of the opposition's expert witnesses; the refusal to allow the opposition architect to inspect the premises; and, the BSA's refusal to subpoena witnesses. In response to these allegations, the BSA notes that since the applicant has the burden to support its case for each of the five required findings under Z.R. § 72-21, applicants must be given the opportunity to do so. But, the BSA maintains that the opponents were in no way strictly limited to a three minute time limit during the four hearings dates.

First, nothing requires sworn testimony, cross-examination of witnesses, or the subpoenaing of witnesses at a BSA hearing. Under section 663 of the Charter, it is wholly discretionary for the chair or vice-chair to administer oaths or compel the attendance of witnesses. Similarly, § 1-01.1(j) and (k) of the Rules of the City of New York provides that the Chair controls the admission of evidence and order of the speakers, and allows the Chair to limit testimony.

The administrative record that was submitted in this case belies petitioners' contention that they did not have an adequate opportunity to be heard. The transcripts of the BSA hearings reflect that at every hearing date, community members who opposed the project—including

petitioners, petitioners' counsel, elected officials and other members of the community—were permitted to speak.[16] In addition, opponents to the Project, including petitioners' counsel, submitted numerous letters, documents and reports to the BSA in opposition to the Project.

Petitioners' contentions as to the conduct of the hearing are wholly devoid of merit. The public hearing is not a judicial or quasi-judicial proceeding. Opponents to an application have no due process right to cross-examine applicants for a variance. See note 15, supra. For all of these reasons, petitioners' claim that the procedures employed by the BSA were improper is rejected.

Conclusion

If this court were empowered to conduct a *de novo* review of the BSA's determination, and were not limited to the Article 78 standard of review of a reasonable basis for the determination, the result here might well be different. The facts are undisputed that the Congregation receives substantial rental income from the Beit Rabban Day School and the rental of the Parsonage; the Congregation may have additional earnings from renting the banquet space. There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage. It is also undisputed that the windows of some apartments in the building adjacent to the Project will now be blocked, whereas the windows would not be blocked by an as-of-right structure, which could have been built with two floors of condominiums.

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[16]For example, at the November 27, 2007 hearing, representatives from the offices of State Senator Tom Duane and Assembly Member Richard N. Gottfried spoke in opposition to the Project, as did Mark Lebow, Esq. an attorney for another group of opponents to the application; Norman Marcus, a retired attorney who previously served as general counsel to the Planning Commission; Alan Sugarman, Esq., counsel for petitioners herein; and, many other community residents. Indeed, of the 88-page transcript for that day's hearing, 43 pages contain opposition testimony.

Community residents expressed concern that approval of the variances at issue here opens the door for future anticipated applications by other not-for-profits in the Upper West Side historic district. The concern for precedential effect may well have merit. But, "in reviewing administrative determinations, a court may not overturn an agency's decision merely because it would have reached a contrary conclusion." Matter of Sullivan County Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 278 (1972). This court cannot substitute its judgment for that of the BSA. When viewing the record as a whole, and giving the BSA's determination the due deference that it must be afforded, it cannot be said that the BSA's determination that the Congregation's application satisfied each of the five specific findings of fact lacked a rational basis. Matter of Sullivan County Harness Racing Ass'n, supra, at 277-78 (1972) ("if the acts of the administrative agency find support in the record, its determination is conclusive."). The record reflects that the BSA "balanced and weighed the statutory facts, and its findings were based on objective facts appearing in the record." Halperin, supra, 24 A.D.3d 773. Accordingly, the decision must be confirmed. Id.

Based on the foregoing, the request to annul and vacate the BSA's determination is denied, and the petition is dismissed. The decision of the BSA is confirmed in all respects. This constitutes the decision, order and judgment of the court.

Dated: July 10, 2009

JOAN B. LOBIS, J.S.C.

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Norman Cindman
Clerk

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Index No. [redacted]/2008

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

NIZAM PETER KETTANEH and
HOWARD LEPOW,

Petitioners,

- against -

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents.

DECISION, ORDER, AND JUDGMENT

MICHAEL A. CARDOZO
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Tel: (212) 788-0790

Due and timely service is hereby admitted.

New York, N.Y. ....., *200* . . .

..... *Esq.*

Attorney for.....

EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 6

- -

LANDMARK WEST, INC., 103 CENTRAL PARK WEST CORP., 18 OWNERS CORP., 91 CENTRAL PARK WEST CORP. AND THOMAS HANSEN,

Plaintiffs

- against -

THE CITY OF NEW YORK, BOARD OF STANDARDS AND APPEALS, NYC PLANNING COMMISSION, HON. ANDREW CUOMO, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK AND CONGREGATION SHEARITH ISRAEL,

Defendants

- -

Index No. 650354-2008

- -

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioner

- against -

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, CHAIR, CHRISTOPHER COLLINS, VICE-CHAIR, AND CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents

- -

Index No. 113227-08

March 31, 2009
60 Centre Street
New York, New York 10007

Lester Isaacs - Official Court Reporter

B E F O R E: HON. JOAN B. LOBIS, Justice.

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BY: CHRISTINA HOGGAN, Assistant Corporation Counsel

Proceedings

THE COURT: For the record. Today I will have argument on two cases that are slightly different in procedural posture, both involve around the determination by the Board of Standards to grant variances to the a building and zoning code to allow accommodation to Congregation Shearith Israel to proceed with construction of a nine story building on property that fronts on West 70th Street, is that correct? And the synagogue that occupies the corner of 70th and Central Park West, and is a landmark structure sometime referred to as the Spanish and Portuguese Synagogue.

This is an Article 78 brought by two individual petitioners to have this Court set aside the determination of the Board of Standards on an Article 78 standard, under Article 78 standard.

The other case that is Landmark West versus the City, includes a cause of action against the Commission, which is now the caption of the 78. It's not completely the defendant or that's not really true?

MR. ROSENBERG: That's correct.

THE COURT: So the variances are all of the

defendants represented in Landmark here today, are they all here?

MR. ROSENBERG: They are here. They are all represented by the same counsel, which is the Corporation Counsel and the City of New York.

THE COURT: Also covering?

MR. ROSENBERG: Congregation Shearith Israel.

MS. HOGGAN: I don't represent the Congregation.

THE COURT: That's one part in the second case. Are they involved with the defendant?

MR. ROSENBERG: Your Honor, plaintiff named the Attorney General, because we raised constitutional issues and we have not received any communication from the Office of the Attorney General.

THE COURT: And they were served with the motion?

MR. ROSENBERG: Yes, they were served with the complaint. We served them with our responsive motion, I think the motion was served.

THE COURT: Do we have any idea if they are taking no position, or are they defaulting?

MS. HOGGAN: They never appeared, that's why I guess, they never appeared in the case.

THE COURT: It's one of those probable cases that we have to tie up before any decision can be

reached.

What I would like to do now is briefly address the differences between the Article 78 by the two individuals and the Landmark West case which is different. I assume, that basically why the Landmarks is a 78 is because it's 78 is more narrow, but you were timely in bringing the action so there would be no impediment to converting it as a 78; is that correct?

MR. ROSENBERG: That's correct, your Honor.

THE COURT: What are the other issues, to set aside zoning provisions itself, is that what it is?

MR. ROSENBERG: No, Your Honor.

THE COURT: Why don't you explain the difference?

MR. ROSENBERG: Well, I don't know everything that's in their papers. Yesterday I received from Mr. Sugarman, the attorney for the plaintiff in the other case, I think a couple thousand pages of documents, which I had not seen previous. So I'm not fully familiar with their case. I wasn't served with the papers in that case.

THE COURT: But what I thought I could do today, I would be able to do, is to combine the two arguments.

Proceedings

MR. ROSENBERG: I don't know. I know that my case -- I don't know what the differences between their cases are.

THE COURT: Counsel for the City, since you're involved in both cases and you're moving to dismiss, anyone that's in the Landmark case.

MS. HOGGAN: Yes.

THE COURT: Can you distinguish the differences between the two cases?

MS. HOGGAN: If you give me a minute.

THE COURT: Sure.

MR. SUGARMAN: Your Honor, if I may. While counsel is looking at our papers, would you like my view?

THE COURT: My law secretary, Ms. Sugarman, we determined that there was no relationship.

MR. SUGARMAN: None at all.

THE COURT: Unless you're trying to get me off the case?

MR. SUGARMAN: No. I think one of the important issues in the case is the problem in the City Planning, the Department of City Planning. With Landmarks, the have over seen jurisdiction over granting waivers of the zoning laws for the purpose based upon Landmark's hardships, that's not what is

BSA. So the landmark question as to them, as a defendant and properly so, we believe we raise the same issue.

THE COURT: If I understand it, in reviewing. I made a start review, I have not read everything. I have read mostly the papers in the Kettaneh, but not in the Landmark cases, I thought Landmark approved it.

MR. SUGARMAN: Landmark approved the project from the point of view of from the certificate appropriateness. They do not look at the Zoning Law. They are specifically prohibited from doing this. Landmark has a whole separate procedure of 74, 711 where they consider the hardship by the applicant. And the applicant has to show their financial hardship. They have to show that information and generally their encumbrances and other conditions put on the property, as part of that process, and then it's pursued. But the Department of City Planning, that's to get a waiver of the Zoning Laws, that the Board of Standards and Appeals is not involved in that process.

This applicant started off in 2001, that's when the case started, asking for 74 711 relief from Landmarks and for whatever reason they withdraw it

because it was telegraphed to them they weren't going to get it.

THE COURT: So as to the project.

MR. SUGARMAN: To get a waiver of Zoning Laws, so the Landmarks Commission did -- they said, look this is the maximum height that we think architecturally it will fit here. We are not making any determination as to the other requirements for obtaining a variance under the Zoning Law. And you guys go to the BSA and see if you can prove to them that you meet those standards. But they didn't take the position or whether or not they meet the standards.

Did they receive much of the evidence that would apply to those standards. For example, Landmarks was never advised that windows could be blocked up in the adjoining building. That's an issue to be considered by the BSA.

THE COURT: But if the BSA, I guess I need some background on BSA between Landmark and who trumps whom? If one doesn't know, can landmark say no to the variance?

MS. HOGGAN: That's why I have to go to Landmark. They, an applicant, would go because they are the Landmark. They go get a certificate of

appropriateness from Landmarks. Then they have --

THE COURT: They have it.

MS. HOGGAN: They have it, it's not an issue. They go to BSA. They apply for the variances, which I don't thing the procedural is incorrect. It's fine, it's represented.

THE COURT: If Landmark says it's okay from what they saw, it goes to the Board of Standards and Appeals, that's where the fight has been in the community apparently, is that it?

MS. HOGGAN: Yes, that's what the hearing is for, that's what the determination is.

THE COURT: But that's where the 78 comes in, because the Board has approved the variance to a project that is a nine story project?

MR. SUGARMAN: Yes.

THE COURT: They have to go back to Landmark at this point?

MS. HOGGAN: No.

MR. SUGARMAN: Not technically for a rubber stamp, but it goes back. Landmarks had trumped the BSA, if they go through the 78, 711 process, but that's not done here.

THE COURT: So they have a choice?

MR. SUGARMAN: No, if you want to use Landmark

as a hardship you have to go through the Landmark Commission. There is nothing in the variance part of the zoning resolution for variances that recognizes landmarking as a hardship, because if you were to do that, then that would make 74 711 meaningless among other things.

MR. ROSENBERG: We are on accord on that point, at least one of them is clearly on accord.

The other point is that the only agencies that are permitted to grant relief under the City Charter are either the City Planning Commission or Landmarks itself. You can't then go to the BSA and in order to argue I'm a Landmark, so therefore, I'm holding a special variance.

THE COURT: That's not what they did.

MR. ROSENBERG: They did.

THE COURT: I thought they went based on the standards that are incorporated in the zoning themselves?

MR. SUGARMAN: On the surface it would look like that, but they actually new landmarking hardships -- as part of the evidence for finding A or B, finding A is the hardship finding. So they used the Landmark hardship as the hardship under defining A, which is not permitted.

Number two, they did something very different.

Finding A requirement in order to obtain a variance request and the first thing that has to be shown in the New York City law.

THE COURT: Is finding first A?

MR. SUGARMAN: Yes, first finding A. The applicant has to show a hardship or practical difficulty. It has to arise out of a physical condition.

THE COURT: That can't be, because it's a Landmark building and it's on adjoining property.

MR. SUGARMAN: That's one of our points, yes, your Honor.

Most important is the causation issue here. The hardship or difficulty has to single out, how it will be related to the Zoning Law. In other words, the hardship has to arise out of the strict application of the Zoning Law. You can't just say oh, we have this hardship with access to circulation and therefore we meet finding A. You can't do that because if the access of circulation as is here can be fully resolved by what's called an asset right on conforming a building or that condition or hardship cannot arise out of the strict application of the Zoning Law, because the Zoning Law fully permits them

to resolve that issue.

What they did with landmarking though they tried to make that a condition, but more importantly in a very subtle way and the finding B, which is the reasonable return part. What they have to show is that their building cannot earn a reasonable return, a for profit building.

THE COURT: That's the question I have about the two differences, if it's considered a religious not for profit or a for profit, because it's five stories of condominium.

MR. SUGARMAN: The way the BSA looked at it, we agree the lower floors which really, your Honor, only represent ten percent of the variances here.

THE COURT: That's the set back.

MR. SUGARMAN: That's the ten feet set back. Most of the variance relates to the profit, the luxury condominium. So that's 90 percent of the case. So, for that they have to earn, they have to be able to show that they can't earn if they comply with the zoning.

THE COURT: Is there any dispute about that standard applying? Because that's the question that I had, when I was looking at it, because it's a religious building and the argument they don't really

have to make is a showing and that they are kind of sitting back on their religious part, for the rest of the building.

MR. MILLMAN: The way we look at it, we look to the statute itself. Here is what the statute said in 7221 (B) which is the place where it talks about reasonable -- it says quote, this finding shall not be required for the granting of a variance to a nonprofit organization.

It does not say to a nonprofit organization when it's pursuing something related to its program.

For example, if you were dealing with Lincoln Center and it's a nonprofit organization they were seeking a variance, you wouldn't have some special rules to deal with the fact that part of the theatre is involved. A restaurant, which doesn't relate to the theatre directly, even though that's there for profit -- not for profit, but for financial gain. So that can be restored to the mission of the non-for-profit.

THE COURT: Then what is the Board of Standards asking for?

MR. MILLMAN: What they did, what they said, what we would like to do is separate the project into two basement floors.

THE COURT: They want to do this expansive and somewhat complicated evaluation?

MR. MILLMAN: They believe, even though the statute says non-for-profit organization, didn't talk about the specific view. They believe that it makes sense in this kind of a situation to separate out the analysis, but that as we have the benefit here on review, your Honor, of being able to uphold them either because in fact the statute says that you don't have to do that or because in fact they found that a smaller amount of residential use, any smaller, would be as an as of right use would actually result in a loss. And they looked at the expert reports provided by the congregation indicating there would be a loss and they found those reported to be persuasive.

THE COURT: There is two very different issues here, that's one, because it's a synagogue or non-for-profit you never have to make the reasonable return analysis. And then I think it's your argument that they did the wrong analysis once they got to it, they used the wrong standard for rate of return or valuation.

MR. SUGARMAN: That's part of it. We will get to that in more detail, that's part of our argument.

But if you were to -- first of all, I think what the Board of Standards and Appeal did was proper or what they did was they looked at all the case law that applies to variances and taking the constitutional law. So when this was written, no one was looking at multi level buildings and things like that, air rights. And that logically it doesn't make sense. I know the synagogue wants to have a strict reading of B, but they don't want to have a strict reading of A, which says physical condition. But it's the congregation's position here that if they are going to take this position that B doesn't apply at all, then it's clear. If you go to the constitutional law on this, in the Penn Central case, they are able to accommodate the needs of the congregation in an as of right building, with a ten percent variance. But in a as of right building, if they are coming into a pure nonprofit, then they will say forget about money. Can you resolve your needs in a conforming building. The answer is, yes. According to their own testimony, except for property, ten percent.

THE COURT: That will get to the difference of whether I'm doing a de novo view of what was before the Board of Standards or the arbitration or the other standard for a review on an Article 78, because

you're saying as a matter of law, that they don't get past A.

MR. SUGARMAN: Yes.

THE COURT: But if you get past A, then there is a determination how they apply B. Is that pretty much a short hand way?

MR. SUGARMAN: Not only affirmatives, I don't know if your Honor got to the answer and reply. They actually admit now they do earn a reasonable return on a conforming building. I can go through it, I have some exhibits, also some posters which are copies of the exhibits.

THE COURT: I mean, I have got all this stuff upstairs, these are parts of the yellow bound book?

MR. SUGARMAN: Yes, your Honor.

THE COURT: Why don't you walk me through that now. I would like to get through the differences between the two.

MR. SUGARMAN: Well, real quickly, we did start off asking questions about Landmark and that got into the finding B. What they did was they used the fact that the adjoining property was Landmark to increase the site value on the development site.

THE COURT: They did that by saying they can't develop.

MR. SUGARMAN: The area of the parsonage. But increasing that value they make it impossible to earn a reasonable return.

I don't know if the respondents will now concede but 90 percent of this building, are variances. There are the read, and the blue are the ones for the community house.

THE COURT: Okay.

MR. SUGARMAN: You can look at that and see there is a disproportion.

The other thing, this is the first floor and under the first floor, New York City law gives community organizations like this, the right to fill up the entire lot. Why is that significant here.

First, it's an accommodation, but secondly this is where all the access -- most of the access of circulation arise.

THE COURT: Let's jump to something that doesn't seem to be really argued by petitioner, which is that there is really no impact, except for the height of the building on the community.

The central character of the neighborhood, it's really the height. If they have a community center and they rent the center to a school, that will change the characteristics.

MR. SUGARMAN: We did not make that argument. We concede that we would be quite happy to have the congregation build a community center, rent it out to a school, if they want, if they need the income.

THE COURT: At sometime you said it was for a school.

MR. SUGARMAN: The conforming ability allows them to go 75 feet, not on all the floors, or ten feet high. The building, they are proposing first for the community place, the next four are here. The next two floors are the condominium. That's all within the conforming.

MR. MILLMAN: Your Honor, the as of right structure.

THE COURT: Can you say your name?

MR. MILLMAN: Claude Millman, for the congregation. The as of right structure that Mr. Sugarman is describing was actually found by BSA to be insufficient to solve even the problematic needs, the religious needs of the congregation.

THE COURT: Where did they make that?

MR. MILLMAN: Where did they make that finding?

THE COURT: Yes.

MR. MILLMAN: As to the three floors, you have that finding, Paragraph 68.

Proceedings

THE COURT: If they did a higher building, but not the nine story building.

MR. MILLMAN: They specifically found that an as of right structure which is the one that the petitioner is describing would not -- because of various foot prints and also the space that would be needed for school space would not be sufficient.

MR. ROSENBERG: But he is talking about a different variance, about a variance.

MR. MILLMAN: No.

MR. SUGARMAN: You have to show me how these variances here, Mr. Millman, related to the problematic needs?

THE COURT: Why don't you take a couple of minutes to see about a presentation. Why, as a matter of law, this has to be reversed because it's arbitrary and capricious, and then I want to have a question. I think counsel was looking to answer when we went totally in another direction.

MR. SUGARMAN: There are six thousand pages of records.

THE COURT: I know.

MR. SUGARMAN: So we can get a visual, these are the two floors in the conforming building. The top two floors. They can build as of right. And our

position on the 10 percent variances is that these uses could be moved up here.

There is one use or which is the caretakers apartment on the fourth floor can easily be moved to these other two floors and the BSA did not pay any attention to that.

MR. MILLMAN: These are the arguments, your Honor, that were in fact made to the board and the board rejected moving those things up.

THE COURT: I'm fascinated with the underlying facts. I'm not actually doing that kind of review, that's one of the things that I wanted to focus on. This is just to help me understand what the controversy has been, its been a long standing controversy.

MS. HOGGAN: Legally, we can't tell a religious organization, please move your child care center from the first floor to the fifth floor. It's not proper. There is case after case that I cited them, it's not proper.

MR. ROSENBERG: One of the points in our case, is that that's a difference to a religious institution.

THE COURT: Is constitutional.

MR. ROSENBERG: That's a clear constitutional

matter.

THE COURT: There was a dissent recently in one of the Court of Appeals cases, that the difference is no longer one in the twenty first century, that should have a plan to give various ways in which to develop property.

MR. SUGARMAN: Your Honor, we have cited many cases where the court's have scrutinized what religious operations do, and they are in our briefs and there are cases on both sides.

THE COURT: If it ended up that there was no impediment to the synagogue doing what it wanted for its community needs and issues, and the need to have the entrance way for the community, and the value of having a religious school, although not affiliated with the synagogue there for the congregants, you still can't do that within the building, that they continue to go up?

MR. MILLMAN: No, Your Honor.

THE COURT: What don't you get if you do the building this way?

MR. SUGARMAN: What you do not get?

MR. MILLMAN: What the Board found, you would have to move us higher up in the building.

THE COURT: Like what, parcels? The apartments?

Proceedings

MR. MILLMAN: There are various options. One of the options were discussed, have the caretaker apartment up. The board found that and there was evidence you need to have a caretaker closer down in order to be more responsive to various historical objects that are in the synagogue, also as to emergencies that are in the synagogue.

MR. SUGARMAN: Your Honor --

THE COURT: Let him speak, he hasn't had the floor at all. Other than the fact that it may take a caretaker a couple of minutes to get down to the synagogue area, what are the other things that the congregation couldn't do.

MR. MILLMAN: I think I'm able to go through every single one of them. But I think the main point is this, your Honor. There were six hearings where every one was present, the Landmark would like to challenge deference. In fact, the Board mentioned deference, but they required all sorts of submissions like how the facilities would be used.

There was testimony where witnesses said that they stood in front of the synagogue, believe it or not, and them walking in, whether they were disabled. Ultimately all that evidence, roughly 7,000 pages was related to the Board. They are the ones who made the

decision on this and they concluded that from a Paragraph 68 of their finding. They said that there is evidence here that from a programmatic point of view the variances were required.

THE COURT: Other than relying on the Standards because it's what the City is doing. Can the accommodation address the first point about the way the the Board considered the first of the five findings, that the court has to make. What is that argument? That's just not to the deference of the Board, but a clear arbitrary capricious determination of the law.

MR. MILLMAN: I think there is an assumption that it's incorrect to begin with.

First of all, the property, the property for zoning purposes, your Honor, is not what's called lot 37 which is the property. That's off a little bit from Central Park West. Every one has agreed here that for zoning purposes, at least one merged lot for zoning purposes. What you have here is a lot on the corner, is a very important and hystoric synagogue, you have also very old parsonage, slightly to the South and slightly to the west.

You have this community center that is of no significance, and then an empty lot. So if one were

to preserve the synagogue and, yes, it landmarked, but its also central to the mission of a non-for-profit, that is making the application here.

There whole point of being, they only exist by virtue of their hystoric relationship to this building and so put aside landmark. It would destroy their mission, to take down that building.

THE COURT: Is this the zoning?

MR. MILLMAN: Your Honor, this is part of the record in this, the history of the building is actually of significance.

THE COURT: Is of significance, but the congregation could theoretically --

MR. ROSENBERG: Not only could, but they went from downtown and moved progressively uptown as the population moved. This is not the original synagogue of the congregation. It's a lovely synagogue, it's to preserve it, it's landmarked.

MR. MILLMAN: Their preserving of the synagogue, it is not the site of the synagogue, so the landmarks they would still want to preserve the synagogue.

THE COURT: That's irrelevant.

MR. MILLMAN: The purposes of the A finding in terms of physical, the physical conditions, it's very important because what it means is that you have a

piece of property that is taken up. All there is, is a lot of development space. There si 144,000 square feet of development space. That's that vast part, that is taken up. But, this building you want to keep, you end up with a little L shape face to build upon.

It was concluded that one part of the L, where the parsonage is, is a little small to go on and they have you end up with a community house and the strip of vacant property.

It was concluded by the BSA, unless you develope something there and what you are allowed to use, you would not solved the problematic use of the synagogue. You would not be able to address or access the classrooms, the achieves offices, things like that.

In addition to that, the synagogue would ask that they place some apartments only in the end. They originally were seeking 14 floors, your Honor, but in the end after going through a seven years process, with Landmarks before BSA and hearing the community, not only was there a change from 14 to eight and a mall penthouse, but in addition it was also altered so that there could be a courtyard.

This process worked, your Honor. The A finding

is met here, because there is a historic building on the site.

There is also a zoning boundry that runs right through the middle of the site, which is very unusual for normally zoning lots have their own zone.

And, in addition, the community center building itself is completely obsolete. There is no accessibility to the synagogue. But my point, your Honor, those are the A findings.

And, in addition, there is case law that says you don't even need a physical impediment when you are dealing with a nonprofit religious organization. So there is no basis for upsetting that A finding.

MR. ROSENBERG: He says we don't need the A finding. We satisfied the A finding for the Landmark. The Landmark is not a unique physical condition that wants a variance.

THE COURT: But the actual lot they mentioned to building on, they argued.

MR. SUGARMAN: It's three brownstone lots, they can go down two levels.

MR. ROSENBERG: It's not unusual.

MR. SUGARMAN: It's a perfect lot.

MR. ROSENBERG: What they have not addressed is this unique area is not used for other things, they

aren't, it's out. It's a property for unrelated use and so some feel that should be included in the custodial part.

THE COURT: But the needs -- I may actually have to you come back again, but I may not, because it's a pretty complicated and obviously an enormous amount of thinking and time went into the record that has already been created on this. What is needed to understand -- the way I have to understand it, with them going to what is requested in both actions.

Let's get back to why I started asking the City about and wrap it up. For now I'll give you a couple of minutes to highlight whatever you would like.

Counsel for the City, what do you think the differences are between the two cases.

MS. HOGGAN: There is two differences that are primarily one, there is jurisdictional grounds that are raised in Landmark. That is not in the other case, but it is not BSA, couldn't even hear the application.

Also in terms of how they framed their argument. The essence is the same regarding the job prints and as far as the application of, but if you couch it in a program, there is a primary factual constitutional aspect --

Proceedings

THE COURT: The fact that there is a constitutional aspect to Landmarks, the fact that they mention your motion to dismiss the Landmark action, it wasn't served on the State, so there is a bit of a problem.

MR. MILLMAN: I think we can fix that, your Honor.

THE COURT: You're going to have to.

MR. MILLMAN: I think that the key here on the motion to dismiss is that while they just couch their argument, I actually think that the case law is essentially the same while they couch the Landmark, they couched their argument in a constitutional way, in a code of constitutional claim.

What in fact, what they are saying, the Board of Standards and Appeals didn't follow its statutory obligations. They are not saying that the fact sheet itself is unconstitutional, when you're arguing that the statute is unconstitutional, that's when you notify the Attorney General. That's when you have been seeking a declaratory judgment.

THE COURT: There is as an applied argument.

MR. MILLMAN: I don't think it's an applied argument. The statute as applied, is unconstitutional, they are saying the statute itself

is not observed. That the requirements of the constitutionality are not observed, that's simply a statutory reference.

I think as to, I suppose if the Board of Standards and Appeals does not follow what is constitutionally required to do, then there may be circumstances in which the constitution is abridged. However, that doesn't make it a constitutional argument. What the First Department said on the issue, it says where the issue is the propriety of the proceeding taken under and other wise, states an Article 78 proceeding is the proper vehicle. That's as to the Rosenthaul case, cited on page three of our reply brief in that motion. It cites a Sulnick decision from the New York Court of Appeals and over and over again the declaratory judgment they dismiss.

THE COURT: Or converted?

MR. MILLMAN: I'm sorry?

THE COURT: Or converted.

MR. MILLMAN: Or converted yes, your Honor.

Because the fact that no claim is being made that the statute was unconstitutional.

THE COURT: Let me hear from Mr. Rosenberg as to that.

MR. ROSENBERG: Your Honor has the right to

convert it, but there are numerous cases that come down everyday. I just looked on line the other day where the courts, especially the Appellate Division have treated actions like this and they quote, they say, it's in part like a 78 and in part it's like a declaratory judgment -- as where such declaratory relief as to the underlying jurisdiction of the BSA in this case and it's not an Article 78.

THE COURT: Can you argue that a little bit, what is your claim with jurisdiction.

MR. ROSENBERG: There are a couple of claims, one is that the termination, which is the basis for the application for the variance.

In other words, to get to the BSA, one must first go to the Department of Buildings and get rejections, then appeal that to the BSA and that's what gives the BSA jurisdiction under the City Charter. In the City Charter it expressly says that rejections must be issued by either the Commissioner of Buildings or what used to be cured by the Borough supervisor, the debuty commissioner for, in this case the Borough of Manhattan.

In this case the document which they relied upon as the ticket to get to the BSA was signed by some person in a civil service line, who had not been

delegated the authority.

THE COURT: You are saying there was an action taken by the the Department of Buildings and that triggered the next step?

THE WITNESS: No, the statute says it must be triggered by a document signed either by the Commission of Buildings or the Borough supervisor or the Borough Commissioner, as it is now in court.

THE COURT: Is there anyone that can comment on that.

MS. HOGGAN: We actually have jurisdiction under the Charter, under 668 that's the problem, but it was procedural, it's just in the statute.

MR. MILLMAN: The Board's point, the Board of Standards and Appeals addressed these and explains why it felt it had jurisdiction.

MR. ROSENBERG: But that doesn't mean it does, that's for the Court to determine.

The second point on jurisdiction, that the plans that they claim had been presented to and rejected by the Department of Buildings, which resulted in the list of objections from the Department of Buildings presented a base for the application for the variance of the Board of Standards and Appeals. Those plans are not the plans that were presented to the Board of

Standards and Appeals, and they admitted on the record the attorneys for the congregation, Shelly Freedman admitted on the record, we have the quote in the document itself, it's actually in the complaint that this was not the same set of plans, that's the second jurisdictional claim.

THE COURT: Let me go over that once again, so that diminish it or is it a whole different concept that they are talking about?

MR. MILLMAN: What happened was, your Honor, there was a change in the plans that were made in order to obviate one of the objections. The Department of Buildings' objection and after that the Department of Buildings just cut one of their objections back, so that relief was required. It's not like a something was being submitted to the BSA, it's the opposite.

THE COURT: So you're arguing that it is something that has to be strictly construed, but it has to be the identical plans, where they can move forward.

MR. ROSENBERG: They never put before the BSA this whole process that he committed a second set of plans to remove this objection. None of that was in the record, ministerially the objections disappeared.

Proceedings

THE COURT: But doesn't that indicate what was done?

MR. ROSENBERG: We didn't get the plans.

MS. HOGGAN: Your Honor, it was --

MR. SUGARMAN: Your Honor, can I?

THE COURT: It gets too confusing when you jump in.

MR. SUGARMAN: I'm sorry.

THE COURT: Mr. Rosenberg, that's a jurisdictional issue.

MR. ROSENBERG: Yes, your Honor.

THE COURT: The other problem is, she was asserting that the need to get the best procedural, the issue, the issue of the deference to the religious.

MR. ROSENBERG: That was one of them, with deference to use the Landmark status, the A which was already talked about.

THE COURT: I am just trying to get the differences between the two.

MR. ROSENBERG: I think the rest of the issues are probably encompassed in Mr. Sugarman's petition.

MS. HOGGAN: I will agree.

THE COURT: The City, has last comment.

MS. HOGGAN: I actually wanted to say what BSA

says.

First's in terms of the issue with regard to the motion to dismiss. Landmark says in speaking, in dealing with it as Mybrid, the only time a Mybrid, they are saying I address all the cases cited and in our reply he is misrepresenting cases. This will be simple. The only time you separate out a challenge in the constitutionality of the law, it's simply that is not being done. Everything here is in terms of the decision made by BSA and the challenge to that. I don't think each relief that he seeks, I didn't go through. I said, why and how it's an Article 78. And in terms of our Article 78 relief, but it's whether or not we attacked in essence in our jurisdiction. That's what he is really arguing here in terms of this jurisdictional argument, that clearly it is Article 78.

I think in three or four, I don't know, I think it's in my papers. So this is an Article 78. There is no difference whatsoever.

In terms of the other matter, I would like to say this was a classic process in terms of the unique characteristics, what was done was not fully presented here. The Landmark buildings were, there were two different projects for two different things.

For the submission of the objection. The second was for the condo portion. There were put four different reviews. In terms of religious status in terms of the characteristics, their problematic needs. There is case law on that. We have cited the case law. It is sufficient in terms of being a unique characteristic, and in terms of what has been referred to in terms of the Landmark being physical that's not restricted to the physical nature of the lot. That's also the building on the lot and there is case after case against it, that the building can be considered. We did that. We considered the building, the Landmark building is Landmark. It's in the middle of the lot. It's just you can't build on that lot. It just creates a problem. We considered the fact that after the building was placed, the lot was then cut by two different zoning provisions. So on one part of the lot you can have a building that is 75 feet, and another one hundred twenty-five feet in terms for width of the building, can be interpreted differently. Assume there is another problem, because there is another law. This applies to part of the property, but would then have to be extended to all of them. In terms of their problems they face the problem with circulation. They face a

problem where the congregation would have cute back on its programs. BSA does look at this. They did an extensive review, in terms they would have to cut back the number of children that could be provided service. The number of classrooms. The classroom side, therefore, the number of students, that they could have in that building. They wouldn't be able to cut on what was planned. In terms of the financial hardship that was looked at, I will go over it, unless you don't want me to --

THE COURT: Not on this stage. I need an analysis on what I have to do, at least on the 78 to the declaratory judgment, that's brought out over what I do need to review on an agency finding, anything.

MR. MILLMAN: Yes, your Honor. I believe your Honor that the analysis in particular on the Article 78 though I think ultimately, it's the same analysis, that was asserted, is what one does, one looks at the five findings, which is maximum, would have to be made. One says you look at the BSA decision. You see the magic words in each of the five. Then after that, you go to the 6,000, 7,000 page record and look to see whether there is some, something, someone is uttering those words in testimony or submission to

the BSA. And, clearly, with respect to every single finding there is some submission.

For example, on pages 5112 through 5181, there is a submission document from the congregation, summing up all their findings that itself is evidence because it is being submitted by zoning law experts. A people who have a reptation and in effect legal recognition when they commit submissions that are not accurate to the board. It is perfectly appropriate for the Board to consider that and right after it, the financial analysis on the economics. Is point is simple, all one really has to do is look to see are the findings made? An if there is something in the record, where the is the Board?

THE COURT: That is soho.

MR. MILLMAN: That is Soho your Honor. After that work is done if there are any questions about some of them, there is a financial return. If it was questionable, that if it hadn't been an economist that submitted something, that's what we are saying had, would be a lot in as, as of rights projection. If you didn't have that, then would you look to the case law and say something about the B finding, doesn't have to be made, same thing with respect to A finding on physical impediment. They did make a

finding on physical impediment. They found zoning line right down the middle, which is something that was used by the court in the matter of the Elliott Case. They used the same law that was a New York Court of Appeal case issue.

You look at those things, you say are those physical impediments? They clearly are under the case law. The City claims you can look at things beyond the structure of land. Once you exclude the synagogue itself, you have an L shape piece of property.

You can look at all those things and those are physical impediments. But under the case law, you wound have to find a physical impediment.

Our view of this is almost a chart exercise, or saying the findings made, you can see them on each paragraph, is there something in the 11 volumes of materials before the BSA, where they can see something. While BSA didn't have a page number because the records were made afterwards, clearly there is something in the record for each and every one of those findings, they are not making that up.

MR. SUGARMAN: Well, the counsel for the respondent has three to four months to search their number of records. If you look at their answer they

cite basically to BSA resolution. The BSA resolution was the magic words they rely upon magic words presented by counsel. For the BSA in their submission to the BSA counsel for the respondent -- I'm sorry -- that's not the factual standard. There are plenty of cases that show that even BSA cannot come in and utter these conclusory findings.

THE COURT: But if the record is there, they made findings, they maybe didn't articulate enough, is that a basis for me to reverse on 78 standards?

MR. SUGARMAN: They can't show you where it is in the record. They cannot show you if the record there is a change in the Department of Buildings plans. They cannot show that to you.

They cannot show you where assess of circulation is affected. And not cured by the conforming building. In fact there own architect agreed with us that's an as of right. During their access of circulation the building, I made big mistakes. And I didn't get to lead with my most important point.

THE COURT: You get to end with it.

MR. SUGARMAN: Your Honor, there are a lot of issues with their economic study, and some of them may fall within the discretion of the BSA. But you get to a certain point where you're beyond the realm

of reason. For example, the site value they use for the two floors of condominium, is beyond reason. And that clearly kills what is called the skim man out, in the scheme city. The idea is if you have this operation, and you come in and you want a variance based upon economic needs, you have to look at the entire building.

This is the so-called all residential building. The BSA asked them to do it. They provided it. It wasn't all residential. They, putting that aside, if you look in the answer this is in my reply. And I have excerpts here. I don't have a poster. But the City, the BSA never fixed the scheme C or residential analysis. They went back and they fixed it. They concluded that an all residential building would earn a six point 7 percent return.

Now, the question, your Honor, is that a reasonable return. If you read that decision over and over and over again, you will never see a reference to any greater return in the decision. Certainly not what is what is considered an adequate rate of return. They said six point 7 percent, so we went back into their record, their initial application and this here is an exhibit. R 140 in the record. It's their economic expert saying in

this application as an conclusion, that six point 55 percent is an adequate return. This is an annual leased return. We discussed, we didn't get into the return of equity. This is the best way you can do it, six point 55 percent, its adequate. They show in their papers, that six point 7 percent is the return they get from not even an all residential building. That's the end of finding B, they are done, that's over.

As a matter of law, because this in the record the verified answer that's in the record, there is no dispute that its in there. There is no dispute this is here. That is the end of their case.

I have other, many other points I can make. I'll just state that 90 percent of the time what the respondents counsel said applies to 10 percent of the variance.

MR. MILLMAN: Your Honor.

MS. HOGGAN: I will say on page 55, we do address this basic argument. Just the point, bringing to counsel's attention, the rate of return was issued to be 11 percent by the congregation, and I did find the record.

We find those references to 11 percent and, this would not be a legal way of describing the

percentages.

MR. MILLMAN: There is a reason why the BSA in it's decision never made a finding as to what the minimum rate of return was, because what they concluded, what they concluded was that if the congregation were allowed to satisfy its needs by putting up the building, the problematic needs and adding five apartments to that or if they were then to add five apartments or two apartments. The apartments one -- would only look at the apartments to determine whether or not there is some sort of rate of return. The first part, the problematic needs are clearly within the law that says you don't look at rate of return for non-for-profit. All this residential structure, okay.

What he is saying is, if the congregation decided that it doesn't care about access to the synagogue and educating its members, it, if it decides that's not important, instead just wants to go into real estate, he claims, I think the numbers are wrong. That they will then make a minimum, a very right on the edge minimum rate of return, for that residential project. That's not the question.

If your Honor would put us in that position, that would really be undermining our position.

Proceedings

THE COURT: At this point you have given me a lot more to look at.

MR. MILLMAN: Your Honor, would it be helpful regarding the issue of page numbers? And in the record, we could provide your Honor with very simple one page or two page identifying the findings.

THE COURT: Are they in the papers?

MR. MILLMAN: I'm not sure.

THE COURT: We have two problems. The Attorney General, the lack of the Attorney General's presence and to convert the landmark to a 78, what procedures do I have to follow to do that.

Thank you very much.

Very interesting argument.

* * *

C E R T I F I C A T E

I, Lester Isaacs, an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

Lester Isaacs, S.C.R.
Official Court Reporter.

EXHIBIT F

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

PRESENT: Joan B. Lobis PART 6

Index Number : 650354/2008
LANDMARK WEST! INC.
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE 3/31/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-9
Answering Affidavits — Exhibits	* see 3-7, MS#1
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

Dated: 4/17/09

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

----------X

LANDMARK WEST! INC., 103 CENTRAL PARK WEST CORPORATION, 18 OWNERS CORP., 91 CENTRAL PARK WEST CORPORATION and THOMAS HANSEN,

Plaintiffs,

Index No. 650354/08

Decision and Order

-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,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 001 and 002 are consolidated for disposition. In Motion Sequence Number 001, defendant Congregation Shearith Israel (the "Congregation"), moves, pursuant to C.P.L.R. Rule 3211(a)(7), for an order dismissing the amended complaint for failure to state a cause of action. In Motion Sequence Number 002, defendants City of New York Board of Standards and Appeals ("BSA") and New York City Planning Commission (the "Commission"), together referred to as the "City Defendants", also move to dismiss pursuant to C.P.L.R. Rule 3211(a)(7). The sole ground on which both motions rely is the contention that this action was erroneously commenced as a plenary action, rather than as an Article 78 proceeding.

This action seeks to challenge the August 26, 2008 determination of the BSA, Resolution 74-07-BZ (the "BSA Resolution"), which approved the Congregation's application for a variance for

the property located at 6-10 West 70th Street in Manhattan. According to the Complaint, the BSA Resolution would permit the Congregation to violate zoning regulations in its planned construction of a new building which will contain a residential tower with five luxury condominium apartments.[1]

Initially, at oral argument, this court raised a concern that the Attorney General was not present and had not appeared in this action. By letter dated April 3, 2009, the City Defendants served the Attorney General with a copy of the City Defendants' motion. According to the letter, the Attorney General has been served with the Complaint and with other papers in this action. To date, the court has not received any submissions from the Attorney General.

The Congregation and the City Defendants argue that plaintiffs deliberately chose to commence this as a declaratory judgment action, rather than as an Article 78 proceeding, because had it been commenced as an Article 78, it would be untimely. Case law supports their contention that parties should not be permitted to circumvent that shorter statute of limitations set forth for Article 78 proceedings "through the simple expedient of denominating the action one for declaratory relief." New York City Health and Hosps. Corp. v. McBarnette, 84 N.Y.2d 194, 201 (1994).

The statute of limitations for an Article 78 proceeding is set forth in C.P.L.R. § 217(1), which provides that "[u]nless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." Pursuant to the New York City

[1] This court also has before it a related case, Kettanch v. Board of Standards and Appeals, Index No. 113227/08, which also challenges the BSA Resolution; this matter was brought as an Article 78 proceeding, within the thirty (30) day period.

Administrative Code (the "Administrative Code"), the time to challenge a final determination of the BSA is shorter than the four months provided in the C.P.L.R. Section 25-207 of the Administrative Code provides that

> [a]ny person or persons, jointly or severally aggrieved by any decision of the [BSA] may present to the supreme court a petition duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition must be presented to a justice of the supreme court or at a special term of the supreme court within thirty days after the filing of the decision in the office of the board.

Therefore, instead of four months, plaintiffs had thirty (30) days within which to bring this action. Defendants assert that since the BSA determination was made on August 26, 2008, and this action was commenced on September 29, 2008, this action is untimely under the Administrative Code, and that plaintiffs should not be able to circumvent the Administrative Code by filing this as a plenary action rather than an Article 78 proceeding.

The Congregation and the City Defendants are simply wrong. They used the incorrect date to begin calculating the time period within which to commence this proceeding. The Administrative Code plainly states that the time to bring a proceeding is "thirty days after the filing of the decision in the office of the board." (Emphasis added.) The last page of the BSA Resolution contains the following language, in bold italic type with dates underlined:

CERTIFICATION

This copy of the Resolution
dated August 26, 2008
is hereby filed by
the Board of Standards and Appeals
dated August 29, 2008

Jeff Mulligan /s/
Jeff Mulligan
Executive Director

Thus, the calculation of the thirty-day period begins on August 29, not August 26. Once the period is calculated from the correct date, it is clear that plaintiffs had until September 29, 2008 to bring a proceeding to challenge the BSA Resolution.[2]

Plaintiffs first commenced this action on September 26, by electronic filing. Even if this court were to utilize the date that the amended complaint was filed, which was September 29, this action would still be timely. Therefore, defendants' argument that this action should not be converted to an Article 78 proceeding because such a proceeding is untimely is without merit. Since the statute of limitations had not expired as of the date of commencement, this is not a reason to deny converting this action to an Article 78 proceeding.

Defendants also assert that this court should not convert this proceeding to an Article 78 proceeding because plaintiffs were given an opportunity to stipulate to a conversion before the motions to dismiss were filed. Notably absent from defendants' argument is whether they would have been willing to waive the affirmative defense, which all parties erroneously believed to be valid, of statute of limitations. Plaintiffs were not required to consent to the conversion, and neither their failure to do so, nor their failure to affirmatively cross-move for such relief, bars the conversion of this proceeding.

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[2] August 29, 2008 was a Friday. Thirty days from that date was Sunday, September 28. Since the thirtieth day was a Sunday, pursuant to General Construction Law § 25-a, the limitations period is extended until the next business day. Therefore, plaintiffs had until Monday, September 29 to commence an action or proceeding to challenge the BSA Resolution. Rodriguez v. Saal, 43 A.D.3d 272, 276 (1st Dep't 2007).

This court has the power to convert a declaratory judgment action into an Article 78 proceeding, sua sponte. C.P.L.R. §103(c); Rosenthal v. City of New York, 283 A.D.2d 156 (1st Dep't 2001), lv. denied 97 N.Y.2d 654 (2001). Therefore, plaintiffs' failure to move for such relief, or failure to consent to such a conversion, does not preclude this court from converting this action into an Article 78 proceeding. Plaintiffs are challenging the BSA Resolution. Although plaintiffs couch some of their objections in terms of the BSA having lacked jurisdiction and having given deference to the Congregation under an unconstitutional delegation of authority, the crux of their allegations is that the determination was arbitrary and capricious and erroneous as a matter of law. Allegations that the BSA failed to follow procedures and violated state laws in reaching its determination are claims that are properly adjudicated in an Article 78 proceeding. Rosenthal, supra.

Accordingly, for the reasons set forth above, this court converts this action into a special proceeding, pursuant to Article 78 of the C.P.L.R. The motions to dismiss are denied. Defendants, now referred to as respondents, shall have ten (10) days from the date of service of a copy of this order with notice of entry, to serve and file their answers and objections in point of law, or otherwise move with respect to the petition.

This constitutes the decision and order of the court.

Dated: April 17, 2009

JOAN B. LOBIS, J.S.C.

EXHIBIT G

City of New York
Board of Standards and Appeals
40 Rector Street, 9th Floor
New York, NY 10006-1705
Phone: (212) 788-8500
Fax: (212) 788-8769

ZONING (BZ) CALENDAR

74-07-BZ *Application Form*

BSA APPLICATION NO. 74-07-BZ
CEQR NO. 07 BSA 074 M

Section A — *Applicant/ Owner*

FRIEDMAN & GOTBAUM, LLP (by Shelly S. Friedman, Esq.) *NAME OF APPLICANT*	Congregation Shearith Israel a/k/a Trustees of the Congregation Shearith Israel in the City of N.Y. a/k/a the Spanish and Portuguese Synagogue *OWNER OF RECORD*
568 Broadway - Suite 505 *ADDRESS*	8 West 70th Street *ADDRESS*
New York / NY / 10012 *CITY / STATE / ZIP*	New York / NY / 10023 *CITY / STATE / ZIP*
212 / 925-4545 *AREA CODE / TELEPHONE*	*LESSEE / CONTRACT VENDEE*
212 / 925-5199 *AREA CODE / FAX*	*ADDRESS*
sfriedman@frigot.com; lcuisinier@frigot.com *EMAIL*	*CITY / STATE / ZIP*

Section B — *Site Data* — *All sections must be completed*

6-10 West 70th Street, New York, NY 10023 and 99-100 Central Park West
STREET ADDRESS (INCLUDE ANY A/K/A) Premises is situated the south side of West 70th Street,
0 feet west of the corner formed by the intersection of Central Park West and West 70th Street
DESCRIPTION OF PROPERTY BY BOUNDING OR CROSS STREETS

1122	36 & 37	Manhattan	7	Lot 36: N/A; Lot 37: # 43472
BLOCK	*LOT(S)*	*BOROUGH*	*COMMUNITY DISTRICT NO.*	*CERTIFICATE OF OCCUPANCY NO.*

R10A/R8B	8C	Hon. Gail A. Brewer
EXISTING ZONING DISTRICT	*ZONING MAP NUMBER (include special zoning district, if any)*	*CITY COUNCILMEMBER*

Section C — *Department Of Buildings Decision*

BSA AUTHORIZING SECTION(S): Z.R. § 72-21 *FOR:* ☒ *VARIANCE* ☐ *SPECIAL PERMIT (Including 11-41)*
SECTION(S) OF ZONING RESOLUTION SOUGHT TO BE VARIED: Z.R. §§ 24-11/77-24; 23-633; 23-663; 23-711; 24-67; 24-36
DOB DECISION (OBJECTION / DENIAL) DATED: March 27, 2007 *ACTING ON APPLICATION NO:* NB-104250481

Section D — *Description*

(LEGALIZATION ☐ *YES* ☒ *NO* ☐ *IN PART)*

Applicant proposes to construct new 8-story (plus PH), mixed-use building community facility/residential on lot 37 (See, Statement of Findings).

Section E — *BSA History and Related Actions*

If "YES" to any of the below questions, please explain in the STATEMENT OF FACTS	*YES*	*NO*
Has the premises been the subject of any previous BSA application(s)?	☐	☒
PRIOR BSA APPLICATION NO(S):)		
Are there any applications concerning the premises pending before any other government agency?	☐	☒
Is the premises the subject of any court action?	☐	☒

I HEREBY AFFIRM THAT BASED ON INFORMATION AND BELIEF, THE ABOVE STATEMENTS AND THE STATEMENTS CONTAINED IN THE PAPERS ARE TRUE

Signature of Applicant, Corporate Officer or Other Authorized Representative

SWORN TO ME THIS 30th DAY OF March 2007

Shelly S. Friedman — *Print Name*
Counsel — *Title*

ELENA ARISTOVA
NOTARY PUBLIC, State of New York
No. 01AR6050323
Qualified in Kings County
Commission Expires November 6, 2010

Elena Aristova
NOTARY PUBLIC

FRIEDMAN & GOTBAUM LLP

568 BROADWAY SUITE 505
NEW YORK NEW YORK 10012
TEL 212.925.4545
FAX 212.925.5199
ZONING@FRIGOT.COM

74 07-BZ

April 1, 2007

BY HAND

The Honorable Meenakshi Srinivasan
Chair
NYC Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

Re: Congregation Shearith Israel
6-10 West 70th Street/99 Central Park West
Block 1122 Lots 36, 37 - Manhattan

Dear Madam Chair:

We are special land use counsel to Congregation Shearith Israel ("CSI"), owner of the above referenced premises. Enclosed please find one original and ten (10) copies of the following materials in connection with CSI's application for a variance pursuant to Sections 72-21 of the New York City Zoning Resolution:

1. BZ form;
2. Department of Buildings objection sheet dated March 27, 2007;
3. Statement of Findings and Facts;
4. BSA Zoning Analysis;
5. Zoning, Sanborn and Tax Maps;
6. Radius diagram;
7. 3 Sets of Drawings prepared by Platt Byard Dovell White Architects LLP dated March 27, 2007 as follows:
   - Existing Conditions (EX - 1 through EX - 14);
   - As-of-right Scheme (AOR - 1 through AOR - 15);
   - Proposed Scheme (P - 1 through P - 17);
8. Existing Certificate of Occupancy for current tax lot 37 (former tax lots 37 and 38);
9. Affected Property Owners List;
10. Environmental Assessment Statement form (one original and 7 (seven) copies);
11. Feasibility Study (one original and 7 (seven) copies);

12. Set of photographs (1 through 6);
13. Copies of the deeds conveying the premises to the CSI;
14. Affidavit of Ownership authorizing Friedman & Gotbaum, LLP to file this application;
15. Copy of New York State Tax Exempt Organization Certification (EX-106776),

If you should have any questions please feel free to call me at (212) 925-4545. Thank you.

Very truly yours,

Lori G. Cuisinier

Enclosures

cc: Hon. Sheldon J. Fine, CB 7
Hon. Gail A. Brewer, City Council Member
Hon. Scott Stringer, Manhattan Borough President
Mr. Alan Geiger, Department of City Planning, BSA liaison
Mr. Ray Gastil, Director, Manhattan Office, Department of City Planning
Hon. Christopher M. Santulli, P.E., Manhattan Borough Commissioner (BZ Form only)
NYC Fire Department
David J. Nathan, Esq.
Peter Neustadter
Dr. Alan Singer

NYC BUILDINGS

THE CITY OF NEW YORK
DEPARTMENT OF BUILDINGS
http://www.nyc.gov/buildings

X
MANHATTAN (1) 280 BROADWAY 3RD FLOOR New York, NY 10007 | BRONX (2) 1932 ARTHUR AVENUE BRONX, NY 10457 | BROOKLYN (3) 210 JORELOMON STREET BROOKLYN, NY 11201 | QUEENS (4) 120-55 QUEENS BLVD. QUEENS, NY 11424 | STATEN ISLAND (5) BORO HALL- ST. GEORGE STATEN ISLAND, NY 10301

DOB Application #	Examiner:	Date: 10/28/05
104250481	Application Type: ~~Alt 1~~ NB	Doc (s):
	Address / Location: 10 West 70th Street	Block: 1122
	Zoning District: R8B; R10A	Lot: 37

Examiners Signature:

To discuss and resolve these objections, please call 311 to schedule an appointment with the Plan Examiner listed above. You will need the application number and document number found at the top of this objection sheet. To make the best possible use of the plan examiner's and your time, please make sure you are prepared to discuss and resolve these objections before your scheduled plan exam appointment.

Obj. #	Doc #	Section of Zoning/ Code	Objections	Date Resolved	Comments

REQUIRED ACTIONS BY THE BOARD OF STANDARDS & APPEALS

1. PROPOSED LOT COVERAGE FOR THE INTERIOR PORTIONS OF R8B & R10A EXCEEDS THE MAXIMUM ALLOWED. THIS IS CONTRARY TO SECTION 24-11/77-24. PROPOSED INTERIOR PORTION LOT COVERAGE IS .80.

2. PROPOSED REAR YARD IN R8B DOES NOT COMPLY. 20.00' PROVIDED INSTEAD OF 30.00' CONTRARY TO SECTION 24-36.

3. PROPOSED REAR YARD IN R10A INTERIOR PORTION DOES NOT COMPLY. 20.00' PROVIDED INSTEAD OF 30.00' CONTRARY TO SECTION 24-36.

4. PROPOSED INITIAL SETBACK IN R8B DOES NOT COMPLY. 12.00' PROVIDED INSTEAD OF 15.00' CONTRARY TO SECTION 23-633.

5. PROPOSED BASE HEIGHT IN R8B DOES NOT COMPLY. 94.80' PROVIDED INSTEAD OF 60.00' CONTRARY TO SECTION 23-633.

6. PROPOSED MAXIMUM BUILDING HEIGHT IN R8B DOES NOT COMPLY. 113.70' PROVIDED INSTEAD OF 75.00' CONTRARY TO SECTION 23-633.

7. PROPOSED REAR SETBACK IN R8B DOES NOT COMPLY. 6.67' PROVIDED INSTEAD OF 10.00' CONTRARY TO SECTION 23-663.

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

DENIED
FOR APPEAL TO BOARD OF STANDARDS AND APPEALS
MAR 27 2007
BORO COMMISSIONER

STATEMENT IN SUPPORT 7.4 0.7.- B Z

OF CERTAIN VARIANCES

FROM THE PROVISIONS OF

THE NEW YORK CITY ZONING RESOLUTION

Affected Premises:

CONGREGATION SHEARITH ISRAEL
6-10 West 70th Street/99-100 Central Park West
Block 1122 Lots 36 & 37
Manhattan

Friedman & Gotbaum LLP
568 Broadway, Suite 505
New York, NY 10012
(212) 925-4545

THE APPLICATION

This statement is filed in support of the Application by Friedman & Gotbaum LLP on behalf of the Trustees of Congregation Shearith Israel ("CSI") pursuant to Section 72-21 of the Zoning Resolution of the City of New York (the "Zoning Resolution" or "ZRCNY") for a variance in connection with the construction of a new 8-storey (plus penthouse) community facility/residential building at 6-10 West 70th Street (Block 1122, Tax Lot 37) (the "New Building" or "Lot 37 Site"). The New Building will replace the current Community House, which is a support building in deteriorating condition connected to the CSI Synagogue (the "Synagogue"), also known as the "Spanish and Portuguese Synagogue in the City of New York," located on the southwest corner of Central Park West and West 70th Street.

The Congregation has worshipped in New York City for 350 years, holding its first services in Peter Stuyvesant's New Amsterdam in 1654. For almost two centuries it served as the only Jewish congregation in New York City, thus sharing its diverse history of serving its congregants and the larger community within the Dutch colonial experience, the British colonial experience and the American experience literally from its birth. The Synagogue is CSI's fifth edifice in New York City and is one of the City's earliest individually designated landmarks.

The New Building proposed in this Application will be developed on a zoning lot comprised of (1) Tax Lot 36, which is fully occupied by the Synagogue and an adjacent single family dwelling (99 Central Park West) that originally served as the Rabbi's Parsonage and (2) Lot 37, which currently consists of a 4-storey Community House constructed in 1954, which will be demolished, and a vacant parcel comprising almost 60 percent of that lot that was previously improved with two rowhouses, which were demolished in 1950. While the entire zoning lot is

situated in the Upper West Side/Central Park West Historic District, only the Synagogue is an individually designated landmark.

The purpose of the New Building is to address several infringements on the mission of CSI as a house of worship, center of Jewish education and culture and provider of community programming open to the public. The Synagogue has severe circulation limitations which interfere with its religious programming. These limitations cannot be addressed through interior alterations. In addition, the physical obsolescence and the ill-configured floorplans of the current Community House compromise CSI's religious, educational and cultural missions. Combined, the configuration of the structures on the zoning lot make it impossible to utilize in a feasible manner any of the lot's unbuilt zoning floor area in order to address any of these programmatic difficulties. As further described throughout the Application, the New Building addresses the programmatic difficulties by providing: (1) new horizontal and vertical circulation systems for the Synagogue to eliminate systemic shortfalls in its construction and design that limit barrier-free access to its sanctuaries and ancillary facilities and that cannot practically be addressed through physical exterior alterations and/or enlargements to the Synagogue itself, (2) a new "Community House" (being the two cellars and the first four floors of the New Building) providing offices and specialized rooms supporting religious, educational and cultural uses that are essential to CSI's mission but either cannot be accommodated within or beneath the Synagogue or can no longer be accommodated in the physically obsolescent and deteriorating existing Community House; and (3) residential use on floors 5 – 8 (plus penthouse) to be developed as a partial source of funding to remedy the programmatic religious, educational and cultural shortfalls on the other portions of the zoning lot. All told, the zoning lot possesses

144,857 sf of development rights. The Synagogue and Parsonage combined use 27,759.20 sf of those rights or 19.2 percent of those available. The Community House currently uses 11,078.8 sf (7.6 percent). When completed, the New Building will increase the zoning floor area for community facility uses by 8,843.56 sf above grade and will add 11,491.72 sf of floor area in two cellars below grade. The residential portion of the New Building will use 23,066.93 sf, out of 144,857 sf of potentially available development rights.

The New Building cannot be constructed in a manner consistent with the Zoning Resolution with regard to its yards, streetwall, lot coverage and height and setback that will overcome the current religious, educational and cultural programmatic difficulties. These zoning issues are described at length below. The need for the waivers requested in this Application stem from (1) the lack of any feasible options to modify the existing structures consistent with the Zoning Resolution that will address these severe programmatic difficulties; (2) the Synagogue's substantial existing zoning noncompliances and (3) the parallel jurisdiction of the Landmarks Preservation Commission, which has approved unanimously both the massing and the design of the New Building, and by so doing has expressed views substantially similar to CSI regarding the need to protect the architectural heritage of the landmarked Synagogue. In sum, while the landmark status of the Synagogue clearly presents hurdles in addressing the programmatic difficulties in a manner compliant with the Zoning Resolution, no claim is made herein for the granting of a variance based on the landmark status of the Synagogue or its location within a historic district. The hardships imposed by attempting to overcome the religious, educational and cultural difficulties facing CSI through a new building that complies with the Zoning

Resolution would be present even if the Synagogue was not so designated and the zoning lot was not located within a historic district.

BACKGROUND OF CSI AND THE SITE

Congregation Shearith Israel was founded in 1654 by twenty-three Sephardic Jews, who, having been kidnapped by pirates and freed by a French ship, were deposited on the shore of Peter Stuyvesant's New Amsterdam, whereupon they were immediately imprisoned in what must have been one of the earliest recorded cases of illegal immigration in the New World. Freed upon petition to the Dutch governments, these involuntary immigrants fought for their rights and prospered in the Dutch colony. Initially limited to these original immigrants, the Jewish community in the colony was relatively small and the Congregation met either in private homes or in rented quarters. On the seventh day of Passover, April 8, 1730, CSI consecrated its first synagogue building on Mill Street in what is now the Financial District and as such was the first structure designed and built to be a synagogue in North America. The first Mill Street Synagogue was replaced by a larger structure at the same location in 1818. In 1834, the Congregation moved to a new building on Crosby Street between Broome and Spring streets. CSI's fourth home was later built on West 19th Street, near Fifth Avenue. CSI owns and preserves the three small cemeteries associated with these earlier synagogues (55 St. James Place, opposite Chatham Square, in use 1682-1828; 76 West 11th Street, between 6th and 7th Avenues, in use 1805-1829 and 110 West 21st Street between 6th and 7th Avenues, in use 1829-1851) in which are buried some of its earliest congregants, including officers and financiers of the Revolutionary War and founders of Columbia University, the New York Stock Exchange and Mount Sinai and

Montefiore Hospitals. Emma Lazarus, whose poem is inscribed on the base of the Statue of Liberty, was a congregant, as were Supreme Court Justice Benjamin Cardozo and Commodore Uriah Phillips Levy, Revolutionary War naval hero and later owner and restorer of Thomas Jefferson's Monticello.

CSI built the current Synagogue in 1896, as New York City's population increased and migrated northward. It was surrounded by farmlands at the time. In the Sephardic tradition, the congregants transported and incorporated elements of its past synagogues into its new building. The floorboards in the main sanctuary were originally used as such in the previous sanctuaries. The Reader's Desk on which the Torah Scrolls are opened and read and the four large candlesticks that surround it are original to the 1730 building. The small chapel in the current Synagogue, now a room in the Synagogue but known as the Little Synagogue, contains lighting fixtures, including the Ner Tamid (the Eternal Flame), the tablet of the Ten Commandments located over the Ark, benches and religious objects also used in the Mill Street Synagogue. Many of the religious objects used in the Little Synagogue have been used in daily services since Pre-Inquisition Spain. The Torah Scrolls encased in the Ark, which are also used on a daily basis, bear the slashes sustained by the sword of a British soldier when the City was attacked during the War of 1812. (Legend has it the soldier was severely punished for his sacrilege.) The silver bells and ornamental plates adorning those Torah Scrolls were smithed by Myer Myers, under whom a young Paul Revere served as an apprentice in Boston. These details of CSI's rich pre-colonial and colonial architectural and ceremonial history are provided to illustrate to the Board that CSI is not only a significant center of Jewish faith and culture, but that in addition its stewardship of its archeological, historical and architectural treasures, used in its everyday

services, has created a unique environment in which the exercise of faith occurs in a living museum. Jewish scholars and visitors from around the world come to visit the Synagogue, referred to by others as the "Mothership of the Jewish Experience in the Americas." Indeed, its ties with the colonial experience are so deep that it once uniquely shared attributes with the Anglican Church of the 18th and 19th Centuries in referring to the home of its religious leader as the "Parsonage" (*i.e.*, 99 CPW) and referring to its Chief Rabbi by the honorific title "Rt. Reverend."

This physical and cultural history of the Synagogue is an essential element of this Application. The physical appearance of the existing Synagogue has come to serve as an icon to World Jewry for the migration of Judaism to the New World and the founding of the Jewish experience in the Americas. While the Synagogue's landmark designation is, of course, an honor, it comes centuries late for a congregation that has a 350 year unblemished history of approaching historic preservation with an orthodoxy and a purpose far and away exceeding municipal regulation. This stewardship is undeniably linked to the religious, cultural and educational mission of CSI. It informs every decision regarding the use and development of its property. It may, in fact, be true that the Landmarks Commission would not approve applications proposing to alter the Synagogue through additions over it or jeopardize its structural integrity by building under it; but with all due respect those regulatory issues are rendered meaningless by the superseding obligations succeeding generations of congregants have accepted to preserve the Synagogue and its traditions. CSI holds any effort to alter the Synagogue to be a violation of that obligation and antithetical to its mission. Thus, this Application, while tracking the hopes of most preservationists by (1) transferring available floor

area from the Synagogue footprint for use elsewhere on the zoning lot, (2) refraining from any form of construction or alteration above, within or below the Synagogue that might affect its integrity, and (3) dedicating itself to the continued archival restoration and maintenance of the landmarked Synagogue through capital fundraising that includes a one-time monetization of zoning floor area through developing a moderate amount of residential space, is otherwise driven by CSI's own core values as trustees of the Synagogue and its contents for the benefit of generations to come. All of the requests for relief presented in this Application are directed toward alleviating the hardships caused to that mission by the literal application of the cited provisions of the Zoning Resolution.

7.4 0.7.- BZ

CURRENT USES AND CONDITIONS

As noted above, the Synagogue itself remains in constant use as a house of worship. In addition to its sanctuaries, the Synagogue contains small meeting rooms and a multifunction room in its basement. Although the Synagogue has a formal monumental entrance on Central Park West, it is almost never used. It is perhaps the most glaring design flaw of the Synagogue. Because according to Jewish Law a synagogue must be designed so worshippers face west when praying toward the altar, the altar is located along the western wall of the Synagogue. Thus, the monumental entrance is anything but monumental as once it is entered, without vestibule or foyer, it is reduced to small interior doors backstage of the altar and narrow passages to circumnavigate it. The daily route for entering and leaving the Synagogue is through its side doors on West 70th Street, which were never designed as a primary means of access or egress and which require the use of a steep interior stairway to enter the foyer leading to the sanctuaries.

This access was only moderately improved by the construction of the Community House in 1954, which provided additional doors but only through indirect means and in any event did nothing to alleviate the need for the stairs.

While one is tempted to conclude that this unfortunate result was solely due to religious orthodoxy, the fact remains that the lay architectural mandates (or hubris) of the day may also have contributed to creating this unpractical result. Most of the institutional buildings facing Central Park West have similar monumental entrances that either originally or over time have been abandoned by their occupants in favor of more practical side-street entrances. Such examples are the New-York Historical Society, which uses its West 77th Street on a daily basis but rarely uses its prominent CPW entrance, and the First Church of Christ, Scientist at CPW and West 68th Street.

CSI can no longer ignore the programmatic impacts caused by this inability to enter the Synagogue and move around it in a proper manner. When constructed in 1896, CSI was a congregation of 300 families. It is now a community of 550 families. Its primary sanctuary cannot be reached without great labor. Access to its sanctuaries and their ancillary facilities are not barrier-free. CSI has studied the options for internal alterations to the Synagogue to address these deficiencies. The studies have concluded that there are no good options and that in any event there are no options that would not necessitate significant loss of original historic material. These access deficiencies can only be addressed by demolishing the Community House and replacing it with a new contiguous building designed with circulation systems that can be appended to Synagogue.

In 1954, CSI converted two adjacent rowhouses into the current Community House. Aside from re-cladding the façade, the scope of the alterations to the rowhouses was minimal, as evidenced by the continued presence of the shared party wall between them in many areas of the building. These original structures now comprising the Community House have reached the end of their useful life and are in need of substantial improvement. The combined buildings house a 1,668 sf multipurpose room/auditorium, which is on the same level as the Synagogue's first floor albeit at a lower level and thus cannot be entered without the use of stairs. This room is used for various meetings and as a play space for a day school which leases the space to run its programs. Approximately 1,028 sf of offices and 2,554 sf of classrooms are located above the auditorium/ multipurpose space. The entire CSI administration is housed in these quarters. These include the Rabbis' study and offices, and all of the Synagogue's executive offices. All of CSI's programming for religious services and community services, which are open to public, emanates from these small spaces. CSI's community services programming is extremely active, with a number of affiliate organizations, such as the longstanding Sisterhood providing community outreach to congregants and non-congregants, Hebra Hased Va-Amet, the City's oldest Jewish philanthropic organization, which provides dignified burials for indigents and the 1654 Society dedicated to preserving CSI's historical treasures and fostering a historical awareness of the Jewish American colonial experience. CSI has a rich and detailed history of championing the plight of the poor, homeless and hungry, both globally and within the West Side community. All of those efforts are administered by staff and volunteers from within the Community House.

In addition, the Community House needs to provide space for CSI's Hebrew School of approximately 40 students and its tenant school, which enrolls 125 children between the ages of

five and seventeen in full time attendance. Recently the Landmarks Preservation Commission approved the addition of a temporary trailer in the vacant portion of Lot 37 to permit these educators to alleviate the severe overcrowding in the Community House. In addition, CSI offers a wide range of youth activities such as monthly Shabbat dinners, "toddler Shabbat" and informal Saturday religious classes. During holidays, the students participate in traditional holiday community service programs which include delivery of food packages throughout the City. For adult congregants, the Community House provides space for educational studies in Mishneh Torah (basic principles in Jewish philosophy, ethics and law); Ladino (Judeo-Spanish language studies); Shabbat; and basic Judaism. These classes have been embraced by Jews throughout the metropolitan region seeking to reach a deeper connection with their heritage.

In addition, the lack of adequate storage space and offices has forced CSI to move off-site its seminal historical archives. It remains a long-held aspiration to have suitable archival facilities on site so that more could be made of this extraordinary collection for the benefit of the congregants and children in its educational programs and scholars.

With the construction of the New Building, the floorplate of the Community House will be increased by 3,259 sf and the overall square footage of community facility use will be increased by 8,843.56 sf above grade. In addition, the demolition and replacement of the Community House will permit excavation to provide two cellar levels for programming where none exist today. The programmatic improvements to functions currently in the Community House made possible through construction of the New Building are as follows:

- New 6,432 sf multi-function room at the subcellar level.
- New babysitting room, storage and office space, dairy and meat kitchens at the cellar level.

- Enlarged barrier-free vestibule and Synagogue lobby at the first floor level.
- Expanded Small Synagogue, new exhibition space and relocated archives at the first floor level.
- New barrier-free elevator dedicated solely to accessing the Synagogue's upper levels.
- Appropriately sized Rabbinical and executive offices on floors one and two.
- Twelve (versus six existing) appropriately sized barrier-free new classrooms on floors two through four.

Without the New Building requested in this Application, CSI's existing programmatic deficiencies will remain and continue to get worse. The continuation of these deficiencies through CSI's inability to construct the New Building would seriously undermine the religious, educational and cultural mission of CSI. Only through the approval of this Application can these deficiencies be eliminated.

THE LANDMARKS APPROVAL PROCESS

A Certificate of Appropriateness for the New Building was unanimously approved by the Landmarks Preservation Commission ("LPC") on March 14, 2006. One Commissioner described the New Building's design and massing as "thoroughly modern...but speak[ing] very eloquently both to the temple adjacent and to the other brick apartment buildings." It was not only an "appropriate addition to [the Upper West Side/Central Park West historic] district, but a very positive addition . . . that will stand on its own as a landmark . . . " The official LPC March 14, 2006 recorded transcript provides the excerpts from statements by various Commissioners preceding the unanimous vote to approve the New Building:

"...this is a fine example of what can happen i[f] careful evolution i[s] permitted...we have a contemporary design, finally in complete harmony with the classic building next to it...I think the reduction of height was one of the major things we felt from the beginning was necessary. Also, the redesign of the entrance relating to the old building is now very successful, and they work together beautifully."

"I think the massing is appropriate. It is a massing that relates to the street and to its proximity to Central Park West. And, overall, I think the building will make a great contribution to the streetscape."

"I do think [the proposal] is an elegant solution in many ways to what is a difficult and complex problem here, to try to insert this building into the existing synagogue and adjacent property."

" ...I think the massing with the removal of the upper penthouse is absolutely in line with the surrounding buildings, specifically, the building adjacent, with the single setback penthouse that is partially visible...Again, I have always felt that the limestone frame that is adjacent to the temple and soars over the main bulk of the building is inspired."

The New Building represents a six-storey reduction from CSI's initial LPC submission in 2003. The reduction was necessitated due to the LPC's concerns that the height of the initial submission was not in keeping with the character of the Historic District.

The reduction in height brought with it a profound change in the nature of the zoning waivers being sought, which is highly pertinent to this Application. As originally proposed, the New Building required the transfer of substantial zoning floor area across the zoning district boundary bisecting the zoning lot, in contravention of the Zoning Resolution. This would have

been another objection in addition to those presented in this Application. Inasmuch as the zoning floor area being transferred was being taken from air space over the designated landmark, and because the proceeds of the development of the residential portion of the New Building (ten floors in the initial Application) were being directed to the continued restoration and maintenance of the landmarked Synagogue, CSI believed that such an action would qualify the development under the LPC's precedents for a Special Permit pursuant to ZRCNY Sec. 74-711. However, the Commission's response to the initial LPC application, and in particular the use of ZRCNY Sec. 74-711 to transfer zoning floor area across a district boundary, was mixed, with some Commissioners opposed to finding that the requisite "preservation purpose" (NYCZR Sec. 74-711(a)(i)) would be served. The partial remarks of LPC Commissioner Gratz are hereby submitted as representative of that opposition:

> "We are being asked to find appropriate a high rise building under a 74-711 Special Permit proceeding that spans two zoning districts if (1) it is appropriate to the landmark site and (2) if it serves the preservation purpose. . . . . While the 74-711 provision allows some flexibility in order to achieve conformity with the existing neighborhood character, that flexibility was never meant to allow something so contrary to the site. This would surely lead to an erosion of the landmarks law that I believe would be beyond our wildest nightmares."

In fashioning its response to the Commissioners' comments, CSI choose to reduce the height of the New Building from 14 to 8 stories plus penthouse. In so reducing the floor area of the New Building, the distribution of zoning floor on each side of the zoning district boundary resolved itself without the need for waiver or special permit. In addition, the extent of the streetwall and height and setback waivers was also reduced. In consultation with the LPC staff, it appeared that

if the Commission was signaling that the larger project would fail the preservation purpose required for its support of a ZRCNY Sec. 74-711 Special Permit, there was no reason to believe the smaller building would. In returning to the LPC with the smaller New Building, CSI indicated its willingness to seek the variance requested in this Application. The Commissioners in attendance did not object to CSI's position and the Commission moved forward with its consideration of the revised Application and ultimately unanimously approved it.

This history of LPC consideration is submitted to substantiate that CSI took every available step to seek the administrative relief provided in the Zoning Resolution for seeking a special permit to modify the bulk regulations for which this variance Application now seeks waivers, thereby exhausting its administrative remedies prior to the filing of this Application.

THE ZONING LOT AND ZONING NON-COMPLIANCES

Tax Lots 36 and 37 have been in common fee ownership since 1949 and share the necessary contiguity set forth in ZRCNY 12-10 to be deemed a single zoning lot since that date. The zoning lot is a rectangle bounded on the west by Central Park West (100.5 ft frontage) and on the north by West 70th Street (172 ft frontage). On its east boundary is the building wall of 18 West 70th Street, a 9-storey multiple dwelling. Its southern lot line is shared with 91 CPW and a row house at 9 West 69th and forms an irregular pattern of rear yards and side and rear walls of various depths. The zoning lot's area is 17,286 sf. A zoning district boundary runs parallel to CPW 125 ft west of CPW. The R10A avenue portion of the zoning lot comprises 73 percent of the total area of the zoning lot. All of the Parsonage and Synagogue and approximately the easternmost 17 feet of the current Community House are located in the R10A portion of the

zoning lot. The remainder of the zoning lot (27 percent of its total) is zoned R8B. The maximum permissible FAR for a community facility in an R10A district is 10 and for a mixed use community facility/residential building in an R8B district is 4. Because the zoning lot has been in existence since prior to December 15, 1961, it is entitled under the provisions of ZRCNY 77-22 to utilize an average FAR across the entire zoning lot. The Applicant has calculated that averaged permissible FAR to be 8.38. Using that FAR, the R10A portion of the zoning lot is permitted 105,273.75 sf of zoning floor area and the R8B portion of the zoning lot is permitted 39,582.93 sf of zoning floor area. Upon completion, the New Building will contain 42,989.39 sf (11,197.09 on the R10A and 31,792.30 on the R8B portions of the zoning lot), which amounts to a total FAR on the zoning lot of 4.09, well under the amounts permitted. In addition, included in the LPC approvals is a determination to promote a distance between the landmark Synagogue and the New Building. This was satisfactorily achieved by employing a "notch" of open space pushing west the east elevation of the New Building. This notch was imposed without regard to zoning considerations, one of which was that it eliminated from full development the only portion of Lot 37 within the R10A district. Thus the notch has the effect of requiring more floor area to be built in the R8B portion of Lot 37, thereby increasing the extent of the bulk waivers requested in this Application.

With regard to the R10A portion of the zoning lot, development of available zoning floor area is complicated by the fact that beyond 100 ft from the avenue, the existing Synagogue and Community House already exceed permitted lot coverage and that, if the Synagogue is going to remain unaltered and the air space above it undeveloped, the further use of the floor area must be restricted to the same westernmost portion of the R10A ir

coverage exceedance exists. This limitation results in a severe limitation of the use of available zoning floor area, and its only feasible use is as set forth for the massing of the New Building. The following exceedances are increased or created in the R10A portion of the zoning lot:

(1) ZRCNY Sec. 24-11/77-24: extent of the existing lot coverage noncompliance is increased, and

(2) ZRCNY Sec. 23-711: required 40 ft separation between buildings is not provided.

Within the R8B portion of the zoning lot, the New Building is underbuilt based on the permitted FAR 8.38, but its massing cannot be provided in an as-of-right manner due to the unique role it must play in addressing the Synagogue's deficiencies as well in providing the types of spaces required for CSI to maintain its religious, educational and cultural activities. The following exceedances are created in the R8B portion of the zoning lot:

(1) ZRCNY Sec. 24-11/77-24: permitted lot coverage is exceeded,

(2) ZRCNY Sec. 23-633: permitted base height, setback and building height requirements are exceeded, and

(3) ZRCNY Sec. 23-663: required rear setback is not provided.

Finally, in order to provide for the appropriate connections between the Synagogue and the New Building and in order to provide suitable floorplans and adjacencies for the portion of the New Building to be used by CSI for Community House purposes (floors 1 – 4), the first floor will fully cover the lot and floors 2 – 4 will set back 20 ft from the rear property line. Such coverage is permitted for the first floor but the other three floors fail to provide the required 30 ft rear yard in either the R10A portion or the R8B portion of the zoning lot as set forth in

36.

FIFTY YEAR SITE HISTORY

The Synagogue was built in on Lot 36 in 1896-97. The Community House was created in 1954 through the combination of two turn of the century rowhouses on what is now a portion of Lot 37. The Community House and Synagogue have come to share the same property address: 8 West 70th Street. The vacant portion of Lot 37 was created when two of the four rowhouses owned by CSI, presumably numbered Nos. 16 and 14 West 70th Street, were demolished in 1950. These houses no doubt once existed on individual tax lots, but over time those lots have been merged into Lot 37. No use or bulk modifications have occurred since 1954. In 2006 the LPC approved the installation of one trailer for educational purposes on the vacant portion of Lot 37.

THE NEW BUILDING DEVELOPMENT PROGRAM

For all of the reasons set forth above, CSI can no longer meet its religious, educational and cultural programmatic needs without significantly modifying the access and egress for the sanctuaries. Because there is no practical solution that includes alteration work within the Synagogue, and because any such alteration work would be contrary to CSI's mission, the solution must be found within the footprint of the New Building. Although the Synagogue's CPW and West 70th Street entrances will remain where currently located, the New Building will provide a more generous barrier-free set of door leading to a vestibule off an expanded Synagogue lobby and gallery. The New Building will include elevators designed to provide access to the balcony seating area of the main sanctuary. Adjacent to the gallery, an archives room worthy of CSI's historical relics, papers and documents for exhibition and scholarly study

will be located. Of major importance to CSI is the first floor's proposed 1,258 sf enlargement of the Little Synagogue into the New Building, which remains the most important room within the Synagogue for daily sunrise and sunset prayer services, small ceremonies and personal prayer.

In addition, CSI's ability to continue to operate within the limitations of the existing Community House has ended and it now must address the need for both newly designed and enlarged community facility space beneath and within a newly constructed New Building. Below-grade levels will provide an appropriately sized and barrier-free multi-function rooms, meat and dairy kitchens, a babysitting room, residential storage space and building services. Rabbinical and executive offices currently in the Community House have been given more appropriately sized and barrier-free locations on the Floors 1 and 2. Floors 2, 3 and 4 will contain appropriately sized and barrier-free classrooms for CSI and its tenant school's educational purposes. Floors 5 through 8 and the penthouse will be residential.

The additional space in the New Building allocated to CSI's religious, educational and cultural mission is the first such increase in space for CSI since 1954. The addition of this space will permit the Synagogue leaders to address the needs of its 550 families, which is an increase of 30 percent in the number of families that were congregants in 1954. In addition to administrative space, the creation of a suitable multipurpose room for larger ceremonies, meetings, lectures, etc and the addition of classrooms will address significant shortfalls in CSI's ability to serve both its members and the community. Finally, the addition of residential use in the upper portion of the building is consistent with CSI's need to raise enough capital funds to correct the programmatic deficiencies described throughout this Application. The residential floor area uses only 16 percent of the zoning lot's available zoning floor area. When completed

with the New Building, more than half the development rights on the zoning lot (74,108.09 sf) will remain unused.

7.4 07- BZ

THE OBJECTIONS

The following objections were received from the Department of Buildings (the "DOB") on March 27, 2007:

1. Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to Section 24-11/77-24. Proposed interior portion lot coverage is .80.

2. Proposed rear yard in R8B does not comply. 20.00' provided instead of 30.00' contrary to Section 24-36.

3. Proposed rear yard in R10A interior portion does not comply. 20.00' provided instead of 30.00' contrary to Section 24-36.

4. Proposed initial setback in R8B does not comply. 12.00' provided instead of 15.00' contrary to Section 23-633.

5. Proposed base height in R8B does not comply. 94.80' provided instead of 60.00' contrary to Section 23-633.

6. Proposed maximum building height in R8B does not comply. 113.70' provided instead of 75.00' contrary to Section 23-633.

7. Proposed rear setback in an R8B does not comply. 6.67' provided instead of 10.00' contrary to Section 23-663.

8. Proposed separation between buildings in R10A does not comply. 0.00' provided instead of 40.00' contrary to Section 24-67 and 23-711.

ZRCNY Sec. 72-21 REQUIRED FINDINGS

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 difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the [zoning] resolution; and that the alleged practical difficulties or unnecessary hardships 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. ZRCNY Sec. 72-21(a)

The unique physical conditions peculiar to and inherent in CSI's zoning lot include: (1) the presence of a unique, noncomplying, specialized building of significant cultural and religious importance occupying two-thirds of the footprint of the zoning lot, the disturbance or alteration of which would undermine CSI's religious mission; (2) a development site on the remaining one-third of the zoning lot whose feasible development is hampered by the presence of a zoning district boundary and requirements to align its streetwall and east elevation with the existing Synagogue building; and (3) dimensions of the zoning lot that preclude the development of floorplans for community facility space required to meet CSI's on-site religious, educational and cultural programmatic needs. These physical and regulatory constraints are unique to this zoning lot. The strict application of the ZRCNY provisions raised as objections to the approval of the New Building will preclude CSI from developing the New Building or any substantially similar building and as such represents a practical difficulty in developing any feasible as-of-right New Building. Such strict compliance with the ZRCNY would therefore present a serious hardship in the furtherance of CSI's religious, educational and cultural mission.

For the programmatic reasons described above, none of CSI's religious, educational or cultural programmatic difficulties can be addressed through further development or alteration to the Synagogue on Lot 36. The Lot 37 Site has an area of 6,432 sf and is improved with a

building in very poor condition which long ago ceased to provide CSI with the offices, meeting rooms, archives and classrooms it requires. The allowable zoning floor area on Lot 37 totals 53,900.16 sf (based on an averaged FAR 8.38), but due to the zoning district boundary 26.6 percent of Lot 37 must be developed with R10A Quality Housing bulk regulations and 74.4 percent of Lot 37 must be developed with R8B Quality Housing bulk regulations. While the ZRCNY recognizes that the zoning lot is entitled to average the FAR of the two zoning districts, it does not provide a similar mechanism for providing relief from the R8B height and setback, streetwall and rear yard provisions correlating to the FAR 4 massing established for R8B Quality Housing developments. This alone creates practical difficulties in this case; as it is essential that the New Building's massing accommodate its role in providing circulation space for the Synagogue and appropriately sized floorplates for the Community House, which cannot be achieved within the R8B Quality Housing regulations.

Lot Coverage in R10A and R8B. (Objection 1) ZRCNY Sec. 24-11 imposes a maximum lot coverage of 70 percent for interior lots, or portions of zoning lots that are interior lots. There is no similar requirement for corner lots within 100 ft of a corner. The CSI zoning lot is partially a corner lot, which portion is entirely zoned R10A and fully covered by the Synagogue and Parsonage, and partially an interior lot. The maximum permitted lot coverage is exceeded in the remaining R10A portion located beyond 100 ft from the avenue. Within the R8B portion of the zoning lot, the New Building covers 79.8 percent of the lot measured from above its groundfloor, below which is exempt from the calculation. Without a wavier permitting lot coverage in excess of 70 percent, the New Building cannot provide the floorplans that can address the existing programmatic difficulties in either the Synagogue or the new Community House.

Rear Yard in R10A and R8B. (Objections 2 & 3) ZRCNY Sec. 24-36 requires a rear yard of not less than 30 ft for interior lots or portions of zoning lots which are interior lots in R8B and R10A districts. ZRCNY Sec. 24-33 permits community facilities to build within a required rear yard to an elevation of 23 ft or one storey above grade, whichever height is lower. The New Building does not provide a 30 ft rear yard for its first four floors, those floors constituting the community facility portion of the building to be occupied by the Community House. The first floor is fully built to the rear property line as permitted. Floors 2-4 provide only a 20 ft rear yard because those floors must align properly with the Synagogue and must provide the appropriately sized offices and classrooms. The Application is limited to requesting a waiver from the rear yard requirement for floors 2 through 4 only. Above those floors, the remaining residential floors of the New Building provide a fully compliant rear yard.

Height and Setbacks in R8B only. (Objections 4, 5 & 6) ZRCNY Sec. 23-633 governs height and setback requirements for buildings in contextual zoning districts such as R10A and R8B. The regulations establish a base height, require a setback above the base height and establish building height. The portion of the New Building within the R10A is fully compliant. In an R8B district, the permitted base height can range between 55 and 60 ft above curb, at which point the front elevation must set back 15 ft. The overall building height cannot exceed 75 ft. The New Building has a base height of 94.8 ft, a setback of 12 ft and a building height of 105.8 ft. The unique aspects of the zoning lot, including the footprint of the Synagogue, the presence of the zoning district boundary in the only portion of the zoning lot capable of development, combined with the interests of the LPC in providing a front elevation harmonious

with both the designated landmark and the historic district render it impossible to provide any useful development in accordance with the applicable provisions of ZRCNY Sec. 23-633.

With regard to LPC's consideration of the location and height of the streetwall, the Commission took note of all of the surrounding buildings in approving the New Building, none of which comply. The 9-storey building to the west, 18 West 70th, located entirely within the R8B district, has a base height of approximately 100 ft, with no setback. With an FAR of 7.23, it is almost twice its permitted bulk. The buildings directly to the north and south, 101 CPW and 91 CPW respectively, each of 15- and 13-stories, also exceed these zoning requirements in the R8B portion of their zoning lots to an extent much greater than the New Building. The FAR of 101 CPW is 13.92 and the FAR of 91 CPW is 13.03. In reducing the New Building from the 14-storey initial application to the approved 8-storey plus penthouse New Building, the Commission worked closely with CSI's architects to gauge the precise elevations for the New Building's base, its setbacks and its height so as to strike a balance with the monumental architecture of the Synagogue to its east and the considerably noncompliant streetwalls to its west and north.

Rear Yard Setback. (Objection 7) ZRCNY Sec. 663(b) requires that in both R10A and R8B districts no part of a building that exceeds the maximum building height established in ZRCNY 633 can be located within 10 ft of the rear lot line. The New Building's height complies with the maximum height provisions applicable in an R10A district. The New Building exceeds the maximum building height provisions applicable in an R8B district, thus triggering the requirements of ZRCNY Sec. 663(b). Because the ground floor of the New Building is built full to the rear property line, an objection was issued. As discussed, the ground floor of the New Building, which is permitted to be built full because its use will be an eligible community facility

use group, must spatially align with the Synagogue to provide the necessary circulation space and to provide for the expansion of the Little Synagogue.

Building Separation. (Objection 8) ZRCNY Sec. 23-711 imposes a 40 ft separation between the facing walls of the Synagogue and New Building. Inasmuch as the Synagogue and the New Building are connected for the full height of the Synagogue, there is no separation between the two buildings, thus generating the objection. Given the remaining depth of the zoning lot beyond the Synagogue's footprint is only 64 ft, providing a complying 40 ft setback for the height of the Synagogue's sloped roof would leave a developable footprint of 24 ft, which is wholly impractical.

Because of the 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. ZRCNY Sec 72-21(b)

CSI's status as a not-for-profit religious organization renders this finding unnecessary. At the Board's request, however, due to the fact that the Application presents a situation in which Use Group 2 floor area is being created for sale to third parties as a component of the CSI's financial strategy for producing the New Building, CSI has retained the services of Freeman Frazier Associates to provide a Feasibility Study analyzing potential mixed use development on Lot 37. This analysis compared the rate of return that could be expected from the New Building containing 16,242 sf of residential floor area with a hypothetical as-of-right building that would provide 5,022 sf of residential floor area. It concluded that due to existing physical conditions on the zoning lot, including the need to address the Synagogue's circulation problems and the need to replace and enlarge the functions in the Community House, there is no reasonable possibility

that a financially feasible mixed use building could be developed in strict conformity with the Zoning Resolution. The 27,302 sf as-of-right building yields 5,022 sf of residential sellable area. The total investment for such a project would be $27,696,000 on a net project value of $11,574,000, producing a capital loss to a developer of $8,672,000.

In comparison, the New Building as proposed herein with 16,242 sf of residential sellable area requires an investment of $33,688,000 on a net project value of $39,606,000. This is a 6.55 percent rate of return, which Freeman Frazier posits to be minimally sufficient consideration as an investment opportunity.

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 uses or development of adjacent property; and will not be detrimental to the public welfare. ZRCNY Sec. 72-21 9 (c)

The Variance, if granted, will not alter the essential character of the neighborhood or the historic district; nor will it either substantially impair the appropriate uses or development of the adjacent properties or be detrimental to the public welfare. It is indisputable that a diversity of uses has been what has distinguished New York City neighborhoods and the Upper West Side is no exception. Approval of this Application will add 8,843.56 sf of Use Group 3 Use to CSI's current total of 38,838.10 sf, or an approximately 23 percent increase. It will add 23,066.93 sf of Use Group 2 residential use to a block developed with hundreds of thousands of feet of residential use. There will be no significant environmental consequences attributable to adding this minimal amount of square footage to the existing condition, which already includes the Synagogue, Parsonage and Community House. Moreover, at eight stories and one penthouse, the New Building will be a minor addition to the streetscape. It is dwarfed by the 13-storey 91 CPW

to its south and the 15-storey 101 CPW to its north (both developed in excess of FAR 13) and has been limited by the LPC to the same height as 18 West 70th to its west. Viewed from the east in Central Park, it will rise but a few stories over the pitched roof of the Synagogue.

With regard to the New Building's impacts on the landmarked Synagogue and the historic district, the LPC has spoken definitively on the acceptability of the new design as appropriate regarding both urban design and preservation values. CSI has worked hard to earn the LPC's acclimation and enthusiasm for the New Building and believes the LPC Certificate of Appropriateness should be considered the final word on its impact regarding urban design and historic preservation. With regard to CSI's rear and side property line neighbors, the interior rear yard and rear yard setback waivers will have minimal impact. To the extent that construction at the ground floor will extend to Lot 37's southern lot line, it must be recalled that full lot coverage up to 23 ft above mean curb elevation is permitted as a matter of right on interior lots (or portions of zoning lots deemed interior lots) for qualifying community facilities. The rear yard waiver is required for floors 2 though 4 because a 20 ft rear yard is provided instead of 30 ft. Noncompliances with rear yard and rear yard setback requirements for the relatively small portion of this zoning lot deemed an interior lot are more than adequately compensated by the fact that yard conditions of the existing adjacent buildings, are both idiosyncratic and deep, producing distances between rear walls of up to 120 ft.

The practical difficulties or unnecessary hardships are inherent in the zoning lot and were not created by the Applicant or its predecessor in title. ZRCNY Sec 72-21(d)

CSI acquired Lot 36 in 1895 and Lot 37 in 1949. Both were purchased specifically for development of the Synagogue and Community House, respectively. Conditions since the last

alterations to the property in 1954 now impose economic hardships that could not have possibly been envisioned at the time the buildings were developed. Accordingly, neither the current nor the past Trustees have taken any steps leading to or increasing the extent of the conditions that result in the objections giving rise to this Application.

Within the intent and purposes of this resolution the variance, if granted, is the minimum variance necessary to afford relief. ZRCNY Sec. 72-21(e)

The Application provides nothing more than the waivers necessary to resolve CSI's religious, institutional and cultural programmatic difficulties. Specifically, the waivers are those minimally necessary to permit the New Building envelope to provide, in part: (1) the minimally necessary number of classrooms and the minimally necessary number of offices; both of suitable size, design and quality required, (2) a modest increase in the size of the Little Synagogue, (3) a multi-function room with ancillary kitchen facilities of suitable size and configuration for the many functions -- social, religious and educational – any religious institution is called upon to provide, (4) archival facilities such that CSI's papers and relics can be brought back from an off-site facility and integrated into the religious, educational and cultural missions of CSI, (5) the incorporation in the New Building of a system of circulation designed to provide improved and barrier-free access to the sanctuaries in the Synagogue, and (6) the addition of residential units at floors 5 through 8 (plus penthouse) levels, representing a small amount of the unused zoning floor area available after the new community facility floor area is taken into account.

These programmatic elements described above must occupy a specific floor area and floor area configuration, which in the aggregate result in the New Building's development in a manner which requires the waivers described above. The waivers requested in this Application

have been carefully reviewed so as to assure they both qualitatively and quantitatively represent the smallest necessary waiver to address each of the programmatic hardships.

Without the waivers requested in this Application, CSI will not be able to build a Community House in a manner which addresses the access deficiencies of the Synagogue, nor can it hope to provide better classrooms, offices, and specialized facilities that are critical to the continuation of its religious, educational and cultural missions. In every category the demand for these programmatically required elements is increased, and CSI considers it essential to provide these services without compromising the landmarked Synagogue building.

CONCLUSION

CSI has one of the longest histories of any existing religious institution in the City of New York, of attending to the needs of its congregants and the community. From the basement where it held its first services in 1654 through to the construction of the Community House is 1954, CSI has proceeded slowly and carefully to provide worship and cultural space. While this is its fifth location, a change of real estate venue averaging once every 75 years can hardly be considered aggressive. It has been in its present house of worship since 1896. Since that time its only expansion has been in 1954, at which time it combined the two rowhouses to form the current Community House. Now, 53 years since taking its last measures to adjust its space for programmatic purposes, it needs to do so again. It began those measures in 2001 with a $9 million restoration of the Synagogue, raised entirely from within the Congregation. That work continues, under such strict (and self-imposed) preservation guidelines that it has been the

subject of glowing reviews by such local entities as the Landmarks Conservancy and such foreign interested parties as the Vatican, which has sent a delegation to observe the work.

Having begun the work to preserve this sacred site with a world-class restoration, CSI must how address with equal conviction the gap between what its facilities can provide and its programmatic goals. The gap is presently wide, but through careful analysis a plan has emerged that leaves the Synagogue untouched but requires that CSI utilize 42,989.39 sf of the 121,789.75 sf (35 percent) of unused floor area available to it on its zoning lot to redress these deficiencies. The successful deployment of that floor area resolves a complex matrix of Synagogue circulation issues, educational issues and administrative issues. Successful deployment includes the construction of 23,066.93 sf of new residential space, a small fraction of the available floor area intended to subsidize the endeavor. This successful deployment cannot occur without the approval of this Application.

On the basis of the foregoing statements, the Applicant respectfully requests that the Board make the requisite findings and grant the requested variances.

Respectfully submitted,

Shelly S. Friedman, Esq.
FRIEDMAN & GOTBAUM, LLP

Dated: New York, New York
March 30, 2007

NYS RA/PE SEAL AND SIGN

BSA ZONING ANALYSIS

REVISED APRIL 2004

BSA CALENDAR NO. -07-BZ BLOCK 1122 LOT 36 & 37

SUBJECT SITE ADDRESS 6-10 West 70th Street; 99-100 Central Park West

APPLICANT Friedman & Gotbaum, LLP for Congregation Shearith Israel

ZONING DISTRICT R8B; R10A

SPECIAL DISTRICT UWS/CPW

COMMUNITY BOARD 7

PRIOR BSA # N/A

* APPLICABLE ZR SECTION	MAXIMUM PERMITTED	MINIMUM REQUIRED	LEGAL PER C of O or BSA	EXISTING	PROPOSED	COMPLIANT: "Y" IF NOT: "N" and INDICATE AMT OVER/UNDER
LOT AREA				17,286.0	17,286.0	Yes
LOT WIDTH				172'	172'	Yes
USE GROUP (S)	22-00			4	2 & 4	Yes
FA RESIDENTIAL	23-145;77-22	144,856.70	N/A	0	23,066.93	Yes
FA COMMUNITY FACILITY	24-11;77-22	144,856.70	N/A	38,838.10	47,681.66	Yes
FA COMMERCIAL/INDUST.	N/A	N/A	N/A	0	0	N/A
FLOOR AREA TOTAL	----------	144,856.70	N/A	38,838.10	70,748.59	Yes
FAR RESIDENTIAL **	23-145;77-22	8.38 adj.*	N/A	0	1.33	Yes
FAR COMMUNITY FACILITY **	24-11;77-22	8.38 adj.*	N/A	2.25	2.76	Yes
FAR COMMERCIAL/INDUST. **	N/A	N/A	N/A	0	0	N/A
FAR TOTAL **	77-22	8.38 adj.*	N/A	2.25	4.09	Yes
OPEN SPACE	28-30	None	N/A	N/A	N/A	Yes
OPEN SPACE RATIO **	N/A	None	N/A	N/A	N/A	N/A
LOT COVERAGE (%) **	24-11; 77-24	Interior: .70 Corner :1.0	N/A	Corner: .89	Interior: .80 Corner: .89	Interior: No 10% Corner: Yes
NO. DWELLING UNITS **	23-22; 23-24	32	N/A	0	5	Yes
WALL HEIGHT **(base height)	24-522; 23-633; 77-28	R8B: 55'-60' R10A: 60-125'	N/A	52.81'	R8B 94.8' R10A 105.8'	R8B No R10A Yes
TOTAL HEIGHT	24-522; 23-633; 77-28	R8B: 75' R10A: 185'	N/A	52.81'	R8B: 105.8' R10A: 105.8'	R8B: No R10A: Yes
NUMBER OF STORIES			N/A	4	8 (+PH)	Yes
FRONT YARD	24-34	None	N/A	None	None	Yes
SIDE YARD	----------	----------	N/A	----------	----------	----------
SIDE YARD	24-35	None	N/A	None	None	Yes
REAR YARD	24-36; 24-391	R8B/R10A: 30'	N/A	Int. lot: 26.5	20'	No, 33%
SETBACK (S)	24-522; 23-633; 77-28 (front/narrow street)	R8B/R10A: 15'	N/A	N/A	R8B: 12' R10A: 15'	R8B: No, 20% R10A: Yes
SKY EXP. PLANE (SLOPE)	43-43	85'	N/A	None	None	Yes
NO. PARKING SPACES	13-42	7	None	None	None	Yes
LOADING BERTH (S)	N/A	N/A	N/A	N/A	N/A	N/A
OTHER: Standard minimum distance between buildings	24-67; 23-711		40'	N/A	None	0' - 2" No, 100%

Be sure that all elements noted in the DOB Denial/Objection are consistently and accurately reflected in the BSA analysis. If no category listed above corresponds to the DOB Denial/Objection, indicate in OTHER; or explain in NOTES; or attach explanation.

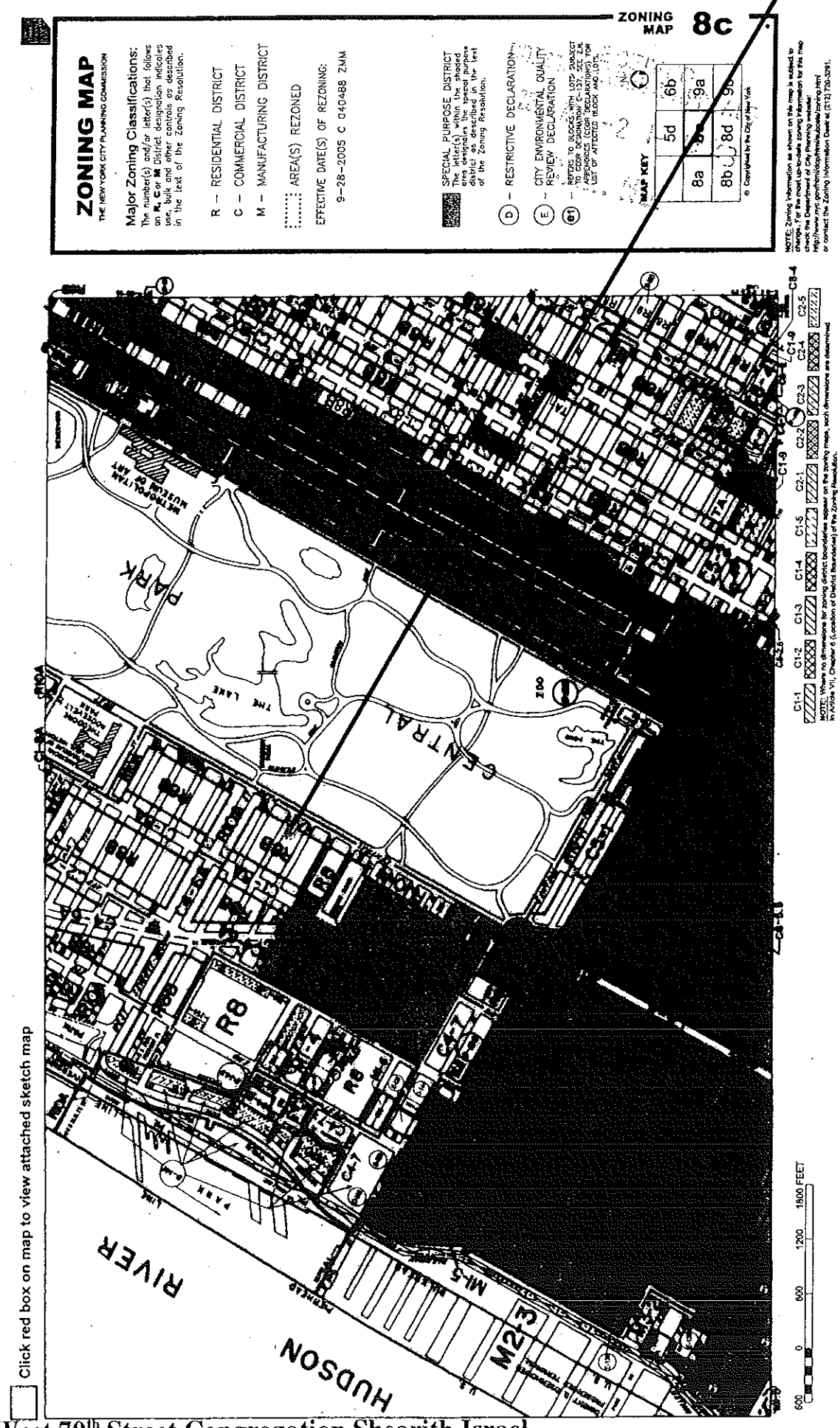
* In *Applicable ZR Section* column, if proposed use does not conform to the district's use regulations, thereby making the bulk requirements inapplicable, indicate "NA," and where ** is noted, instead of "NA," indicate the EQUIVALENT DISTRICT in which that use is permitted, considering the bulk proposed.

NOTES: Rear setback: 24-522; 23-663; 10' required; R8B - 6.5' proposed (noncompliant); R10A compliant

REGISTERED ARCHITECT HARRIS BOVELL JR. No. 18176 STATE OF NEW YORK

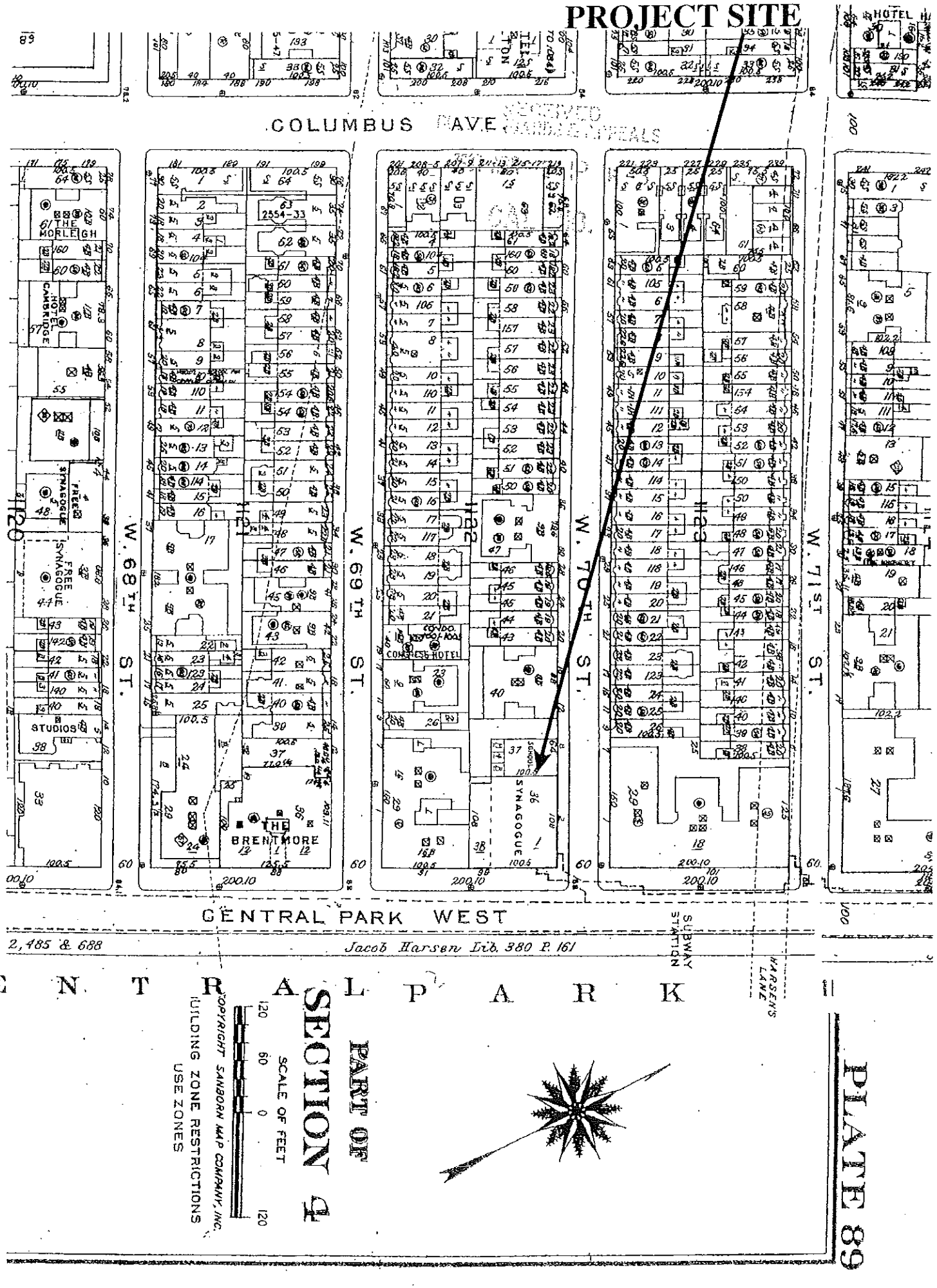
03/27/2007

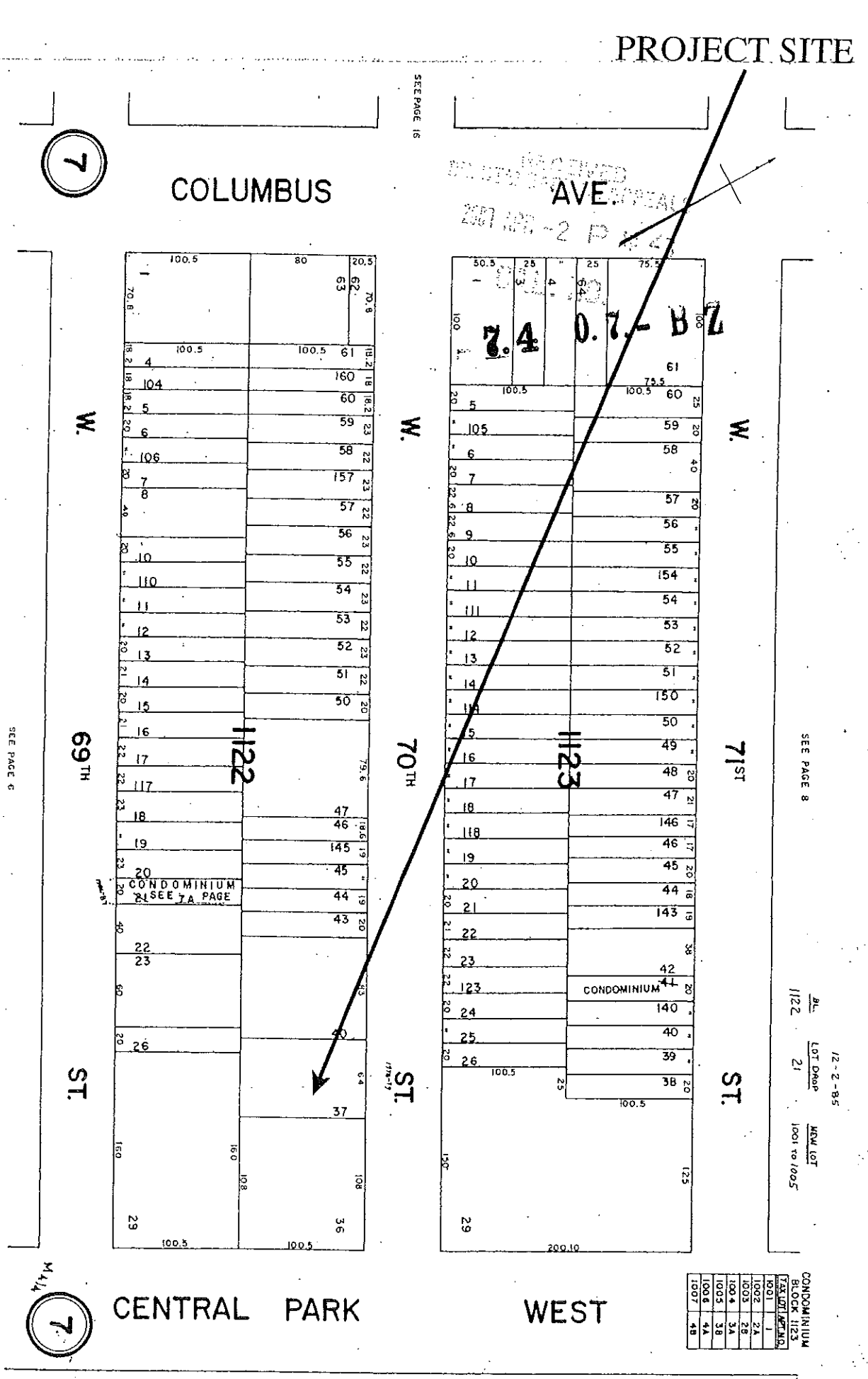
PROJECT SITE



Click red box on map to view attached sketch map

6-10 West 70th Street Congregation Shearith Israel **Zoning Map**


PROJECT SITE
COLUMBUS AVE.
W. 68TH ST.
W. 69TH ST.
W. 70TH ST.
W. 71ST ST.
CENTRAL PARK WEST
THE BRENTMORE
SYNAGOGUE
FREE SYNAGOGUE
HOTEL CAMBRIDGE
THE MORLEIGH
STUDIOS
SUBWAY STATION
HARSENS LANE
2,485 & 688
Jacob Harsen Lib. 380 P. 161
SECTION 4
PART OF
PLATE 89
SCALE OF FEET
120 60 0 120
COPYRIGHT SANBORN MAP COMPANY, INC.
BUILDING ZONE RESTRICTIONS
USE ZONES



6-10 West 70th Street Congregation Shearith Israel

Tax Map

DRAWINGS OMITTED

DEPARTMENT OF HOUSING AND BUILDINGS

BOROUGH OF MANHATTAN, CITY OF NEW YORK

No. 43472

Date December 13, 1954

CERTIFICATE OF OCCUPANCY

(Standard form adopted by the Board of Standards and Appeals and issued pursuant to Section 646 of the New York Charter, and Sections C26-181.0 to C26-187.0 inclusive Administrative Code, 21.34 to 21.37 Building Code.)

74 07 82

This certificate supersedes C. O. No. 28280

To the owner or owners of the building or premises:

THIS CERTIFIES that the ~~new~~ altered ~~existing~~ building—premises located at

6-8 West 70th Street

Block 1122 Lot 37 & 38

, conforms substantially to the approved plans and specifications, and to the requirements of the building code and all other laws and ordinances, and of the rules and regulations of the Board of Standards and Appeals, applicable to a building of its class and kind at the time the permit was issued; and

CERTIFIES FURTHER that, any provisions of Section 646F of the New York Charter have been complied with as certified by a report of the Fire Commissioner to the Borough Superintendent.

~~Alt.~~ Alt. No. 679-1953

Construction classification— Class 5

Occupancy classification— Public Bldg. , Height Bsmt. & 3 stories, 51 feet.

Date of completion— December 13, 1954 , Located in Residence Use District.

B Area 1½ , Height Zone at time of issuance of permit 1211-1954; 2397-1953

This certificate is issued subject to the limitations hereinafter specified and to the following resolutions of the Board of Standards and Appeals: (Calendar numbers to be inserted here)

PERMISSIBLE USE AND OCCUPANCY

STORY	LIVE LOADS Lbs. per Sq. Ft.	PERSONS ACCOMMODATED MALE	FEMALE	TOTAL	USE
Basement	on ground	100	50	150	Auditorium and kitchen.
1st story	75	20	20	40	Offices and classrooms.
2nd story	75	20	20	40	Office and classrooms.
3rd story	75	2	2	4	Office, book storage and one (1) janitor's apartment.

Sec. 6.133 sub. 2 Admin. Code, C26-222.0 Adm. Code

class and maintained in the main entrance hall of such structures."

Borough Superintendent

NO CHANGES OF USE OR OCCUPANCY NOT CONSISTENT WITH THIS CERTIFICATE SHALL BE MADE UNLESS FIRST APPROVED BY THE BOROUGH SUPERINTENDENT

Unless an approval for the same has been obtained from the Borough Superintendent, no change or rearrangement in the structural parts of the building, or affecting the light and ventilation of any part thereof, or in the exit facilities, shall be made; no enlargement, whether by extending on any side or by increasing in height shall be made; nor shall the building be moved from one location or position to another; nor shall there be any reduction or diminution of the area of the lot or plot on which the building is located.

The building or any part thereof shall not be used for any purpose other than that for which it is certified.

The superimposed, uniformly distributed loads, or concentrated loads producing the same stresses in the construction in any story shall not exceed the live loads specified on reverse side; the number of persons of either sex in any story shall not exceed that specified when sex is indicated, nor shall the aggregate number of persons in any story exceed the specified total; and the use to which any story may be put shall be restricted to that fixed by this certificate except as specifically stated.

This certificate does not in any way relieve the owner or owners or any other person or persons in possession or control of the building or any part thereof from obtaining such other permits, licenses or approvals as may be prescribed by law for the uses or purposes for which the building is designed or intended; nor from obtaining the special certificates required for the use and operation of elevators; nor from the installation of fire alarm systems where required by law; nor from complying with any lawful order for additional fire extinguishing appliances under the discretionary powers of the fire commissioner; nor from complying with any lawful order issued with the object of maintaining the building in a safe or lawful condition; nor from complying with any authorized direction to remove encroachments into a public highway or other public place, whether attached to or part of the building or not.

If this certificate is marked "Temporary", it is applicable only to those parts of the building indicated on its face, and certifies to the legal use and occupancy of only such parts of the building; it is subject to all the provisions and conditions applying to a final or permanent certificate; it is not applicable to any building under the jurisdiction of the Housing Division unless it is also approved and endorsed by them, and it must be replaced by a full certificate at the date of expiration.

If this certificate is for an existing building, erected prior to March 14, 1916, it has been duly inspected and it has been found to have been occupied or arranged to be occupied prior to March 14, 1916, as noted on the reverse side, and that on information and belief, since that date there has been no alteration or conversion to a use that changed its classification as defined in the Building Code, or that would necessitate compliance with some special requirement or with the State Labor Law or any other law or ordinance; that there are no notices of violations or orders pending in the Department of Housing and Buildings at this time; that Section 646F of the New York City Charter has been complied with as certified by a report of the Fire Commissioner to the Borough Superintendent, and that, so long as the building is not altered, except by permission of the Borough Superintendent, the existing use and occupancy may be continued.

"§ 646 F. No certificate of occupancy shall be issued for any building, structure, enclosure, place or premises wherein containers for combustibles, chemicals, explosives, inflammables and other dangerous substances, articles, compounds or mixtures are stored, or wherein automatic or other fire alarm systems or fire extinguishing equipment are required by law to be or are installed, until the fire commissioner has tested and inspected and has certified his approval in writing of the installation of such containers, systems or equipment to the Borough Superintendent of the borough in which the installation has been made. Such approval shall be recorded on the certificate of occupancy."

Additional copies of this certificate will be furnished to persons having an interest in the building or premises, upon payment of a fee of fifty cents per copy.

NAMES AND ADDRESSES OF AFFECTED PROPERTY OWNERS

Compiled from the records of the New York City Department of Finance and the Office of the City Register, New York County (as of 03/27/2007)

Premises: 6-10 West 70th Street/99 Central Park West
New York, NY
Block 1122 Lots 36 & 37

BLOCK	LOT	OWNER'S NAME AND ADDRESS
1121	17	25 WEST 68TH STREET LLC 640 5TH AVE FL 3 NEW YORK NY 10019
1121	22, 23, 24, 123	FINE TIMES, INC 1270 AVE OF THE AMERICAS SUITE 2116 NEW YORK NY 10020
1121	25	15 WEST 68TH STREET, LLC C/O FINE TIMES, INC. 1270 AVE OF THE AMERICAS 21ST FL. NEW YORK NY 10020
1121	29	80 CPW APARTMENTS CORP. C/O GOODSTEIN MGMT. 211 E 46TH ST NEW YORK NY 10017
1121	36	88 ASSOCIATES INC C/O HERON, LTD 820 2ND AVE FL 4 NEW YORK NY 10017
1121	37	BRATTFORD INVESTMENTS LIMITED 12 W 69TH ST NEW YORK NY 10023
1121	39	FONDOULIS GEORGE 14 W 69TH ST NEW YORK NY 10023
1121	40	16 WEST 69TH STREET LLC C/O SMULEWICZ RENATE 44 W 70TH ST NEW YORK NY 10023
1121	41	18 WEST 69TH STREET, LLC 18 WEST 69TH STREET, NEW YORK NY 10023 18 WEST 69TH STREET, LLC 70 W 71ST ST NEW YORK NY 10023
1121	42	20 WEST 69TH STREET, LLC 70 W 71ST ST APT 1C NEW YORK NY 10023

1121	43	22-24 WEST 69TH ST CORP. 24 W 69TH ST NEW YORK NY 10023 R A COHEN & ASSOCIATES, INC. 60 EAST 42ND STREET ROOM 1250 NEW YORK NY 10165
1121	45	26-28 WEST 69TH STREET HOUSING CORP. ADVANCED MANAGEMENT SERVICES 26 COURT ST STE 804 BROOKLYN NY 11242
1121	46	HERBERT W &PAMELA HIRSCH 30 W 69TH ST NEW YORK NY 10023
1121	47	WID RLTY CP 32 W 69TH ST NEW YORK NY 10023
1121	48	34 WEST 69TH STREET, LLC C/O COLLEN HANFIELD 33 W 75TH ST APT 1B NEW YORK NY 10023
1121	49	36 W 69 APT INC C/O AMS 25 W 45TH ST NEW YORK NY 10036-4902
1121	50	38 WEST 69TH STREET CO. (LP) C/O VELTRI JAMES 27 W 70TH ST APT 2A NEW YORK NY 10023
1122	13	ROSANNA BRUECK 130 LYNN STREET HARRINGTON PARK NJ 07640
1122	14	ARLENE M. KAHN 39 WEST 69TH STREET NEW YORK, NY 10024
1122	15	CLAUDIA HENSCHKE 37 W 69TH STREET NEW YORK NY 10023
1122	16	35 WEST 69TH STREET, LLC 163 W 74TH ST NEW YORK NY 10023
1122	17	33 WEST 69TH STREET, LLC 33 W 69TH STREET NEW YORK NY 10023
1122	18	29 WEST 69TH STREET ASSOCIATES, LLC 29 W 69 STREET NEW YORK NY 10023
1122	19	TOWNHOUSE ESTATES 27 W 69TH ST NEW YORK NY 10023

1122	20	HONG BOOM SIM AND FANG SHIUAN WU 25 W 69TH ST NEW YORK NY 10023
1122	22	PIERRE CONGRESS APARTMENTS, LLC 19 W 69TH ST NEW YORK NY 10023
1122	23	11-69 OWNERS CORP. C/O HERON, LTD 820 2ND AVE FL 4 NEW YORK NY 10017
1122	26	9 WEST 69 ST CO 9 W 69TH ST NEW YORK NY 10023
1122	29	91 CENTRAL PARK WEST CORPORATION 91 CENTRAL PARK WEST NEW YORK NY 10023 91 CENTRAL PARK WEST CORPORATION 74 07 BZ C/O HERON, LTD 820 2ND AVE FL 4 NEW YORK NY 10017
1122	40	18 OWNERS CORP. C/O MIDBORO MANAGEMENT, INC. 148 W 37TH ST NEW YORK, NEW YORK, 10018 PATRICIA K ISSAESCU 30 HAZARD AVE PROVIDENCE, RI 02906-3308
1122	43	20 WEST 70TH STREET LLC 105 CLAY STREET BROOKLYN NY 11222 20 WEST 70TH STREET LLC 20 W 70TH ST NEW YORK NY 10023
1122	44	CATHOLIC HIGH SC ASSOC 1011 1ST AVE NEW YORK NY 10022
1122	45	24 WEST 70TH STREET APARTMENT CORP. C/O MELANIE J. WALKER 101 W 70TH ST APT. 2N NEW YORK NY 10023
1122	46	KANDER JOHN 28 W 70TH ST NEW YORK NY 10023
1122	47	30 W. 70TH ST CORP C/O PETER J KLEIN 225 BROADHOLLOW RD MELVILLE NY 11747
1122	50	BARBARA HOROWITZ 38 WEST 70 STREET NEW YORK NY 10023

1122	51, 145	LINCOLN PARK REALTY COMPANY 26 WEST 70 STREET NEW YORK NY 10023
1122	52	KAYE STEPHEN C 42 W 70TH ST NEW YORK NY 10023
1122	117	SIDMAR PROPERTY CORP C/O PETER KHOURY 31 W 69TH ST NEW YORK NY 10023
1122	1001	JULIO BOGORICIN 23 WEST 69TH STREET - UNIT A NEW YORK NY 10023
1122	1002, 1003, 1004, 1005	23 WEST 69TH STREET CORP. C/O IRVINE REALTY GROUP 122 E 55TH ST FL 3 NEW YORK NY 10022
1123	13	KAZ NATHANIEL 43 WEST 70 STREET 10023
1123	14	COHEN, JOAN S.COHEN,KENNETH C/O PANTHEON PROPERTIES 119 W 57TH ST PH SO NEW YORK NY 10019
1123	15	WENNER JANN S 37 W 70TH ST NEW YORK NY 10023
1123	16	GROSBARD, BRENDA Y 35 W 70 ST NEW YORK NY 10023
1123	17	HIRSCH LANA F 33 W 70TH ST NEW YORK NY 10023
1123	18	KIZNER ASSOCIATES, INC. 144 W 72ND ST NEW YORK NY 10023
1123	19	FRANCESCO VELTRI 65 W 68TH ST NEW YORK NY 10023
1123	20	25 W 70 LLC 25 W 70TH ST NEW YORK NY 10023
1123	21	MALA REALTY CORP. 1064 RIVER RD EDGEWATER NJ 07020
1123	22	PERLMAN ITZHAK 21 W 70TH ST NEW YORK NY 10023
1123	23	VELTRI FRANCESCA 65 WEST 68TH STREET 10023

1123	24	KETTANEH, NIZAM PETER 15 WEST 70 STREET 10023
1123	25	ROSINA A VELTRI PO BOX 30 ALBERTSON NY 11507-0030
1123	26	VAKNIN, AHARON 9 W 70TH ST NEW YORK NY 10023
1123	29	103 CENTRAL PARK WEST CORP C/O INSIGNIA RESIDENTIAL GROUP 201 E 42ND ST FL 6 NEW YORK NY 10017
1123	38	JULY REALTY INC 6 WEST 71STH STREET NEW YORK NY 10023
1123	39	DAVID WANAT 8 W 71ST ST APT 1BNEW YORK NY 10023
1123	40	CATHOLIC DAUGHTERS OF THE AMERICAS 10 W 71ST ST NEW YORK NY 10023
1123	42	HEIT REALTY CORP 16 W 71ST ST NEW YORK NY 10023
1123	44	TIGER HOLDING CO. 22 WEST 71STH STREET NEW YORK NY 10023
1123	45	ARRIEN SCHILTKAMP 24 W 71ST ST NEW YORK NY 10023
1123	46	WYDRO KENNETH 26 W 71ST ST NEW YORK NY 10023
1123	47, 48	FINE TIMES INC 1270 AVE OF THE AMERICAS SUITE 2116 NEW YORK NY 10020
1123	49	VEDANTA SOCIETY 34 W 71ST ST NEW YORK NY 10023
1123	114	GROSBARD, RICHARD 39 W 70TH ST NEW YORK NY 10023
1123	118	LINCOLN PARK REALTY COMPANY 29 WEST 70 STREET 10023
1123	123	17 WEST 70TH STREET CO. (LP) 17 W 70TH ST NEW YORK NY 10023
1123	140	RUCH JULIA 40 W 83RD ST NEW YORK NY 10024

1123	143	TWENTY SEVENTY ONE REALTY CORP. 20 WEST 71 STREET NEW YORK NY 10023
1123	146	IAN & TERESA CANINO 28 W 71ST ST NEW YORK NY 10023
1123	1001-1004, 1006, 1007	DANIEL MARI 14 W 71ST ST NEW YORK NY 10023
1123	1005	DANIEL MARI C/O MARILOU MARI 14 W 71ST ST NEW YORK NY 10023
1124	21	17 WEST APARTMENTS CORP C/O HERON, LTD 820 2ND AVE FL NEW YORK NY 10017
1124	27	115 CENTRAL PARK WEST CORP C/O WALLACK MGMT CO 18 E 64TH ST NEW YORK NY 10021 C/O AKAM ASSOCIATES INC. 8 WEST 38TH STREET 7TH FLOOR NEW YORK NY 10018
SITE 1122	36, 37	CONGREGATION SHEARITH ISRAEL A/K/A TRUSTEES OF THE CONGREGATION OF SHEARITH ISRAEL 8 WEST 70TH STREET NEW YORK NY 10023

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Elena Aristova, being duly sworn, deposes and says:

(1) I reside at 8020 Fourth Avenue, Brooklyn, NY 11209.
(2) I am affiliated with Friedman & Gotbaum, LLP, special land use counsel to Congregation Shearith Israel ("CSI").
(3) In connection with CSI's application for a variance, attached is a true and complete list of Affected Property Owners within the radius shown on drawing Radius Diagram, compiled based on the information obtained from the records of the New York City Department of Finance, Tentative Assessment Roll 2007/2008, and the Office of the New York City Register, New York County.

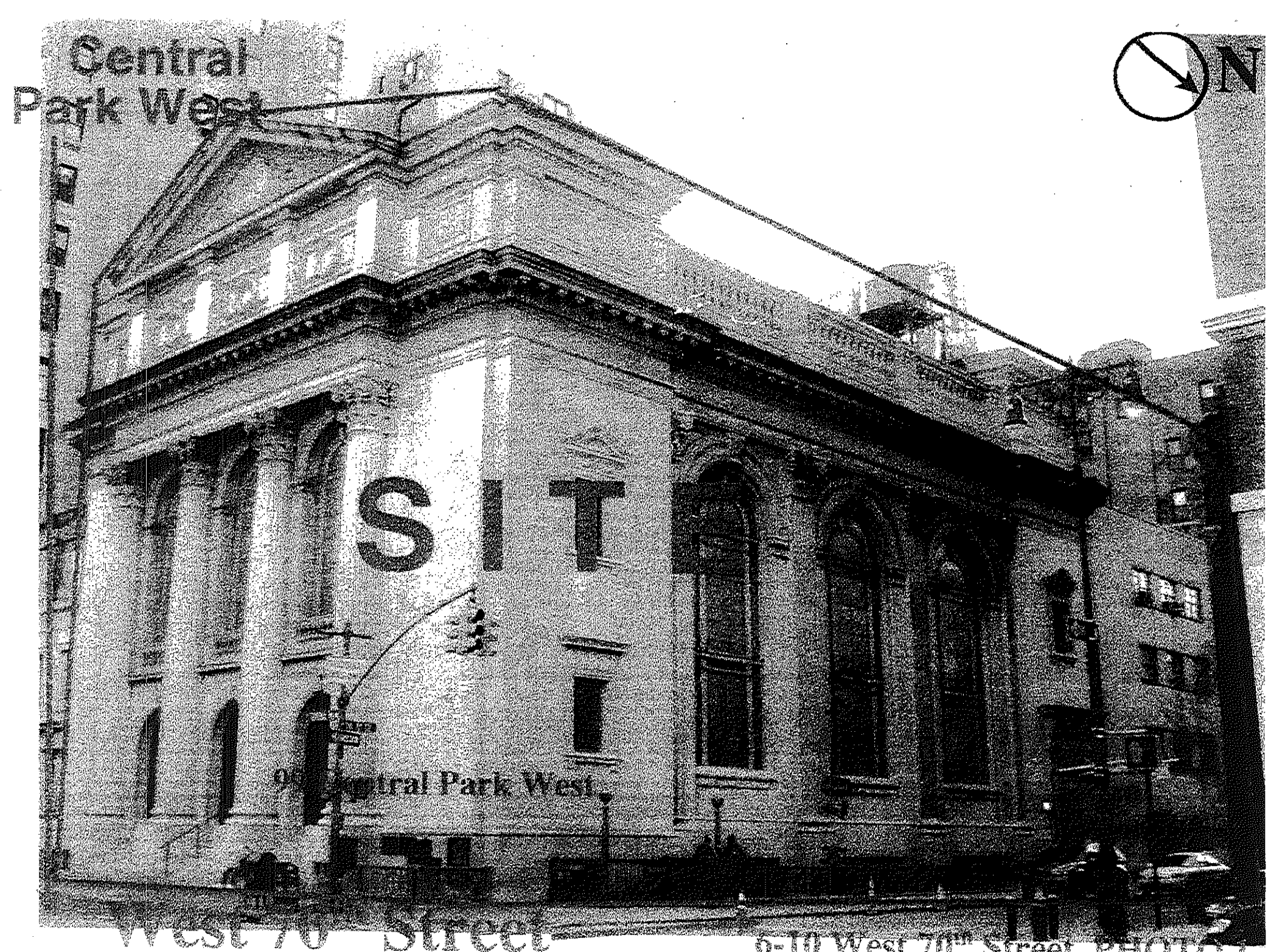
Elena Aristova

Elena Aristova

Sworn to before me this
27th day of March 2007

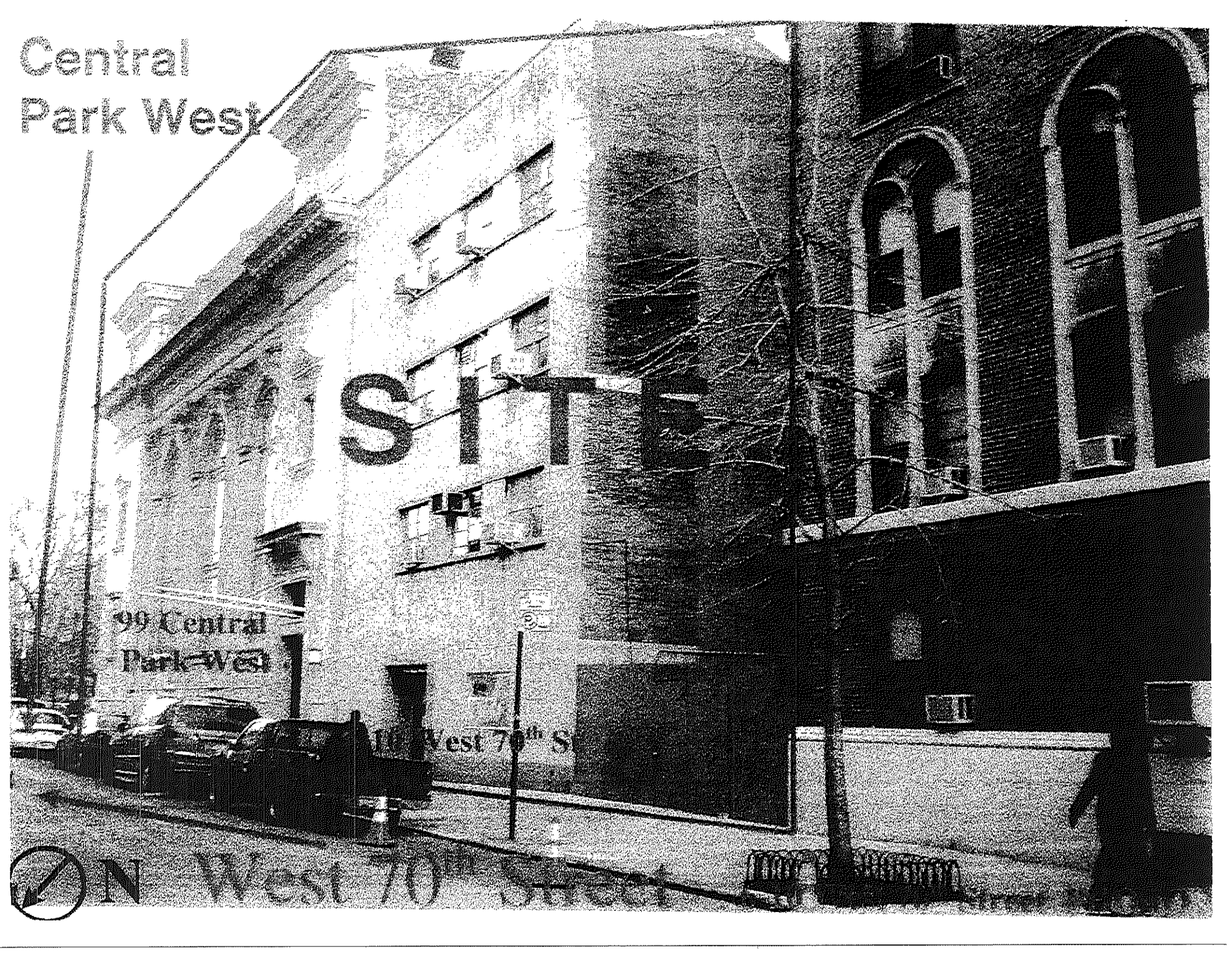
Notary Public

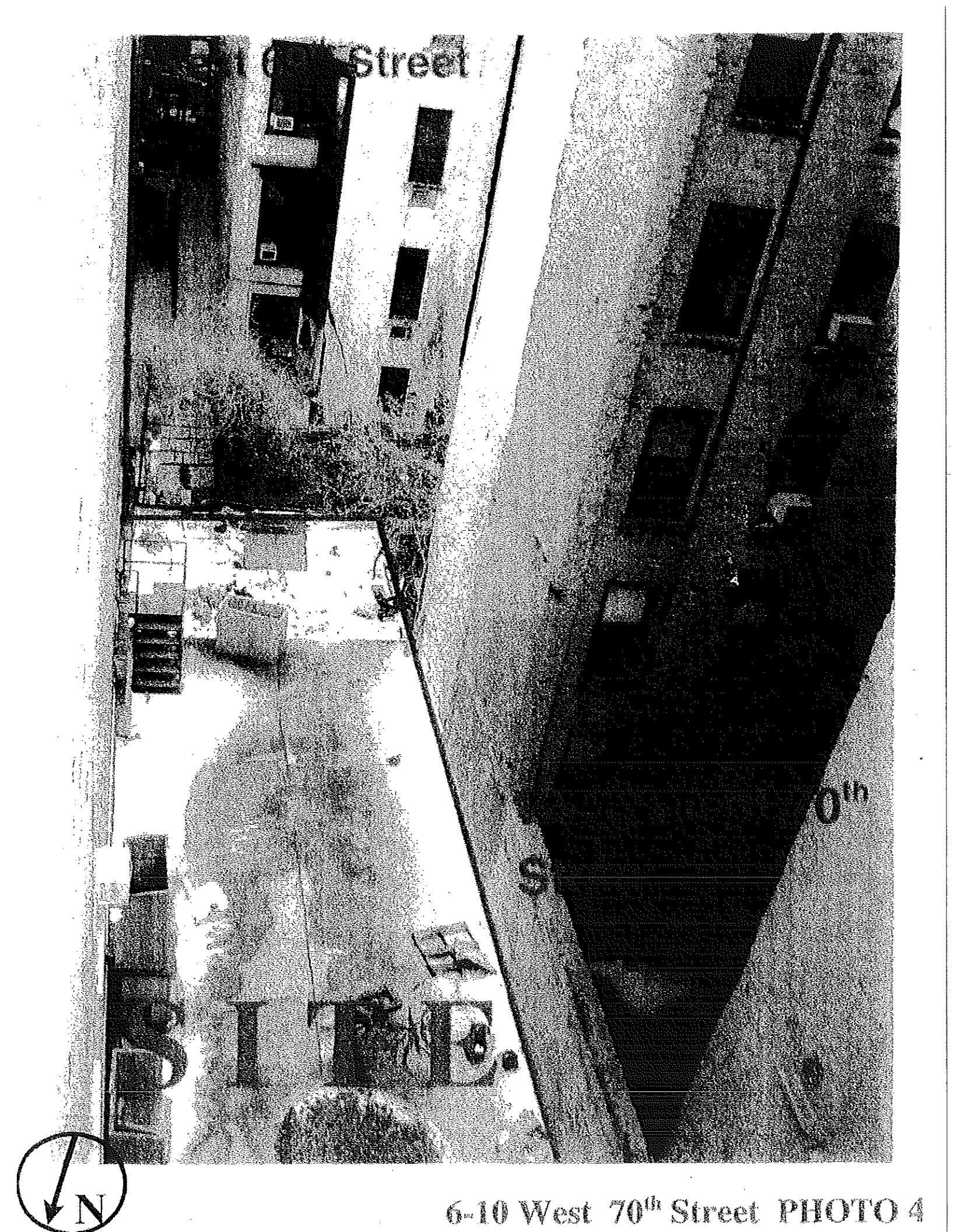
LORI G. CUISINIER
Notary Public, State of New York
No. 02CU6017170
Qualified in Queens County
Commission Expires May 25, 2007



6-10 West 70th Street PHOTO 1

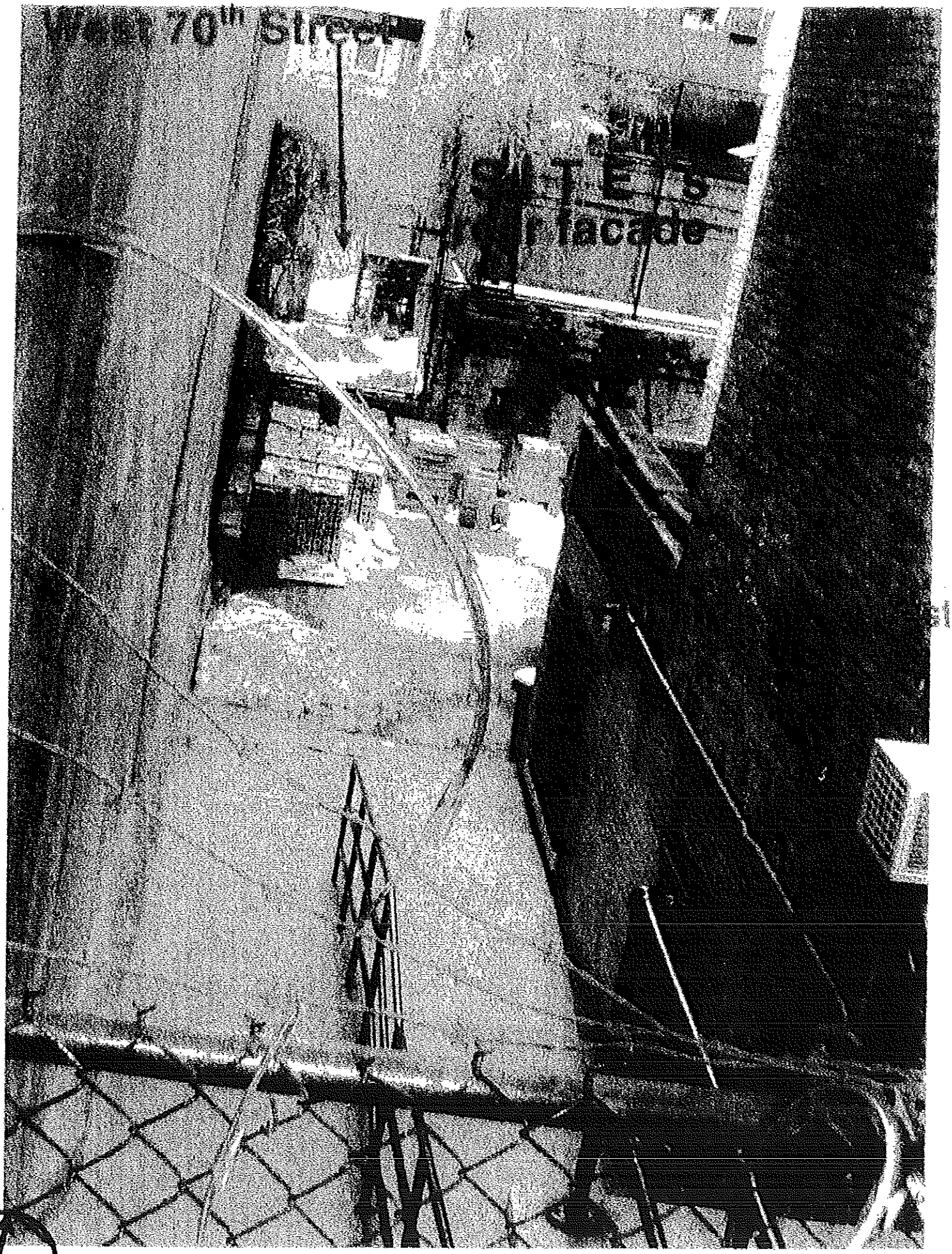

E 70th


Central
Park West
SITE
99 Central
Park West
West 70th St
N West 70 Street



6-10 West 70th Street PHOTO 4


SITE
N
6-10 West 70th Street Portfolio



N

6-10 West 70th Street PHOTO 6

CITY OF NEW YORK
BOARD OF STANDARDS AND APPEALS
40 Rector Street, 9th Floor
New York, New York 10006-1705
Phone: (212) 788-8500
Fax: (212) 788-8769

AFFIDAVIT OF OWNERSHIP

State of New York
City of New York
County of New York } ss.:

74-07-BZ

DAVID J. NATHAN, being duly sworn, deposes and says that (s)he resides at 215 W. 92ND ST. in the City of New York, in the County of New York, in the State of New York; that Congregation Shearith Israel is the owner in fee of all that certain lot, piece or parcel of land located in the Borough of Manhattan, in the City of New York and known and designated as Block 1122, Lot(s) 36 and 37, Street and House Number 99-100 Central Park West and 6-10 West 70th Street; that (s)he hereby authorizes Friedman & Gotbaum, LLP to make the annexed application in her/his behalf; and that the statements of fact contained in said application are true.

Signature of Owner David J Nathan

Print Name DAVID J. NATHAN

Print Title VICE PRESIDENT, CONGREGATION SHEARITH ISRAEL
(State if Partner, or give Title if Officer of Corporation)

Sworn to before me this 30th day of March 2007

Anastasia M. Tsongas
(Notary Public)

ANASTASIA M. TSONGAS
Notary Public, State of New York
No. 01TS6059341
Qualified In Queens County
Commission Expires Sept. 3, 2007

07 | BSA | 071 M

ECONOMIC ANALYSIS REPORT

6-10 WEST 70TH STREET

NEW YORK, NEW YORK

Prepared For

Congregation Shearith Israel

March 28, 2007

Freeman/Frazier & Associates, Inc.
132 Nassau Street, Suite 1220
New York, New York 10038

1.00 Scope of Report

The purpose of this Report is to analyze the feasibility of two alternatives for the development of a site located at 6-10 West 70th Street, New York, New York. The alternatives considered include: 1) As of Right Residential/Community Facility ("As of Right Development") and 2) The Proposed Residential/Community Facility Development ("Proposed Development"). The Proposed Development requires a variance from the Board of Standards and Appeals.

The report includes detailed financial Schedules that compare the ability of the As of Right and Proposed Development alternatives to provide an acceptable return on the investment required to facilitate development. A summary of the economic characteristics of the As of Right and Proposed alternatives, including projected cash flows and development costs may be found on Schedules A and B.

Recent, verifiable comparable vacant land sales were reviewed to establish the market in the vicinity of the subject property. A schedule of this review may be found as Schedule C.

Recent, verifiable residential condominium sales were reviewed to establish the potential space market in the vicinity of the subject property. A schedule of this review may be found as Schedules D. A schedule of projected sales values for the Proposed residential schemes is attached as Schedule D1 and D2.

Financial feasibility, the ability to provide the developer and investor, with the return of and a reasonable return on capital invested, was analyzed for each alternative using actual and estimated costs, for Acquisition, Hard and Soft Construction Costs and building operating expenses. These assumptions are detailed in subsequent sections of this Report.

1.10 Description of Property and Project Area

The subject property is located at 6-10 West 70th Street (Block 1122 Lot 37) at the southwest corner of Central Park West and 70th Street on Manhattan's Upper Westside, and is part of Central Park West Historic District. Adjacent to the subject property is 99-100 Central Park West (lot 36) which has a synagogue designated a historic landmark in 1974 by New York City's Landmark Commission. Currently, 6-10 West 70th Street has a four story community house with community facilities that is not included as part of the historic landmark designation. The community house has 64 feet of frontage on West 70th Street.

The building is located in Manhattan Community Board #7. Central Park West and the Park Blocks are composed of a mix of architecturally distinctive buildings including row houses, apartment houses, apartment hotels and institutional buildings including: museums, churches and synagogues, many of which have been designated as landmarks. The immediate vicinity of the site is mixed residential and commercial to the north and to the south.

The subject lot area is approximately 6,432 sq.ft. The site has a four-story community facility on the site.

1.20 Zoning Regulations

The present zoning for the property is R8B and R10A and the property is located in the Central Park West Historic District. The split lot zoning divides 73% of the property into the R8B zone, approximately 4,723.5 sq.ft., and 27% of the property into R10A, approximately 1,708.5 sq.ft.

The current Floor Area Ratio (F.A.R.) permitted by Zoning for the district R8B is 4.0 F.A.R., and the permitted F.A.R. for an R10A district is 10.0. The total adjusted maximum developable square footage, for Lot 37 only, is 37,889 sq.ft.

Under the Proposed Development, the residential floor area would be 23,067 sq.ft. and the community facility floor area would be 19,922 sq.ft. The combined total floor would be a zoning floor area of 42,989 sq.ft. The Proposed Development requires approval by the Board of Standards and Appeals.

1.30 Property Ownership

The Trustees of the Congregation Shearith Israel owns the subject property.

The property is currently assessed in the 2007/2008-tax year as follows:

	Land	Total
Target	$2,002,500	$2,322,000
Transitional	$1,744,200	$2,022,300

The property has an exempt value of $2,322,000 because of its standing as a non-profit institution. However, without the exemption status, and at a Class 4 tax rate of 10.997%, taxes on the property are estimated at $222,392/year as per the NYC Department of Finance website.

The applicant in this BSA case is Shelly Friedman of Friedman & Gottbaum on behalf of The Trustees of the Congregation Shearith Israel.

1.40 Development Alternatives

1.41 As of Right Residential/Community Facility Development

The As of Right Development would consist of new construction of six-story building on lot 37. The new development would consist of a new synagogue lobby on the ground floor, and community facilities on the second through fourth floors, with a gross floor area of 20,178 sq.ft. On the fifth and sixth floors there would be two condominium units for sale with a gross residential area of 7,596 sq.ft.

The gross built area of this alternative would be 27,774 sq.ft. not including the cellar. The zoning floor area for this alternative would be 27,774. The residential sellable area is 5,022 sq.ft.

This development program is referred to as the "As of Right Development".

1.42 Proposed Residential/Community Facility Development

The Proposed Development alternative would consist of new construction of an eight-story plus penthouse mixed use building on lot 37 with the synagogue remaining untouched on the ground floor. The new development consists of a new synagogue lobby on the ground floor, and community facility space on floors two through four with approximately 19,922 sq.ft. of gross area. Floors five through eight plus the penthouse would be five condominiums.

The residential portion of the development would be sold as condominium units, with one condominium per floor. There would be a total of 16,242 sellable square feet. The fifth, sixth, seventh, and eighth floors would have an average size of 3,565 sq.ft and would have four bedrooms and three and a half bathrooms. The penthouse apartment would have 1,984 sq.ft. of sellable area, and would have two bedrooms and two and a half bathrooms. The penthouse apartment would also have a 1,555 sq.ft. terrace with views to the north, south, and west.

The gross built area of this alternative would be 42,989 sq.ft. not including the cellar. The zoning floor area for this alternative would be 42,989 sq.ft.

This development program would require a variance from the Board of Standards and Appeals and is referred to as the "Proposed Development".

2.0 Methodology

2.10 Value of the Property As Is

In order to estimate the value of the land under consideration, recent sales prices for comparable vacant properties in similar R8B zones and in geographic proximity within Manhattan were reviewed. Four appropriate sales were identified. A site visit to each property was made and location, condition and sales price data were compared. A schedule of the comparable sales is attached as Schedule C.

Vacant land sale prices, adjusted for comparability ranged from $453.09/sq.ft. of F.A.R. development area to $565.62/sq.ft. with an average of $500.31/sq.ft. For purposes of this analysis, a value of $500/sq.ft., or slightly above the average, was used. The site area is approximately 6,427 sq.ft. with a potential residential zoning floor area of 37,889 sq.ft.; therefore, the acquisition cost for Lot 37 for residential use is estimated at $18,944,000.

3.0 Economic Assumptions

An economic analysis of the two development alternatives was undertaken. Schedule A of this Report identify and compare the ability of each alternative to provide acceptable income to justify the capital investments required.

3.10 Development Cost Assumptions

Development Costs consist of Acquisition Costs, as described in Section 2.00 above; Holding and Preparation Costs; Hard Construction Costs for specific improvements; and Soft Costs including construction loan interest, professional and other fees, property and other taxes and miscellaneous development related expenses incurred during the construction period.

Development related soft costs for the alternatives were estimated based on typical expenses incurred for similar types of development.

The architectural firms of Platt Byard Dovell White Architects LLP have provided plans. For each development alternative, a construction cost estimate has been provided by McQuilkin and Associates. Each estimate can be found in Exhibit A to this Report.

The estimated hard construction cost for the total development of the As of Right Development is $3,603,000. The work includes residential core and shell, electrical, mechanical and elevator systems. Apartment interiors include kitchen appliances, bathrooms and high end finishes. No construction costs related to development of the community facilities have been included.

The estimated hard construction cost for the total development of Proposed Development is $7,488,000. This work includes residential core and shell, electrical, mechanical and elevator systems. Apartment interiors include kitchen appliances, bathrooms and high-end finishes. No construction costs related to development of the community facilities have been included.

The cost estimates for each Development alternative were compared with costs for similar development projects and can be considered within the reasonable range for comparable construction and finishes for this type of project. Development related soft costs for the alternatives were estimated based on typical expenses incurred for similar types of development. Schedule B identifies the specific Hard and Soft Cost estimates utilized in this analysis for the each of the alternatives.

3.20 Financing Assumptions

Typically, construction loan interest rates may be assumed to be 1.0-2.0 percentage points above the Prime Rate. As of the Report's date, the Prime Rate was 8.25%, which cannot be reasonably assumed to remain in effect during the development's projected timeframe. Therefore, 9.50% was used as the construction loan rate for the analysis.

The As of Right and Proposed Development alternatives will be developed as for-sale Condominiums. Therefore, any long term financing will be the responsibility of individual Condominium Unit purchasers and no assumptions were made for this analysis.

3.30 Real Estate Tax Assumptions

Current taxes were assumed as a base for the construction and rent up periods for the as of right use alternative.

It is assumed that the As of Right and Proposed Developments would not be eligible for the 421-a Real Estate Tax Abatement Programs.

The As of Right and Proposed Developments under consideration will be developed as for-sale Condominiums. Therefore, any real estate taxes will be the responsibility of individual Condominium Unit purchasers and no assumptions were made for this analysis.

3.40 Expense Assumptions

As a residential condominium it is assumed that the tenant will pay all expenses.

3.60 Residential Condominium Sales

The upper Westside and residences along side Central Park are popular areas for historic homes as well as new condominium apartment development. Comparable condominium sales from the Upper Westside and Central Park West areas have been used, and appropriate adjustments made to account for their location and other pertinent factors. In estimating the potential sales prices for the As of Right and Proposed Developments, adjustments to observed sales prices were made for time of sale, building location and location of unit within the building, size and level of improvement. This information is provided in the attached Schedule D.

Based on a review of recent verifiable sales of comparable apartments in recently renovated or constructed buildings, apartments are selling in the range of $2,456.90 to $2,800.48/sq.ft., adjusting for location, size, floor and amenities. Pricing for each unit in the As of Right and Proposed Developments were estimated based on the adjusted comparable sales contained in Schedule D. The attached Schedule D1 and D2 identify these estimated sales prices.

4.00 Consideration

4.10 Property Acquisition

Based on our market review, the estimated price is within the observed market range, taking into account the special features and conditions regarding the subject property as noted in Section 2.10. Economic feasibility issues regarding the project are not, therefore, a result of the estimated value of the property.

4.20 Unique Site Conditions

Although the potential residential floor area is 37,417 sq.ft., the undersized site; the presence of the existing zoning district boundary and requirements to align its street wall and east elevation with the existing Synagogue; need to replace and enlarge the existing functions in the Community House; and need to address the Synagogue's circulation problems create practicable difficulties in being able to feasibly develop the New Building in a manner that would further CSI's religious, educational and cultural mission. These restrictions also prevent development of a valuable tower component of the building on the R10A portion of the site and limit the overall residential floor area possibilities.

4.30 As of Right Residential/Community Facility Development

As shown in the attached Schedule A1, the Feasibility Analysis estimated the project value to be the sum of residential condominium unit sales, less sales commissions. Consideration of the economic feasibility of condominium projects is typically based on the potential profit generated from the sale of apartment units and other sources, on a an annualized basis. Profit is the amount available for distribution to investors after all project expenses incurred in the development and sale of units are deducted from gross revenues. "Annualized Return on Total Investment" is measured by dividing the estimated annualized project profit by the total investment in the project.

As shown in the attached Schedule A, the total investment, including estimated Property Value, base construction costs, soft costs and carrying costs during the sales period for the As of Right Development is estimated to be $27,970,000.

The Feasibility Analysis estimated the net project value to be $11,574,000. This amount is the sum of residential condominium unit sales, less sales commissions. As shown in Schedule A, the development of the as of right alternative would result in an annualized **capital loss of $8,672,000.**

4.40 Proposed Residential/Community Facility Development

As shown in the attached Schedule A, the total investment, including estimated Property Value, base construction costs, soft costs and carrying costs during the sales period for the Proposed Development is estimated to be $33,688,000.

The Feasibility Analysis estimated the net project value to be $39,606,000. This amount is the sum of residential condominium unit sales, less sales commissions.

As shown in Schedule A, the annualized return on total investment for the Proposed Development is estimated to be 6.55% with a 28-month development and sales period.

5.00 Conclusion

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

There is no Return on Investment provided by the As of Right Development.

6.00 Professional Qualifications

A statement of my professional qualifications is attached. Please note that I am independent of the subject property's owner and have no legal or financial interest in the subject property.

SCHEDULE A1: ANALYSIS SUMMARY - CONDOMINIUM USE

		AS OF RIGHT DEVELOPMENT	PROPOSED DEVELOPMENT
BUILDING AREA (SQ.FT.)			
BUILT RESIDENTIAL AREA		7,596	23,067
SELLABLE AREA		5,022	16,242
CAPITAL INVESTMENT SUMMARY			
ACQUISITION COST		$18,944,000	$18,944,000
HOLDING & PREP. COSTS		$0	$0
BASE CONSTRUCTION COSTS		$3,603,000	$7,488,000
SOFT CONSTRUCTION COSTS		$4,873,000	$6,592,000
		$27,420,000	$33,024,000
PROJECT VALUE			
SALE OF UNITS		$12,313,000	$42,134,000
(less) SALES COMMISSIONS	6%	($739,000)	($2,528,000)
CAPITALIZED VALUE OF COMMERCIAL SPACE		$0	$0
EST. NET PROJECT VALUE		$11,574,000	$39,606,000
PROJECT INVESTMENT			
ACQUISITION COST		$18,944,000	$18,944,000
HOLDING & PREP. COSTS		$0	$0
BASE CONSTRUCTION COSTS		$3,603,000	$7,488,000
SOFT CONSTRUCTION COSTS		$4,873,000	$6,592,000
CARRYING COSTS DURING SALES PERIOD		$550,000	$664,000
EST. TOTAL INVESTMENT		$27,970,000	$33,688,000
RETURN ON INVESTMENT			
ESTIMATED PROJECT VALUE		$11,574,000	$39,606,000
(less)EST.TOTAL INVESTMENT		($27,970,000)	($33,688,000)
(less) EST.TRANSACTION TAXES		($225,000)	($769,000)
EST.PROFIT (loss)		($16,621,000)	$5,149,000
DEVELOPMENT/SALES PERIOD (MONTHS)		23	28
ANNUALIZED PROFIT (loss)		($8,672,000)	$2,207,000
RETURN ON TOTAL INVESTMENT		0.00%	15.28%
ANNUALIZED RETURN ON TOTAL INVESTMENT		0.00%	6.55%

NOTE : ALL $ FIGURES ROUNDED TO NEAREST THOUSAND

SCHEDULE B : DEVELOPMENT COSTS

		AS OF RIGHT DEVELOPMENT	PROPOSED DEVELOPMENT
DEVELOPMENT COST SUMMARY			
ACQUISITION COSTS		$18,944,000	$18,944,000
HOLDING & PREP. COSTS:		$0	$0
BASE CONSTRUCTION COSTS		$3,603,000	$7,488,000
TENANT FIT-OUT COSTS		$0	0
EST.SOFT COSTS		$4,873,000	$6,592,000
EST. TOTAL DEV.COSTS		$27,420,000	$33,024,000
ACQUISITION COSTS :			
Land Purchase Price		$18,944,000	$18,944,000
TOTAL LAND VALUE		$18,944,000	$18,944,000
HOLDING & PREP. COSTS:		$0	$0
BASE CONSTRUCTION COSTS :		$3,603,000	$7,488,000
TENANT FIT-OUT COSTS		$0	
EST.CONST LOAN AMOUNT :		$20,585,000	$24,769,000
EST.CONST.PERIOD(MOS) :		20	24
EST. SOFT COSTS :			
Builder's Fee/Developer's Profit	3.00%	$823,000	$991,000
Archt.& Engin. Fees	8.00%	$288,000	$599,000
Bank Inspect.Engin.		$12,000	$34,000
Construction Management	5.00%	$180,000	$300,000
Inspections, Borings & Surveys			
Laboratory Fees	LS	$5,000	$5,000
Soil Investigation	LS	$10,000	$10,000
Preliminary Surveys	LS	$5,000	$5,000
Ongoing Surveys	LS	$10,000	$10,000
Environmental Surveys/Reports	LS	$2,000	$2,000
Controlled Inspection Fees	LS	$45,000	$45,000
Legal Fees			
Dev.Legal Fees		$150,000	$150,000
Con.Lender Legal		$62,000	$62,000
End Loan Legal		$0.	$0
Permits & Approvals			
D.O.B. Fees	25.53%	$117,000	$145,000
Cond/Co-op Offering Plan		$30,000	$30,000
Other		$40,000	$40,000
Accounting Fees		$5,000	$5,000
Consultant Fees		$0	$0
Appraisal Fees		$6,000	$6,000
421-a Tax Exemption Fee	0.00%	$0	$0
421a Tax Certificates		NA	NA
Marketing/Pre-Opening Expenses			
Rental Commissions	25.00%	$0	$0
Sales Expenses & Advertising		$198,000	$198,000
Capitalized Start-up Costs		NA	$0
Financing and Other Charges			
Con.Loan Int. @ Loan Rate =	8.50%	$1,628,000	$2,353,000
Rent-up Loan Int. @ Loan Rate =	7.00%	$0	$0
Con.Lender Fees	1.00%	$206,000	$248,000
End Loan Fee	1.00%	$0	$0
Construction Real Estate Tax		$334,000	$445,000
Rent-up Real Estate Tax		$0	$0
Title Insurance	0.33%	$98,000	$109,000
Mtge.Rec.Tax	2.75%	$566,000	$681,000
Construction Insurance	1.00%	$54,000	$112,000
Water and Sewer		$5,000	$5,000
Other		$0	$0
TOTAL EST.SOFT COSTS		$4,873,000	$6,592,000

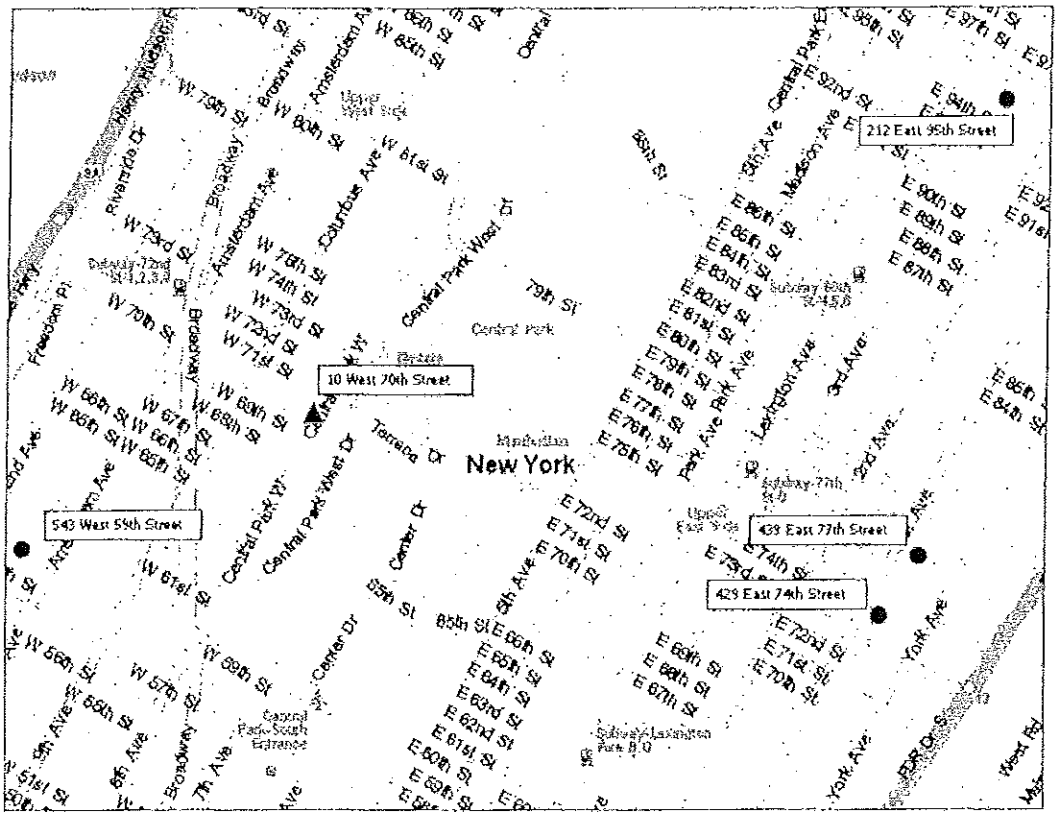
NOTE : ALL $ FIGURES ROUNDED TO NEAREST THOUSAND

Freeman/Frazier & Associates, Inc.
Date : March 28, 2007
Property : 10 West 70th Street
Block : Blk 1122, Lot 37
Total Land Area : 6,472 sq.ft.
Zone : R8B & R10A
Page 10

Schedule C : Comparable Vacant Property Sales

SALE LOCATION	ZONE	DATE	PRICE	LOT AREA	BUILDING SQ.FT.	PRICE/ BUILT SF	TIME	LOCATION	SIZE	ZONING	OTHER	COMPOS FACTOR	ADJUSTED PRICE/S.F.
1. 543-547 West 59th Street New York, NY Blk 1151 Lot 9	C6-2	8/3/2005	$12,480,762	7,550	45,451	$275	1.20	1.25	1.00	1.10	1.00	1.65	$453.09
2. 429 East 74th Street New York, NY Blk 1469 Lot 14	R8B	6/1/2006	$10,151,200	6,554	26,216	$387	1.10	1.10	1.00	1.10	1.00	1.33	$515.38
3. 439 East 77th Street New York, NY Blk 1472 Lot 17	R8B	7/6/2006	$12,300,000	7,236	28,944	$425	1.10	1.10	1.00	1.10	1.00	1.33	$565.62
4. 212 East 95th Street New York, NY Blk 1540 Lot 40	R8	7/26/2006	$10,700,000	5,650	34,013	$315	1.08	1.25	1.00	1.10	1.00	1.49	$467.16
												Average	$500.31
Subject 10 West 70th Street New York, NY						$500	1.00	1.00	1.00	1.00	1.00	1.00	$500.00

Schedule C: Comparable Vacant Property Sales



Schedule C: Comparable Vacant Property Sales

1. 543-547 West 59th Street

This 7,550 sq.ft. vacant lot is located between Tenth and Eleventh Avenues. The property resides in a C6-2 zoning district with an F.A.R. of 6.02, and has a buildable area of approximately 45,451. It is located one mile south of the subject property. A +20% adjustment was made for time, and +25% adjustment for the property's inferior location relative to the subject property. A +10% adjustment was made for the inferior zoning. No adjustments were made for size or other factors.

2. 429 East 74th Street

This is a 6,554 sq.ft. under utilized lot on Manhattan's Upper East Side. It is approximately 2.5 miles east of the subject property, and is located on East 74th Street between York and First Avenues. A +10% adjustment was made for time, and a +10% adjustment was made for the inferior location. A +10% adjustment was made for the inferior zoning. No adjustments were made for size or other factors.

3. 439 East 77th Street

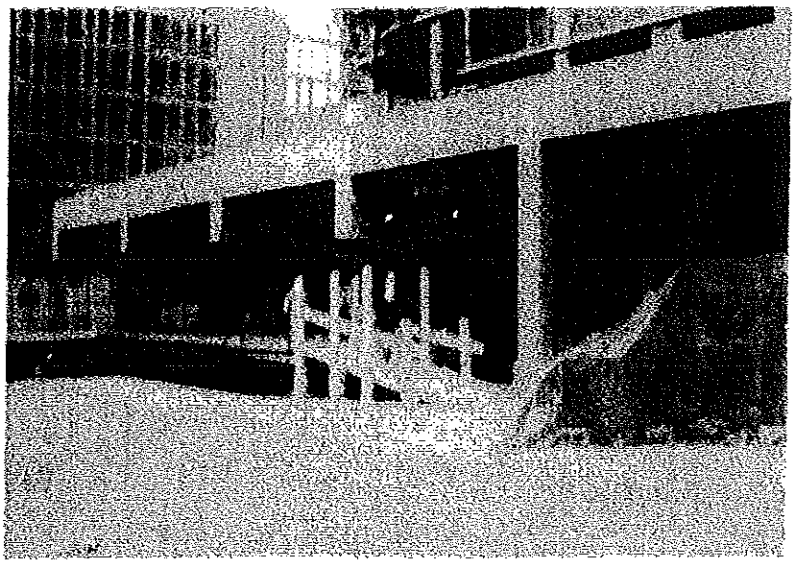
This is a 2,236 sq.ft. under utilized lot on Manhattan's Upper West Side. It is located on East 77th Street between York and First Avenues. It is approximately 2.5 miles east of the subject property. A +10% adjustment was made for time, and a +10% adjustment was made for the inferior location. A +10% adjustment was also made for the inferior zoning. No adjustments were made for size or other locations.

4. 212 East 95th Street

This is a 5,650 sq.ft. vacant lot located on East 95th Street between Second and Third Avenues on Manhattan's Upper East Side. It is located approximately 2.5 miles northeast of the subject property. A +8% adjustment was made for time, and a +25% adjustment was made for inferior location. An additional +10% adjustment was made for the inferior zoning. No adjustments were made for size or other factors.

Schedule C: Comparable Vacant Property Sales

1. 543-547 West 59th Street

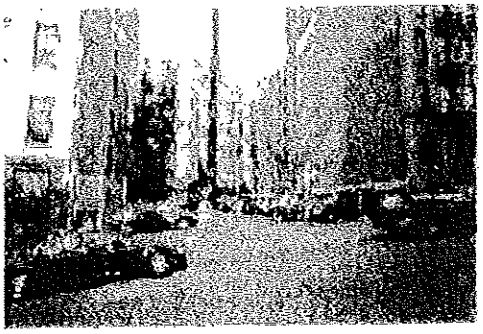


2. 429 East 74th Street

3. 439 East 77th Street

Schedule C: Comparable Vacant Property Sales Continued

4. 212 East 95th Street



Schedule D : Comparable Condominium Sales

SALE LOCATION	DATE	PRICE	AREA	$/SQ.FT.	TIME	LOCATION	SIZE	ZONING	OTHER	COMPOS FACTOR	ADJUSTED PRICE/S.F.
1. One Central Park West #51A New York, NY Blk 1113 Lot 1462	7/19/2006	$13,050,000	5,046	$2,586.21	1.00	0.95	1.00	1.00	1.00	0.95	$2,456.90
2. 15 Central Park West #9G New York, NY Blk 1114 Lot 29	11/20/2006	$6,450,000	2,237	$2,883.33	1.00	0.95	1.00	1.00	0.95	0.90	$2,602.20
3. 111 West 67th Street #45D New York, NY Blk 1139 Lot 1403	8/9/2006	$8,000,000	2,948	$2,713.70	1.00	0.95	1.00	1.00	1.00	0.95	$2,578.02
4. 15 Central Park West #29C New York, NY Blk 1114 Lot 29	11/14/2006	$7,940,000	2,876	$2,760.78	1.00	0.95	1.00	1.00	0.95	0.90	$2,491.60
5. One Central Park West #37B New York, NY Blk 1113 Lot 1462	11/8/2006	$4,250,000	1,599	$2,657.91	1.00	0.95	1.10	1.00	0.95	0.99	$2,638.64
6. 15 West 63rd Street #39A New York, NY Blk 1116 Lot 1738	4/21/2006	$7,861,000	2,800	$2,807.50	1.05	0.95	1.00	1.00	1.00	1.00	$2,800.48
										Average	$2,594.64
Subject Property 10 West 70th Street New York, NY				$2,600.00	1.00	1.00	1.00	1.00	1.00	1.00	$2,600.00

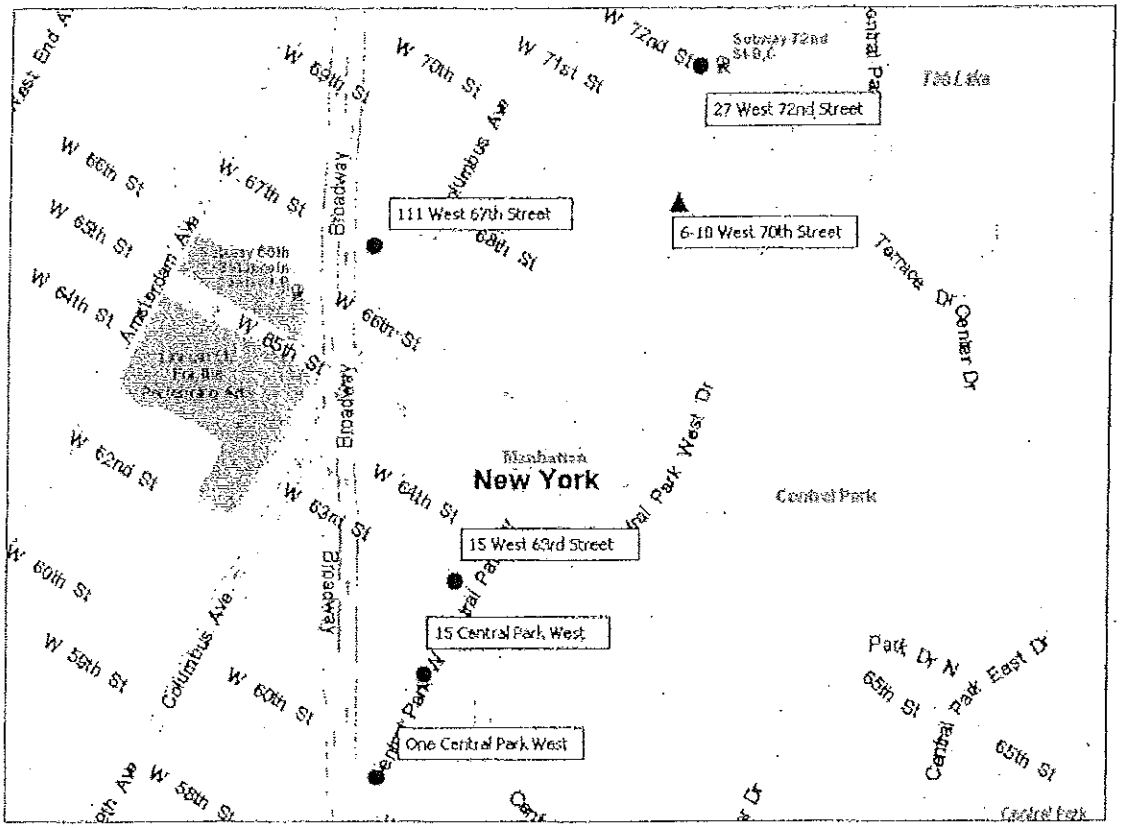
Schedule D1: As of Right Residential Condominium Pricing

Floor	Area	Price	Price/SF	Outdoor Space
Five	2,815	$6,333,750	$2,250	0
Six	2,207	$5,979,319	$2,325	1459
Total	5,022	$12,313,069	$2,452	

Schedule D2: Proposed Residential Condominium Pricing

Floor	Area	Price	Price/SF	Outdoor Space
Five	3,418	$7,861,400	$2,300	0
Six	3,522	$8,364,750	$2,375	0
Seven	3,632	$8,989,200	$2,475	0
Eight	3,686	$9,860,050	$2,675	0
PH	1,984	$7,058,931	$2,975	1555
Total	16,242	$42,134,331	$2,594	

Schedule D: Comparable Condominium Sales



Schedule D: Comparable Condominium Sales

1. One Central Park West #51A

This is a 5,046 sq.ft. condominium with views of Central Park located on the north side of Columbus circle. It is located approximately nine blocks south of the subject property. A –5% adjustment was made for the superior location. No adjustments were made for time, size, zoning or other factors.

2. 15 Central Park West #9G

This is a 2,237 sq.ft. condominium designed by Robert Stern. It is located on Central Park West between West 61st and West 62nd Street in Manhattan's Upper West Side. It is located approximately eight blocks south of the subject property. A –5% adjustment was made for the superior location. No adjustments were made for time, size, zoning or other factors.

3. 111 West 67th Street #45D

This is a 2,948 sq.ft. condominium located on 67th Street between Columbus Avenue and Broadway on Manhattan's Upper West Side. It is located approximately four blocks away from the subject property. A –5% adjustment was made for the superior location. No adjustments were made for time, size, zoning or other factors.

4. 15 Central Park West #29C

This is a 2,876 sq.ft. condominium designed by Robert Stern with views of Central Park. It is located on Central Park West between West 61st and West 62nd Street in Manhattan's Upper West Side. It is located approximately eight blocks south of the subject property. A –5% adjustment was made for the superior location. No adjustments were made for time, size, zoning or other factors.

5. One Central Park West #37B

This is a 1,599 sq.ft. condominium with views of Central Park located on the north side of Columbus circle. It is located approximately nine blocks south of the subject property. A –5% adjustment was made for the superior location, and a +10% adjustment was made for the small size of the unit. No adjustments were made for time, zoning or other factors.

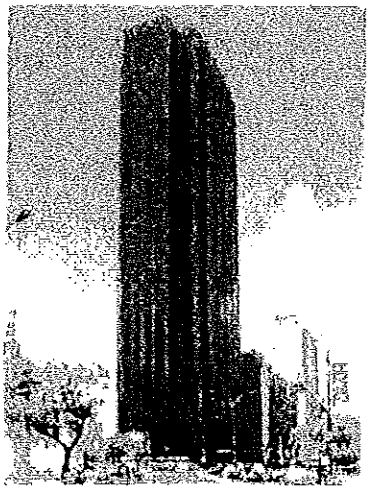
Schedule D: Comparable Condominium Sales Continued

6. 15 West 63rd Street #39A

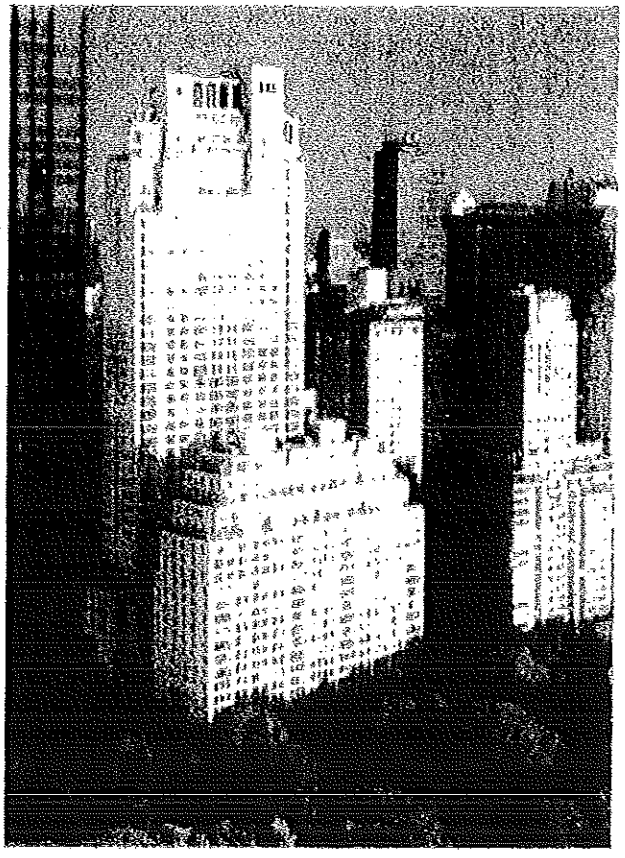
This is a 2,800 sq.ft. condominium located on West 63rd Street between Central Park West and Columbus Avenue. Located on Manhattan's Upper West Side, it is approximately seven blocks south of the subject property. A +5% adjustment was made for time, and a -5% adjustment was made for the superior location relative to the subject property. No adjustments were made for size, zoning or other factors.

Schedule D: Comparable Condominiums

1. One Central Park West

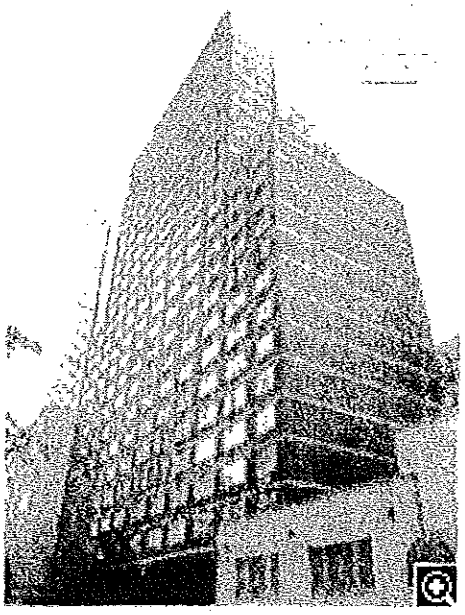


2. 15 Central Park West



Schedule D: Comparable Condominiums Continued

3. 111 West 67th Street



4. 15 West 63rd Street

EXHIBIT A : CONSTRUCTION COST ESTIMATE

CONGREGATION SHEARITH ISRAEL

NEW YORK, N.Y.

AS OF RIGHT CONSTRUCTION COST ESTIMATE

March 7, 2007

McQuilkin Associates, Inc.
Construction Consultants

500 Morris Avenue
Springfield, NJ 07081
Tel 973-218-1600
Fax 973-218-1700

MC QUILKIN ASSOCIATES INC.				DATE:	3/7/07
PROJECT: CONGREGATION SHEARITH ISRAEL				REV:	
LOCATION: NEW YORK, NY					
CSI #	TRADE SUMMARY		SCHOOL	RESIDENTIAL	TOTAL AMOUNT
	AS OF RIGHT				
02050	BUILDING DEMOLITION		103,500	-	103,500
02060	SELECTIVE DEMOLITION		25,000		25,000
02080	ASBESTOS ABATEMENT		NIC	NIC	NIC
02500	PAVING & SURFACING		24,786	-	24,786
02900	EXCAVATION/FOUNDATION		1,967,652	24,000	1,991,652
03010	CONCRETE AND CEMENT WORK		2,325,900	1,023,040	3,348,940
04200	MASONRY		193,140	-	193,140
05500	MISCELLANEOUS METALS		95,950	36,500	132,450
06100	ROUGH CARPENTRY		43,500	16,200	59,700
06400	FINISH CARPENTRY		21,720	21,452	43,172
07530	ROOFING & FLASHING		-	152,880	152,880
07900	JOINT SEALERS		15,000	5,000	20,000
08100	HOLLOW METAL DOORS		19,930	5,890	25,820
08200	WOOD DOORS		13,500	7,250	20,750
08700	HARDWARE		32,800	5,700	38,500
08900	EXTERIOR FAÇADE		636,176	293,004	929,180
09250	GYPSUM WALLBOARD		295,356	139,228	434,584
09300	TILEWORK		136,946	12,492	149,438
09500	ACOUSTIC CEILING		120,876	1,316	122,192
09600	WOOD FLOORING		8,376	32,736	41,112
09680	CARPET & RESILIENT		38,392	764	39,156
09700	TERRAZZO		181,840	22,920	204,760
09900	PAINTING		81,224	21,260	102,483
10100	VISUAL DISPLAY BOARDS		9,750	-	9,750
10150	COMPARTMENTS & CUBICLES		21,200	-	21,200
10520	FIRE PROTECTION SPECIALTIES		7,200	-	7,200
10800	TOILET ACCCESSORIES		21,800	2,600	24,400
11130	PROJECTION SCREENS		18,000	-	18,000
11400	APPLIANCES		5,000	10,000	15,000
14000	CONVEYING SYSTEM		150,000	260,000	410,000
15300	FIRE PROTECTION		175,164	67,584	242,748
15400	PLUMBING		365,940	167,238	533,177
15500	HVAC		1,592,400	430,080	2,022,480
16050	ELECTRICAL WORK		926,092	363,852	1,289,944
	SUBTOTAL		9,674,109	3,122,985	12,797,095
	GENERAL CONDITIONS	12%	1,160,893	374,758	1,535,651
	SUBTOTAL		10,835,002	3,497,743	14,332,746
	LIABILITY INSURANCE	3%	325,050	104,932	429,982
	TOTAL		11,160,052	3,602,676	14,762,728

CONGREGATION SHEARITH ISRAEL

NEW YORK, N.Y.

PROPOSED CONSTRUCTION COST ESTIMATE

March 7, 2007

McQuilkin Associates, Inc.
Construction Consultants

500 Morris Avenue
Springfield, NJ 07081
Tel 973-218-1600
Fax 973-218-1700

MC QUILKIN ASSOCIATES INC.				DATE:	3/7/07
PROJECT: CONGREGATION SHEARITH ISRAEL				REV:	
LOCATION: NEW YORK, NY					
CSI #	TRADE SUMMARY		SCHOOL	RESIDENTIAL	TOTAL AMOUNT
	PROPOSED				
02050	BUILDING DEMOLITION		103,500	-	103,500
02060	SELECTIVE DEMOLITION		25,000		25,000
02080	ASBESTOS ABATEMENT		NIC	NIC	NIC
02500	PAVING & SURFACING		24,786	-	24,786
02900	EXCAVATION/FOUNDATION		1,967,652	56,000	2,023,652
03010	CONCRETE AND CEMENT WORK		2,458,700	2,184,560	4,643,260
04200	MASONRY		193,140	-	193,140
05500	MISCELLANEOUS METALS		95,950	61,300	157,250
06100	ROUGH CARPENTRY		43,500	47,200	90,700
06400	FINISH CARPENTRY		21,720	33,400	55,120
07530	ROOFING & FLASHING		-	166,680	166,680
07900	JOINT SEALERS		15,000	10,000	25,000
08100	HOLLOW METAL DOORS		19,930	17,680	37,610
08200	WOOD DOORS		13,500	26,000	39,500
08700	HARDWARE		32,800	17,600	50,400
08900	EXTERIOR FAÇADE		654,326	737,084	1,391,410
09250	GYPSUM WALLBOARD		303,236	359,208	662,444
09300	TILEWORK		136,946	30,960	167,906
09500	ACOUSTIC CEILING		134,316	4,004	138,320
09600	WOOD FLOORING		8,376	97,258	105,634
09680	CARPET & RESILIENT		42,352	2,102	44,454
09700	TERRAZZO		181,840	22,920	204,760
09900	PAINTING		82,169	56,934	139,103
10100	VISUAL DISPLAY BOARDS		9,750	-	9,750
10150	COMPARTMENTS & CUBICLES		21,200	-	21,200
10520	FIRE PROTECTION SPECIALTIES		7,200	-	7,200
10800	TOILET ACCCESSORIES		21,800	6,500	28,300
11130	PROJECTION SCREENS		18,000	-	18,000
11400	APPLIANCES		5,000	25,000	30,000
14000	CONVEYING SYSTEM		150,000	360,000	510,000
15300	FIRE PROTECTION		185,724	144,551	330,275
15400	PLUMBING		365,940	331,657	697,597
15500	HVAC		1,688,400	919,870	2,608,270
16050	ELECTRICAL WORK		981,772	772,178	1,753,950
	SUBTOTAL		10,013,525	6,490,645	16,504,170
	GENERAL CONDITIONS	12%	1,201,623	778,877	1,980,500
	SUBTOTAL		11,215,147	7,269,523	18,484,670
	LIABILITY INSURANCE	3%	336,454	218,086	554,540
	TOTAL		11,551,602	7,487,608	19,039,210

EXHIBIT B : PROFESSIONAL QUALIFICATIONS

JACK FREEMAN

Jack Freeman is principal of Freeman/Frazier & Associates, Inc. Mr. Freeman's professional background combines real estate finance, development planning, project management and public sector experience to provide comprehensive real estate advisory services to the benefits of his clients.

His development financing background includes several years experience as a Mortgage Officer for The New York City Community Preservation Corporation, responsible for construction and permanent loan origination. The Corporation is a consortium of the New York City Commercial Banks and Savings Institutions, established to provide mortgage financing for multifamily housing rehabilitation and economic development.

Public Sector experience includes the position of Director, New York City Department of City Planning, Zoning Study Group and Senior Staff positions in the Mayor's Office of Development, responsible for management of major commercial and residential projects in Lower Manhattan.

As developer, Mr. Freeman has been a principal and General Partner in the development of multifamily market rate and affordable housing projects, with a value in excess of $17 million.

In 1993 Mr. Freeman was appointed, and served until 1996, as a Commissioner of the New York City Landmarks Preservation Commission. For three years, Mr. Freeman was a member of the New York State Council of Arts Capital Program Review Panel. He has been a recipient of a National Endowment for the Arts Grant for Architecture and a Progressive Architecture Award for Urban Design.

Mr. Freeman is a Licensed Real Estate Broker, a member of the Real Estate Board of New York, the Urban Land Institute and the American Planning Association. He teaches Real Estate Development as a member of Graduate Faculty of the City University of New York and has been a regular lecturer in Real Estate Finance at Princeton University.

Mr. Freeman holds a Masters Degree in City Planning from the City University of New York and a Bachelor of Architecture Degree from Cooper Union.

FREEMAN

FRAZIER

& ASSOCIATES, INC.

EXHIBIT H

NYC BUILDINGS

THE CITY OF NEW YORK
DEPARTMENT OF BUILDINGS
http:www.nyc.gov/buildings

X

MANHATTAN (1) 280 BROADWAY 3RD FLOOR New York, NY 10007 | BRONX (2) 1932 ARTHUR AVENUE BRONX, NY 10457 | BROOKLYN (3) 210 JORELOMON STREET BROOKLYN, NY 11201 | QUEENS (4) 120-55 QUEENS BLVD. QUEENS, NY 11424 | STATEN ISLAND (5) BORO HALL- ST. GEORGE STATEN ISLAND, NY 10301

DOB Application #	Examiner:	Date: 10/28/05
104250481	Application Type: ~~Alt~~ NB	Doc (s):
	Address / Location: 10 West 70th Street	Block: 1122
	Zoning District: R8B; R10A	Lot: 37

Examiners Signature:

To discuss and resolve these objections, please call 311 to schedule an appointment with the Plan Examiner listed above. You will need the application number and document number found at the top of this objection sheet. To make the best possible use of the plan examiner's and your time, please make sure you are prepared to discuss and resolve these objections before your scheduled plan exam appointment.

Obj. #	Doc #	Section of Zoning/ Code	Objections	Date Resolved	Comments

REQUIRED ACTIONS BY THE BOARD OF STANDARDS & APPEALS

1. PROPOSED LOT COVERAGE FOR THE INTERIOR PORTIONS OF R8B & R10A EXCEEDS THE MAXIMUM ALLOWED. THIS IS CONTRARY TO SECTION 24-11/77-24. PROPOSED INTERIOR PORTION LOT COVERAGE IS .80.

2. PROPOSED REAR YARD IN R8B DOES NOT COMPLY. 20.00' PROVIDED INSTEAD OF 30.00' CONTRARY TO SECTION 24-36.

3. PROPOSED REAR YARD IN R10A INTERIOR PORTION DOES NOT COMPLY. 20.00' PROVIDED INSTEAD OF 30.00' CONTRARY TO SECTION 24-36.

4. PROPOSED INITIAL SETBACK IN R8B DOES NOT COMPLY. 12.00' PROVIDED INSTEAD OF 15.00' CONTRARY TO SECTION 23-633.

5. PROPOSED BASE HEIGHT IN R8B DOES NOT COMPLY. 94.80' PROVIDED INSTEAD OF 60.00' CONTRARY TO SECTION 23-633.

6. PROPOSED MAXIMUM BUILDING HEIGHT IN R8B DOES NOT COMPLY. 113.70' PROVIDED INSTEAD OF 75.00' CONTRARY TO SECTION 23-633.

7. PROPOSED REAR SETBACK IN R8B DOES NOT COMPLY. 6.67' PROVIDED INSTEAD OF 10.00' CONTRARY TO SECTION 23-663.

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

DENIED
FOR APPEAL TO BOARD OF STANDARDS AND APPEALS

MAR 27 2007

BORO COMMISSIONER

EXHIBIT I

NYC BUILDINGS

Department of Buildings
280 Broadway
New York, New York 10007
(212) 566-5000 | TTY (212) 566-4769
nyc.gov/buildings

MANHATTAN (1) 280 BROADWAY 3RD FLOOR New York, NY 10007
BRONX (2) 1932 ARTHUR AVENUE BRONX, NY 10457
BROOKLYN (3) 210 JORALEMON STREET BROOKLYN, NY 11201
QUEENS (4) 120-55 QUEENS BLVD. QUEENS, NY 11424
STATEN ISLAND (5) BORO HALL- ST. GEORGE STATEN ISLAND, NY 10301

Notice of Objections

Applicant: Samuel White
Platt Byard Dovell White Architects
20 West 22nd Street
New York, NY 10010

Date: 8/24/2007
Job Application #: 104250481
Application type: NB
Premises Address: 10 West 70th Street
Zoning District: R8B, R10A
Block: 1122 Lot: 37 Doc(s): 01

NYC Department of Buildings Examiner:

Examiner's Signature:

To discuss and resolve these objections, please call 311 to schedule an appointment with the Plan Examiner listed above. You will need the application number and document number found at the top of this objection sheet. To make the best possible use of the plan examiner's and your time, please make sure you are prepared to discuss and resolve these objections before arriving for your scheduled plan examination appointment.

Obj. #	Doc #	Section of Code	Objections	Date Resolved	Comments
1.		24-11/77-24	Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to section 24-11/77-24. Proposed interior portion lot coverage is .80.		
2.		24-36	Proposed rear yard in R8B does not comply. 20.00' provided instead of 30.00' contrary to section 24-36.		
3.		24-36	Proposed rear yard in R10A interior portion does not comply. 20.00' provided instead of 30.00' contrary to section 24-36.		
4.		23-633	Proposed initial setback in R8B does not comply. 12.00' provided instead of 15.00' contrary to section 23-633.		
5.		23-633	Proposed base height in R8B does not comply. 94.80' provided instead of 60.00' contrary to section 23-633.		
6.		23-633	Proposed maximum building height in R8B does not comply. 113.70' provided instead of 75.00' contrary to section 23-633.		
7.		23-663	Proposed rear setback in R8B does not comply. 6.67' provided instead of 10.00' contrary to section 23-663.		
8.					
9.					
10.					
11.					
12.					
13.					
14.					

DENIED
FOR APPEAL TO BOARD OF STANDARDS AND APPEALS
AUG 28 2007
BORO COMMISSIONER

PER-14 (6/05)

EXHIBIT J

NYC BUILDINGS
NYC Department of Buildings
280 Broadway, New York, NY 10007

Patricia J. Lancaster, FAIA, Commissioner

Ida Bohmstein, Director
Human Resources
212.566.4104
212.566.3096 fax
IdaB@buildings.nyc.gov

July 12, 2004

Mr. Kenneth Fladen
[redacted]

Dear Mr. Fladen:

I am pleased to confirm your appointment as a provisional Administrative Borough Superintendent/Level M-II effective June 21, 2004. [redacted]

In accordance with Section 5.1 of the Leave Regulations for Career and Salary Plan Employees, you have been placed on a leave of absence from your permanent title of Architect/Level I.

Your appointment will remain in the Manhattan Borough Office. All appointments are citywide assignments made in accordance with departmental needs.

May I take this opportunity to wish you continued success in your appointment.

Very truly yours,

Ida Bohmstein

EXHIBIT K

BSA NYC BOARD OF STANDARDS AND APPEALS

About BSA

History and Purpose

An integral part of the City's system for regulation of land use, development and construction, the Board of Standards and Appeals was established as an independent board to grant "relief" from the zoning code. When New York City's zoning was first established in 1916, it was intended to be generally applicable to large areas or many sites. However, it was anticipated that certain individual parcels of land could be unduly restricted by the regulations, and that the City would be subject to increased claims of unconstitutional taking of private property. Historically, appeals boards were created all over the country when municipalities established land use regulations. By providing relief through the Board, the possibility is significantly reduced for broad constitutional challenges to the overall zoning. The existence of the Board, in fact, protects the ability of the city's government to regulate development of private property.

The Board, pursuant to the 1991 City Charter, contains five full-time, Mayoral-appointed commissioners.

Authority and Composition

The Board is empowered by the City Charter to interpret the meaning or applicability of the Zoning Resolution, Building and Fire Codes, Multiple Dwelling Law, and Labor Law. This power includes the ability to vary in certain instances the provisions of these regulations.

The majority of the Board's activity involves reviewing and deciding applications for variances and special permits, as empowered by the Zoning Resolution, and applications for appeals from property owners whose proposals have been denied by the City's Departments of Buildings, Fire or Business Services. The Board also reviews and decides applications from the Departments of Buildings and Fire to modify or revoke certificates of occupancy.

The Board can only act upon specific applications brought by landowners or interested 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. Further, in reaching its determinations, the Board is limited to specific findings and remedies as set forth in state and local laws, codes, and the Zoning Resolution, including, where required by law, an assessment of the proposals' environmental impacts.

By law, the Board must comprise one planner, one registered architect, and one professional engineer. No more than two

commissioners may reside in any one borough.

The Board meets regularly in public review session and public hearings.

View the Calendar (in PDF) for the most recent or upcoming Board meeting.

Applications that come before the Board

Variances

Section 72-21 of the Zoning Resolution authorizes the Board to modify or waive zoning regulations. In applying for a variance, property owners typically claim that full compliance with zoning regulations is not possible in order to realize a reasonable economic return on their property. The Board must determine, in granting a variance, that each and every one of five findings identified in Section 72-21 are met. The five findings are excerpted from the Zoning Resolution below:

(a) that there are unique physical conditions .... inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise;

(b) that because of such physical conditions there is no reasonable possibility that the development of the zoning lot will bring a reasonable return ... 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;

(d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner;

(e) ...the variance, if granted, is the minimum variance necessary to afford relief.

Special Permits

Section 73-01 of the Zoning Resolution authorizes the Board to grant special permits for specified uses, or for the modification of use and bulk in appropriate cases.

Special permit applications that affect use regulations include auto service stations in designated commercial districts, eating and drinking establishments with entertainment in designated commercial and manufacturing districts, physical culture establishments (i.e., "health clubs") in designated commercial and manufacturing districts, cellular phone towers, and modification of zoning lots divided by zoning district boundaries and parking requirements.

Special permit applications that affect bulk regulations include the enlargement of single- and two-family residences in designated areas of Brooklyn, enlargement of non-residential buildings, and modification of community facility uses.

Rights to Continue Construction/Vested Rights

Section 11-331 of the Zoning Resolution authorizes the Board to renew (or "vest") building permits that have lapsed due to zoning changes. In order for the permits to be renewed, the Board must determine that, on the date that the permits lapsed,

excavation of the site had been completed and substantial progress made on completion of the foundations.

The Board can also renew permits if an applicant files to vest under the common law doctrine. Based on case law, the Board can make a vesting determination if it is determined that work was commenced under validly-issued permits, tangible change to the property occurred, and economic loss would result due to significant expenditure or irrevocable financial commitment.

Extensions and Modifications to Previous BSA Grants

The Board reviews applications to extend the term of previously approved variances and special permits (if a term was imposed on the approval) and/or to modify previous approvals for both before and after 1961, under Sections 11-411, 11-412, and 11-413 of the Zoning Resolution. The Board also hears applications to extend the time to complete work and/or obtain a Certificate of Occupancy.

General City Law Waivers

Under specific circumstances, the Board may grant an administrative appeal to both Sections 35 and 36 of the NYS General City Law.

Section 35 generally prohibits building in the bed of any street identified on an official map. The Board may grant an appeal to allow issuance of a building permit when a property owner can establish that the land within the mapped street is not yielding a fair return, or when the proposed street extension has been mapped for 10 years but the City has yet to acquire title.

Section 36 generally prohibits the issuance of a certificate of occupancy for buildings that do not front on a mapped street. The Board may grant an appeal if compliance with Section 36 would result in a practical difficulty or unnecessary hardship.

Prior to making its determination, the Board forwards applications for waivers from the General City Law to the Departments of Transportation, Fire and Environmental Protection for review and comment.

Appeals

Section 72-11 authorizes the Board to hear and decide appeals to decisions rendered by the Department of Buildings or any City agency which, under the provisions of the Charter, has jurisdiction over the use of land or use or bulk of buildings or other structures. The Board is authorized to reverse, affirm (in whole or in part), or modify such decision. All appeals to the Board must be made within 30 days of the agency determination.

Application Process

Upon filing, an application is assigned a calendar number and is forwarded to a staff examiner for review. For applications on the Zoning ("BZ") and Special Order Calendars ("SOC"), applicants are required to provide copies of the filed applications to the local community board, borough president, councilmember and the Department of City Planning. When the examiner determines that the application is substantially complete, the application is scheduled for a public hearing. Applicants are notified by the Board of the hearing date at least 30 days in advance of the date.

Notification of Public Hearings

At least 20 days in advance of the public hearing, applicants must provide notice of the hearing to the local community board, borough president, councilmember and Department of City Planning for applications on the BZ and SOC calendars. Applicants with projects on the BZ calendar are also required to notify property owners within a 400 foot radius of the subject site (200 foot radius for applications that involve one- to three-family homes, or for special permit applications for lots of less than 40,000 square feet).

Review Sessions and Public Hearings

Public hearings are held on Tuesdays at 10 a.m. and 1:30 p.m. Occasionally, the Board holds special hearings on Wednesdays for items that may generate significant public testimony.

The SOC and the "Appeals" calendar are heard in the morning. The SOC is devoted to applications to extend the term and/or modify previous grants and the "Appeals" calendar is devoted to applications for waivers to the General City Law and Appeals to decisions from the enforcement agencies, such as the Department of Buildings.

The BZ calendar is heard in the afternoon. Applications for variances and special permits are heard at this time.

The Board holds its review session at 10 a.m. on the Monday before the public hearing. The public is encouraged to attend these meetings to hear the Board's discussion on the items to be heard the following day. However, no public participation is allowed at these sessions.

View the Calendar (in PDF) for the most recent or upcoming Board meeting.

View the Board's Guidelines for Hearing Attendees prior to attending one of the Board's public hearings.

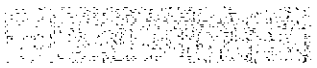
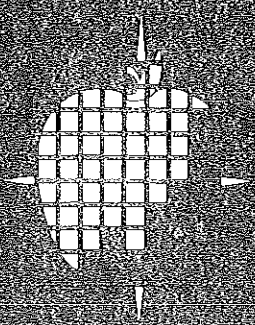


EXHIBIT L

Zoning Handbook



A WORK OF THE DEPARTMENT OF CITY PLANNING

Zoning Handbook

The City of New York

Michael R. Bloomberg, Mayor

Department of City Planning

Amanda M. Burden, AICP, Director

22 Reade Street
New York, NY 10007-1216
nyc.gov/planning

January 2006

Chapter 8

How Zoning is Administered & Amended

Most development in New York City occurs ***as-of-right.*** If the Department of Buildings (DOB) is satisfied that the structure would meet all relevant provisions of the Zoning Resolution and the Building Code, a building permit is issued and construction may begin. No action is required by the ***City Planning Commission (CPC)*** or the ***Board of Standards and Appeals (BSA).***

Sometimes, however, a proposed development cannot proceed without a ***discretionary action*** by the CPC or the BSA. These actions may involve the review and approval of zoning text or zoning map amendments needed to allow a development to proceed at a location or in a manner that zoning presently prohibits. Or some aspect of the planned development may require a CPC or BSA ***special permit*** or an ***authorization*** from the CPC. When development in accordance with zoning would present an economic hardship or practical difficulties, a property owner may request a ***variance*** from the BSA.[1]

All discretionary actions must be assessed for potential environmental impacts in accordance with State Environmental Quality Act (SEQRA) and ***City Environmental Quality Review (CEQR)*** procedures. Zoning map amendments and CPC special permits are also subject to the public review process, known as the ***Uniform Land Use Review Procedure (ULURP)***, as set forth in Sections 197-c and 197-d of the City Charter. Zoning text amendments are subject to a similar procedure set forth in Sections 200 and 201 of the Charter.

[1] Some as-of-right developments require ***certification*** by the CPC or CPC Chair to DOB that certain complex and technical zoning regulations, such as waterfront public access, have been met. Certifications are not discretionary actions.

ZONING ENFORCEMENT

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;
- Reviews and grants applications for certificates of occupancy, allowing legal occupancy of new or altered structures;
- Interprets the provisions of the Zoning Resolution, subject to appeal to the BSA, and promulgates procedures and guidelines for its administration;
- Orders the remedy of zoning violations and, as appropriate, prosecutes violations at the Environmental Control Board and, with the NYC Law Department, before the courts; and
- Maintains public records of all building permits, certificates of occupancy, inspections, violations and other property profile information.

In some cases, administrative and enforcement responsibilities are delegated to other agencies with special expertise. For example, the NYC Department of Environmental Protection enforces industrial performance standards related to air quality, and the NYC Department of Housing Preservation and Development administers ***Inclusionary Housing*** provisions.

ZONING MODIFICATIONS AND WAIVERS

CPC Authorizations

Under circumstances specified in the Zoning Resolution, the City Planning Commission may, at its discretion and by resolution at a public meeting, modify certain zoning requirements for a particular development provided that specific findings have been satisfied. For example, lot coverage controls in the Special Hillsides District may be modified if the CPC finds that development would not be possible without the modification, that preservation of hillsides having aesthetic value would be assured, and that the modification would not impair the natural topography, drainage or essential character of the area. Authorizations do not require public hearings and are not subject to ULURP, but are informally referred to affected community boards for comment.

CPC Special Permits

As specified in the Zoning Resolution and subject to satisfaction of specified findings, the City Planning Commission may grant special permits modifying use, bulk or parking controls. Examples include: transfers of unused development rights from landmark sites to adjacent properties; development of public parking garages; and floor area bonuses for certain public amenities. Because they generally involve significant planning issues, special permit applications must contain site plans and the CPC may stipulate certain conditions and safeguards prior to granting the permit.

Special permits under CPC jurisdiction are reviewed by the affected community board(s) and borough president(s) and by the CPC pursuant to ULURP, and may also be reviewed by the City Council.

BSA Special Permits

The Board of Standards and Appeals may grant special permits for modification of certain zoning regulations which are generally more limited in scope or impact than those reviewed by the City Planning Commission. The modifications must satisfy findings spelled out in the Zoning Resolution and may include, for example: limited expansion of a building into a district where it would not otherwise be permitted; limited enlargement or conversion of a building to a size not otherwise permitted; or adjustment of off-street parking requirements. Special permits granted by BSA are referred for comment to affected community boards but are not subject to ULURP or City Council review.

BSA Variances

When development of a particular parcel of land pursuant to zoning would be impractical or cause the owner undue hardship, the Board of Standards and Appeals may grant a variance from use and bulk provisions to the extent necessary to permit a reasonable use of the parcel. A variance may be granted, following a public hearing, only for a specific development and may be for a specified period of time. In order to grant a variance, the board must find that:

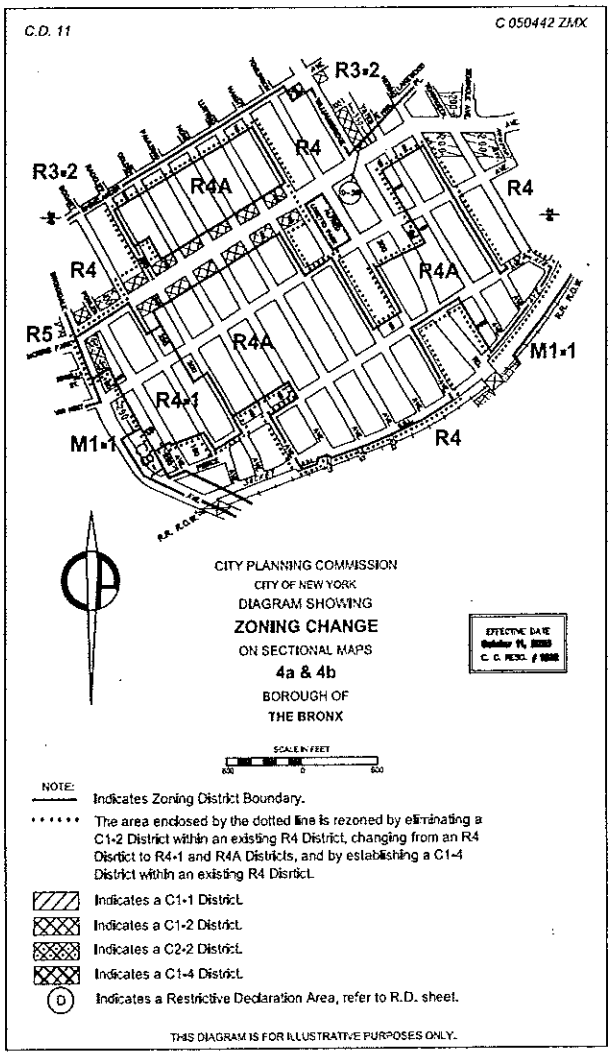
- The practical difficulty or unnecessary hardship is caused by unique physical circumstances;
- The practical difficulty or hardship was not caused by the property owner or his predecessors;
- A variance is necessary to realize a reasonable return (except in the case of a non-profit applicant);
- The essential character of the neighborhood will not be altered, use of adjacent property will not be substantially impaired, and public welfare will not be detrimentally affected; and
- The variance given is the minimum necessary to provide relief.

ZONING AMENDMENTS

An amendment to the zoning text or zoning map, unlike a variance, is a legislative action not limited to a specific development and it generally affects a larger geographic area than a variance. It is generally unconditional, has no time limit and affects all property equally within the area subject to the change. Amendments to the zoning text or maps, sometimes called "rezonings," are often proposed by the Department of City Planning and other public entities to effect broad changes in public land use policy or to address changing land use conditions. Amendments may also be proposed by private applicants to facilitate development proposals.

Pursuant to Sections 200 and 201 of the City Charter, amendments can be initiated by a taxpayer, community board, borough board, borough president, the Land Use Committee of the City Council, the City Planning Commission or the Mayor. Zoning map amendments may be adopted only after public review by the affected community board(s), borough president(s), the City Planning Commission and the City Council pursuant to the ULURP time clock and other provisions. Zoning text amendments must be approved by the Commission and adopted by the City Council, following a ULURP-like review process that does not set a time limit for CPC review.

The Zoning Resolution is amended frequently, both to keep zoning up-to-date in a rapidly changing city and to fulfill the City Planning Commission's charter-mandated responsibility "for the conduct of planning relating to the orderly growth, improvement and future development of the city."



Illustrative "sketch map" of proposed zoning map amendment

Glossary

This glossary provides brief explanations of planning and zoning terminology, including terms highlighted in the Zoning Handbook. Words and phrases followed by an asterisk (*) are defined terms in the Zoning Resolution of the City of New York, primarily in Section 12-10. Consult the Zoning Resolution for the official and legally binding definitions of these words and phrases.

*Accessory Use**

An accessory use is a use that is clearly subordinate to and customarily found in connection with the principal use. An accessory use must be conducted on the same zoning lot as the principal use to which it is related, unless modified by the district regulations. (Off-site accessory parking facilities, for example, are permitted in certain zoning districts.)

Air Rights (see Development Rights)

*Arcade**

An arcade is a continuous covered space that opens onto a street or a plaza. It is unobstructed to a height of not less than 12 feet, and must be accessible to the public at all times.

A ***through block arcade**** is a continuous area or passageway within a building connecting one street with another street, or a plaza or arcade adjacent to the street.

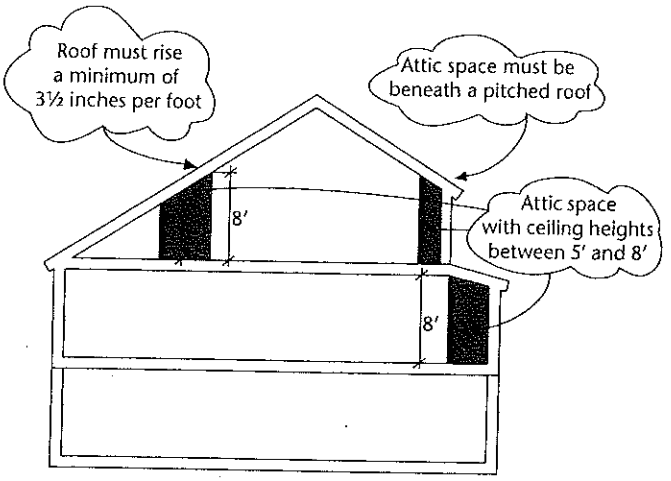
As-of-right Development

An as-of-right development complies with all applicable zoning regulations and does not require any discretionary action by the City Planning Commission or Board of Standards and Appeals.

Attached Building (see Building)*

Attic Allowance

An attic allowance is an increase of up to 20 percent in the maximum base floor area ratio (FAR) for the inclusion of space beneath a pitched roof with structural headroom



between five and eight feet. The allowance is available in R2X districts and all R3 and R4 (except R4B) districts.

In Lower Density Growth Management Areas, the pitch of the roof must be steeper and there is no minimal headroom requirement.

Authorization

An authorization is a discretionary action taken by the City Planning Commission, often after an informal referral to the affected community board(s), which modifies specified zoning requirements if certain findings have been met.

Base Height

The base height of a building is the maximum permitted height of the front wall of a building before any required setback. A building is required to meet a minimum base height only when the height of the building will exceed the maximum base height.

*Base Plane**

The base plane is a horizontal plane from which the height of a building is measured in most low-density and contextual districts and property subject to waterfront zoning. On sites that are flat, the base plane is at curb level; on sites that slope upwards or downwards, the base plane is adjusted to more accurately reflect the level at which the building meets the ground.

* defined in NYC Zoning Resolution

*Basement**

A basement is a building story that has less than one-half of its floor-to-ceiling height below curb level or the base plane. By contrast, a cellar has more than one-half of its floor-to-ceiling height below curb level or the base plane.

*Block**

A block is a tract of land bounded on all sides by streets or by a combination of streets, public parks, railroad rights-of-way, pierhead lines or airport boundaries.

Blockfront

A blockfront is a portion of a block consisting of the zoning lots facing a single street.

Board of Standards and Appeals (BSA)

The BSA, composed of five commissioners appointed by the Mayor, 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. The board also decides on certain special permits to modify zoning regulations for specific sites or projects.

Bonus

A bonus is an incentive to a developer, usually in the form of additional floor area, in exchange for the provision of an amenity or below-market-rate housing.

*Building**

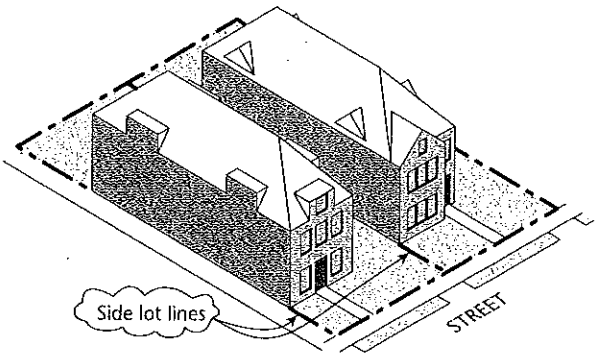
A building is a structure that has one or more floors and a roof, is permanently affixed to the land and is bounded by either open areas or the lot lines of a zoning lot.

An ***attached building**** abuts two side lot lines and is one of a row of buildings on adjoining zoning lots. The end buildings of a row of attached buildings are considered semi-detached buildings if they each have a side yard.

A ***detached building**** is a freestanding building that does not abut any other building on an adjoining zoning lot and where all sides of the building are surrounded by yards or open areas within the zoning lot.

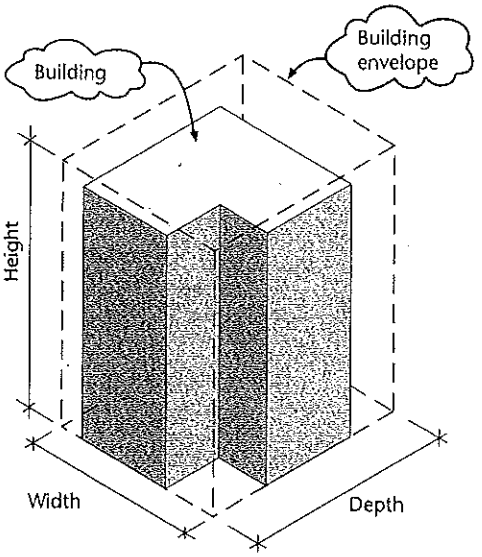
A ***semi-detached building**** is a building that abuts or shares one side lot wall with another building on an adjoining zoning lot and where the remaining sides of the building are surrounded by open areas or street lines.

A ***zero lot line building**** is a building that abuts one side lot line of a zoning lot and does not abut any other building on an adjoining zoning lot.



Building Envelope

A building envelope is the maximum three-dimensional space on a zoning lot within which a structure can be built, as permitted by applicable height, setback and yard controls.



Building Height

The height of a building is measured from the curb level or base plane to the roof of the building (except for permitted obstructions).

Glossary

This glossary provides brief explanations of planning and zoning terminology, including terms highlighted in the Zoning Handbook. Words and phrases followed by an asterisk (*) are defined terms in the Zoning Resolution of the City of New York, primarily in Section 12-10. Consult the Zoning Resolution for the official and legally binding definitions of these words and phrases.

*Accessory Use**

An accessory use is a use that is clearly subordinate to and customarily found in connection with the principal use. An accessory use must be conducted on the same zoning lot as the principal use to which it is related, unless modified by the district regulations. (Off-site accessory parking facilities, for example, are permitted in certain zoning districts.)

Air Rights (see Development Rights)

*Arcade**

An arcade is a continuous covered space that opens onto a street or a plaza. It is unobstructed to a height of not less than 12 feet, and must be accessible to the public at all times.

A ***through block arcade**** is a continuous area or passageway within a building connecting one street with another street, or a plaza or arcade adjacent to the street.

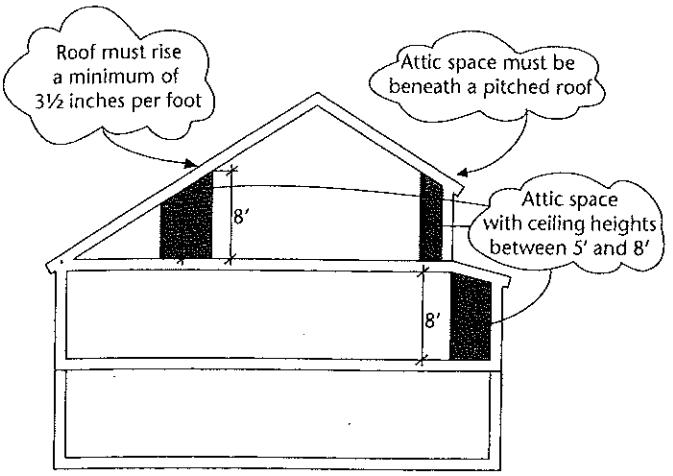
As-of-right Development

An as-of-right development complies with all applicable zoning regulations and does not require any discretionary action by the City Planning Commission or Board of Standards and Appeals.

Attached Building (see Building)*

Attic Allowance

An attic allowance is an increase of up to 20 percent in the maximum base floor area ratio (FAR) for the inclusion of space beneath a pitched roof with structural headroom



between five and eight feet. The allowance is available in R2X districts and all R3 and R4 (except R4B) districts.

In Lower Density Growth Management Areas, the pitch of the roof must be steeper and there is no minimal headroom requirement.

Authorization

An authorization is a discretionary action taken by the City Planning Commission, often after an informal referral to the affected community board(s), which modifies specified zoning requirements if certain findings have been met.

Base Height

The base height of a building is the maximum permitted height of the front wall of a building before any required setback. A building is required to meet a minimum base height only when the height of the building will exceed the maximum base height.

*Base Plane**

The base plane is a horizontal plane from which the height of a building is measured in most low-density and contextual districts and property subject to waterfront zoning. On sites that are flat, the base plane is at curb level; on sites that slope upwards or downwards, the base plane is adjusted to more accurately reflect the level at which the building meets the ground.

* *defined in NYC Zoning Resolution*

*Basement**

A basement is a building story that has less than one-half of its floor-to-ceiling height below curb level or the base plane. By contrast, a cellar has more than one-half of its floor-to-ceiling height below curb level or the base plane.

*Block**

A block is a tract of land bounded on all sides by streets or by a combination of streets, public parks, railroad rights-of-way, pierhead lines or airport boundaries.

Blockfront

A blockfront is a portion of a block consisting of the zoning lots facing a single street.

Board of Standards and Appeals (BSA)

The BSA, composed of five commissioners appointed by the Mayor, 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. The board also decides on certain special permits to modify zoning regulations for specific sites or projects.

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A bonus is an incentive to a developer, usually in the form of additional floor area, in exchange for the provision of an amenity or below-market-rate housing.

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A ***detached building**** is a freestanding building that does not abut any other building on an adjoining zoning lot and where all sides of the building are surrounded by yards or open areas within the zoning lot.

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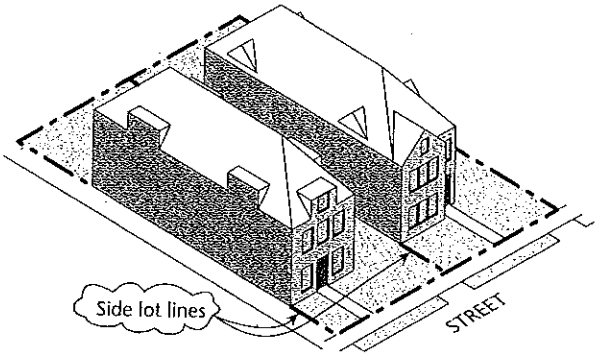
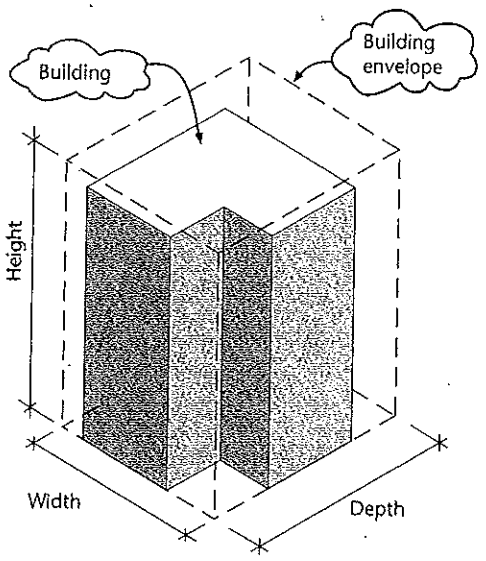
A ***zero lot line building**** is a building that abuts one side lot line of a zoning lot and does not abut any other building on an adjoining zoning lot.



Building Envelope

A building envelope is the maximum three-dimensional space on a zoning lot within which a structure can be built, as permitted by applicable height, setback and yard controls.



Building Height

The height of a building is measured from the curb level or base plane to the roof of the building (except for permitted obstructions).

*Building Segment**

A building segment is a portion of a building with its own entrance. For example, a row of attached townhouses on a single zoning lot is one building, but each townhouse is a building segment.

*Bulk**

Bulk regulations are the combination of controls (lot size, floor area ratio, lot coverage, open space, yards, height and setback) that determine the maximum size and placement of a building on a zoning lot.

Bulkhead

A bulkhead is a roof-top portion of a building that may include mechanical equipment, water tanks, and roof access from interior stairwells. It is not counted as floor area and is permitted to exceed zoning height and setback requirements, within limits specified in the Zoning Resolution.

Bulkhead Line (see Waterfront Area)

*Cellar**

A cellar is a level of a building that has more than one-half of its floor-to-ceiling height below curb level or the base plane. By contrast, a basement has less than one-half of its floor-to-ceiling height below curb level or the base plane.

Certification

A certification is a non-discretionary action taken by the City Planning Commission, or its Chair, informing the Department of Buildings that an as-of-right development has complied with specific conditions set forth in accordance with provisions of the Zoning Resolution.

The term also applies to a step in the ULURP process indicating that an application is complete and ready to begin formal public review.

City Environmental Quality Review (CEQR)

Pursuant to state law, the City Environmental Quality Review (CEQR) process identifies and assesses the potential environmental impacts of discretionary actions, except for minor exemptions, that are proposed in New York City by public or private applicants and funded or approved by a city agency. A discretionary action, such as a zoning map amendment, cannot begin public review until a "conditional negative declaration" or "negative declaration" has been issued, stating that no significant environmental impacts have been identified or, if any potential impacts have been identified, a draft environmental impact statement has been completed, evaluating the significance of identified impacts and proposing appropriate mitigation.

A letter "E" on a zoning map indicates a site where environmental requirements must be satisfied before a building permit may be issued for any development, enlargement or change of use.

City Map

The City Map is a collection of maps that show legal streets, grades, parks and other public places. It is the official map of New York City and is the base for the zoning maps in the Zoning Resolution.

City Planning Commission (CPC)

The City Planning Commission, established in 1936, is a 13-member panel that meets regularly to hold public hearings and vote on applications related to the use and improvement of land subject to city regulation. The Mayor appoints the Chair, who is also Director of the Department of City Planning, and six other members; each Borough President appoints one member and one member is appointed by the Public Advocate. The Department of City Planning provides technical support for the work of the Commission.

*Commercial Building**

A commercial building is any building occupied only by commercial uses as listed in Use Groups 5 through 16.

*Commercial District**

A commercial district, designated by the letter C (C1-2, C3, C4-7, for example), is a zoning district in which commercial uses are allowed and residential uses may also be permitted.

Commercial Overlay

A commercial overlay is a C1 or C2 district usually mapped within residential neighborhoods to serve local retail needs. Commercial overlay districts, designated by the letters C1-1 through C1-5 and C2-1 through C2-5, are shown on the zoning maps as a pattern superimposed on a residential district.

* *defined in NYC Zoning Resolution*

EXHIBIT M

Board of Standards and Appeals

40 Rector Street, 9th Floor • New York, NY 10006-1705 • Tel. (212) 788-8500 • Fax (212) 788-8769
Website @ www.nyc.gov/bsa

MEENAKSHI SRINIVASAN
Chair/Commissioner

June 15, 2007

Shelly S. Friedman, Esq.
Friedman & Gotbaum, LLP
568 Broadway, Suite 505
New York, NY 10012

BSA Cal No: **74-07-BZ**
CEQR No: **07BSA071M**
Premises: **6-10 West 70th Street, Manhattan**

Dear Mr. Friedman:

Attached is a Notice of Objections for the above referenced BZ application which raises issues that need to be addressed before these applications may be calendared by the Board for a hearing. The Board desires to process applications on a timely basis and requests that applicants notify the Board if they are unable to make a complete submission within sixty (60) days. Failure to respond in a timely manner could lead to the dismissal of the application for lack of prosecution.

Each of the following objections should be addressed point-by-point. A copy of all materials sent in response to these objections must also be submitted to the applicable Community Board(s), Borough President, City Council member, Borough Commissioner of the Department of Buildings, Borough Director of the Department of City Planning (DCP) and to the BSA Liaison at the DCP, Mr. Alan Geiger. Applicants are required to notify each of these entities each and every time a submission is made to the Board of Standards and Appeals. Proof of proper notification may be provided by return receipts, copies of transmittal letters, carbon copy (cc's) lists or other comparable proofs.

For further information regarding these requirements, or for information relating to the following objections, please call Jed Weiss, Senior Examiner at (212) 788-8781 or email him at jweiss@dcas.nyc.gov . For detailed instructions for completing BSA applications, please visit www.nyc.gov/bsa

Sincerely,

Jeff Mulligan,
Executive Director

New York City Board of Standards and Appeals

Notice of Objections

74-07-BZ / 07BSA071M

Premises: 6-10 West 70th Street, Manhattan
Applicant: Shelly S. Friedman, Esq., Friedman & Gotbaum, LLP

Date: June 15, 2007

STATEMENT OF FACTS AND FINDINGS

1. **Page 1**: Following the first paragraph, please provide a section summarizing salient aspects of the proposed development for Congregation Shearith Israel (CSI) (FAR, square footage, height, number of stories, uses proposed). Follow this information with a summation of underlying zoning and the waivers requested.

2. **Page 1**: The second paragraph is more appropriate in the "Background of CSI and the Site" section beginning on Page 4.

3. **Page 7**: Within the first sentence of the section entitled "Current Uses and Conditions," it is stated that "...the Synagogue contains small meeting rooms and a multifunction room in its basement." According to the existing and proposed plan sets, only the proposed scenario appears to contain a "multifunction" room. Please clarify this discrepancy.

4. **Page 9**: Provided that the proposed scenario calls for an approximate increase of classrooms from 5 to 12, please precisely explain the nature of the "tenant school" and its relationship to CSI and its programmatic needs (please note that the EAS states that the overall number of students will remain the same under the proposed scenario). Specifically state where the tenant school is located today and where it will be located in the proposed new building.

5. **Pages 10 & 11**: These pages contain information describing the proposed building. For clarity, this section should be combined with the "New Building Development Program" on Pages 17 and 18. This combined section should provide more detail of the alleged nexus of CSI's programmatic needs and the proposed waivers requested. The following four objections (#6 - #9) should be addressed within this combined section.

6. **Page 10**: The first sentence of the first full paragraph references the need for "seminal historical archives" space within the proposed building. Please precisely explain the volume and current location of CSI's archival material. Please explain how much square footage is needed to accommodate such material.

7. **Page 10**: Please describe the caretaker's apartment in the proposed community facility portion of the building and discuss its alleged importance to CSI's programmatic needs.

8. **Page 10**: Within the second full paragraph, it is stated that "...the demolition and replacement of the Community House will permit excavation to provide two cellar levels for programming where none exist today." Please clarify that no sub-cellar exists today; the existing plans indicate an existing cellar level.

9. **Page 10**: Within the second full paragraph, please precisely explain the nature and purpose of the proposed "6,432 sf multi-function room at the subcellar level." Please state whether it is the applicant's intent to lease this space to other entities or for other purposes such as a catering hall.

10. **Page 17**: Please compare the existing CSI program with the proposed scenario by providing a floor-by-floor square footage table for each element of the program.

11. **Page 18**: Within the second full paragraph, it is stated that CSI is compromised of "...550 families, which is an increase of 30 percent in the number of families that were congregants in 1954." Please state the number of families and number of individual worshippers in 1954 and the present.

12. **Page 18**: Within the second full paragraph, new "administrative space" is described. Please precisely describe the programmatic need for an approximate increase in the number of offices from 4 to 13. To this end, please state the number and type of full-time on-site employees and whether CSI anticipates employee growth.

13. **Page 18**: The final sentence of the second paragraph states that "...residential floor area uses only 16 percent of the zoning lot's available zoning floor area." Please follow this sentence by stating the percentage of the proposed zoning floor area (based on the entire zoning lot) that is residential.

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

15. **Page 21**: The first two full sentences on this page state that "...the ZRCNY recognizes that the zoning lot is entitled to average the FAR of the two zoning districts." Please provide evidence that ZR § 77-20 is applicable to this *zoning lot*.

16. **Page 23**: Please correct the title of the second paragraph by replacing "Rear Yard Setback" with "Rear Setback."

17. **Page 23**: Within the second paragraph, wherever found, please change "Sec. 663(b)" to "Sec. 23-663(b)."

18. **Page 23**: Within the second paragraph, please clarify the following statement: "[b]ecause the ground floor of the New Building is built full to the rear property line, an objection was issued." Rather, please clarify that the portion of the building above sixty (60) feet in height violates this section (ZR § 23-663(b)).

19. **Page 23**: Within the second and third sentence of the second paragraph, please change references to both "maximum height" and "maximum building height" to "maximum base height."

20. **Page 24**: Please correct the title of the first full paragraph by replacing "Building Separation" with "Standard Minimum Distance Between Buildings."

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

22. **Page 25**: Within the suggested "(c) finding," please note the number of lot-line windows for adjacent residential buildings that would be blocked for both the as-of-right, lesser variance (see BSA Objections # 30-31) and proposed scenarios.

23. **Page 25**: Within the suggested "(c) finding," please discuss the built context along the subject blockfronts of West 70th Street and the alleged appropriateness of the proposed building in terms of neighborhood character. Please reference drawing P-17.

EXISTING CONDITIONS DRAWINGS

24. **EX-3 & EX-4 (Section Drawings)**: Please substantially enlarge each drawing within the 11x17 sheet and show floor-to-ceiling heights. Additionally, please remove the illustrative as-of-right envelope outline from these drawings.

AS-OF RIGHT CONDITIONS DRAWINGS

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.

26. **AOR-3 & AOR-4 (Section Drawings)**: Please substantially enlarge each drawing within the 11x17 sheet and show floor-to-ceiling heights.

27. **Drawing AOR-14**: Please label the proposed (as-of-right) building and existing, adjacent buildings accordingly.

PROPOSED CONDITIONS DRAWINGS

28. **P-3 & P4**: Please correct the title of the drawings by replacing "street wall sections" with "Areas of Non-Compliance."

29. Please provide new section drawings which show floor-to-ceiling heights.

"Lesser-Variance" Drawings

30. Please provide a full plan set of lesser-variance drawings that show compliant height and setback (objections for ZR § 23-633 and ZR § 23-663 are removed) that seeks to accommodate CSI's programmatic needs and excludes the proposed tenant school space; the remaining floor area shall be used for residential use.

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

BSA Zoning Analysis

32. Under "Maximum Permitted" column, please confirm the maximum allowable FAR as "8.38." Provided that the area within the R10A district measures 125' x 100'6" = 12,562.5 sf (72.7% x 10.0 FAR) and that area within the R8B district measures 47' x 100'6" = 4723.5 (27.3% x 4.0 FAR), the maximum allowable FAR, as averaged pursuant to ZR § 77-22, appears to be 8.36. Please verify this analysis and revise all relevant zoning calculations accordingly.

33. Under Applicable ZR Section for "No. Parking Spaces," please change ZR § 13-42 to § 13-12 (for UG 2) and § 13-133 (for UG 4). Pursuant to these sections, residential parking spaces cannot exceed 35% of dwelling units and community facility parking cannot exceed one space per 4000 sq. ft of floor area. Please verify this information and revise the "Maximum Permitted" column accordingly.

Department of Buildings (DOB) Objections

34. Please provide evidence that the DOB issued their current objections based on the current proposal before the BSA.

Feasibility Study

35. Although it is recognized that Congregation Shearith Israel has not-for-profit status, for the purpose of this study, please ascribe standard market-rate rents for community facility space based on comparables rents in the vicinity of the subject site for both the as-of-right and proposed scenarios.

36. It is noted that all comparable properties analyzed to determine the subject site's value (Schedule C, Page 10-12) are all downward adjusted for "inferior zoning" (the subject site has split zoning - R8B and R10A - and the comparables are all located in R8 or R8 equivalent districts). Please note that for developments in contextual districts, each portion of the zoning lot shall be regulated by the height and setback applicable to the district in which such portion of the zoning lot is located. Further, it is noted that the subject site is located within an historic district which applies further regulation on the height of any

development of this site. Given this information regarding height and setback controls, it does not appear that additional floor area above 4.0 FAR could be utilized on this site (please note that the as-of-right plans show an FAR of 3.23 or 5,513.60 sq. ft. on the R10A zoned portion of Lot 36). Therefore, it does not appear that the subject site's partial location within a 10.0 FAR district (R10A) should warrant any downward adjustment for comparable properties zoned R8, R8B or C6-2A. Please revise this analysis.

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

38. Please analyze the "lesser variance scenarios" as described in BSA Objections # 30 and # 31.

CEQR REVIEW / EAS

39. **Methodology for Project Site:** It is inappropriate to analyze only the proposed new building on the subject zoning lot. Please revise the EAS to reflect the entire zoning lot (existing synagogue and proposed new building).

40. **Methodology for "No-Build" / "Build" Scenarios:** Provided that the feasibility study, submitted as part of this application, asserts that an as-of-right development is not economically feasible, it does not appear to be a reasonable assumption to project new, complying development on Lot 37 by the Build Year of 2009. Please either provide a thorough and rational justification for this approach or revise this EAS's methodology by analyzing existing conditions on the entire *zoning lot* for the "no-build" scenario.

EAS Form

41. **Part I, No. 8:** Please update this section to reflect the Certificate of Appropriateness granted by the Landmarks Preservation Commission for the subject proposal.

42. **Part I, No.13b:** Please verify the gross square footage sums listed for "Project Square Feet To Be Developed" (please be sure to include cellar space) and for "Gross Floor Area of Project" (be sure to include the existing Synagogue building and all cellar space).

43. **Part II, No.3:** Please amend the site data for "Community Facility" by including both existing buildings on the subject zoning lot.

44. **Part II, No.4:** There does not appear to be any existing parking spaces on the subject property. Please revise "Existing Parking" section accordingly.

45. **Part II, No.10:** Under "Proposed Land Use," please verify the gross square footage of each building. Be sure to include the existing Synagogue and all cellar space).

46. **Part II, No.11:** No parking is proposed; please revise this section accordingly.

Technical Analysis

47. Land Use, Zoning & Public Policy:

a) Please provide a fuller narrative of the existing zoning district (R10A & R8B) in terms of use, bulk, and parking regulations. Please discuss nearby zoning districts also in terms of their use, bulk and parking regulations.

b) With regards to "public policy," please discuss whether the site is located within New York City's Coastal Zone Boundary, an Historic District, an Urban Renewal Area, a 197-a Community Development Plan or a proposed rezoning area.

48. Shadows: In accordance with CEQR Technical Manual sections 322 and 400 within Chapter E "Shadows," please provide a fuller description of existing activities/programming and shade tolerance of existing vegetation in the portion of Central Park where new incremental shadows are projected.

EXHIBIT N

FRIEDMAN & GOTBAUM LLP

568 BROADWAY SUITE 505
NEW YORK NEW YORK 10012
TEL 212.925.4545
FAX 212.925.5199
ZONING@FRIGOT.COM

September 10, 2007

BY HAND

Jeff Mulligan
Executive Director
NYC Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

Re: Congregation Shearith Israel
6-10 West 70th Street, Manhattan
74-07-BZ /CEQR No.: 07BSA071M

Dear Mr. Mulligan:

With respect to the BSA Notice of Objections dated June 15, 2007, please use the information herein as a guide to the attached documents and plans which comprise our response in connection with the above variance application for Congregation Shearith Israel.

STATEMENT OF FACTS AND FINDINGS

Items #1 through 23 have been revised and/or incorporated into the attached Statement of Findings and Facts.

Item #1:	See Page 1, Para 2
Item #2:	See Page 6
Item #3:	See Page 10, Para 1
Item #4:	See Page 13, Para 1
Item #5:	See Pages 20-24
Item #6:	See Page 14, Para 1
Item #7:	See Page 22, Para 1
Item #8:	See Page 21, Para 2 (See, Plan EC-5A, P-6 & P-7)
Item #9:	See Page 21, Para 2
Item #10:	See Page 23
Item #11:	See Page 23 (mid-page)
Item #12:	See Page 23 (footnote 1)
Item #13:	See Page 24, Para 1

Item #14: See Pages 25-27

Item #15: See Page 26-27

Item #16: See Page 29

Item #17: See Page 29, Para 1

Item #18: See Page 29, Para 1

Item #19: See Page 29, Para 2

Item #20: N/A: DOB Objection #8 omitted by DOB upon reconsideration (See, DOB Objection Sheet and Proposed Plans, dated August 28, respectively).

Item #21: N/A: DOB Objection #8 omitted by DOB upon reconsideration (See, DOB Objection Sheet and Proposed Plans, dated August 28, respectively).

Item #22: See Page 32, Para 1

Item #23: See Pages 31-32 (and Proposed Plan P-17)

EXISTING CONDITIONS DRAWINGS

Item #24: See revised EX-3 & EX-4 dated August 28, 2007.

AS-OF-RIGHT-CONDITIONS DRAWINGS

Item #25: N/A: DOB Objection #8 omitted by DOB upon reconsideration (See, DOB Objection Sheet and Proposed Plans, dated August 28, respectively).

Item #26: See revised Section Drawings AOR-3 & AOR-4 (Scheme A) dated August 28, 2007.

Item #27: See revised AOR-14 (Scheme A), dated August 28, 2007.

PROPOSED CONDITIONS DRAWINGS

Item #28: See revised P-3 & P-4, dated August 28, 2007.

Item #29: See new section drawing P15-A, dated August 28, 2007.

LESSER VARIANCE DRAWINGS (SCHEMES B & C)

Item #30: See "AOR - Scheme B", Plans AOR-1 through AOR-15, dated August 28, 2007 (See also, Feasibility Study dated September 6, 2007).

Item #31: See "AOR - Scheme C", Plans AOR-1 through AOR-15, dated August 28, 2007 (Although DOB Objection #8 has been removed upon further DOB plan review, AOR - Scheme C has been provided to address Item #31; See also, Feasibility Study, dated September 6, 2007).

BSA ZONING ANALYSIS

Item #32: See revised BSA Zoning Analysis Form, dated September 6, 2007.

Item #33: See revised BSA Zoning Analysis Form, dated September 6, 2007.

DEPARTMENT OF BUILDINGS (DOB) OBJECTIONS

Item #34: See attached DOB Objection Sheet, which was issued on August 28, 2007 in conjunction with Proposed Plans P-1 through P-17 dated August 28, 2007.

FEASIBILITY STUDY

Item #35: See attached Feasibility Analysis, dated September 6, 2007.

Item #36: See attached Feasibility Analysis, dated September 6, 2007.

Item #37: See attached Feasibility Analysis, dated September 6, 2007.

Item #38: See attached Feasibility Analysis, dated September 6, 2007.

CEQR REVIEW/EAS

Item #39: Methodology for Project Site: EAS attachment and form have been revised, where applicable, to reflect the entire zoning lot (existing Synagogue and proposed new building).

Item #40: Methodology for "No-Build/"Build" Scenarios": EAS attachment has been revised (See Page "b", Para 2).

EAS FORM

Item # 41: See EAS, Part I, No. 8

Item # 42: See EAS, Part I, No. 13b

Item # 43: See EAS, Part II, No. 3

Item # 44: See EAS, Part I, No. 4

Item # 45: See EAS, Part II, No. 10

Item # 46: See EAS, Part II, No. 11

TECHNICAL ANALYSIS

Item # 47: Land Use, Zoning and Public Policy – See attached analysis by AKRF dated August 2007.

Item #48: Shadows – See attached analysis by AKRF dated August, 2007.

In addition to the above, please find attached the Certificate of Appropriate issued by the LPC on March 21, 2007 (COFA 07-6281).

Thank you for your attention in this matter. Please contact me should you have any questions or require further information. Thank you.

Very truly yours,

Lori G. Cuisinier

Enclosures

cc: Hon. Sheldon J. Fine, CB 7
Hon. Gail A. Brewer, City Council Member
Hon. Scott Stringer, Manhattan Borough President
Mr. Alan Geiger, Department of City Planning, BSA liaison
Mr. Ray Gastil, Director, Manhattan Office, Department of City Planning
Hon. Christopher M. Santulli, P.E., Manhattan Borough Commissioner
NYC Fire Department
David J. Nathan, Esq.
Peter Neustadter
Dr. Alan Singer

EXHIBIT O

New York City Board of Standards & Appeals

TRANSCRIPTION OF TAPE

Case # 74-07-BZ.

6 through 10 West 70th Street, Borough of Manhattan.

2-12-08.

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 this 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.

MR. ROSENBERG: Well, then that's a separate application I would respectfully suggest because the original appeal was from the eight objections.

VICE-CHAIR COLLINS: Right. So, if there's another objection, then they'll have to come and get another variance. I think that's what the Chair said.

MR. ROSENBERG: No, what I'm saying is that the application was from the original objections. If they want to do another filing - - if they claim they have made another filing and they have changed their plans, then that's another objection and another application.

VICE-CHAIR COLLINS: Well, look, the nature of the objections may change based on some of the discussion that we have had here today.

We've talked about possibly doing a courtyard. That may raise another objection in which the plans will have to go back to Buildings and they may have to issue another objection. We will then have jurisdiction over that one.

But, what we have right now are seven. Everybody else in the room seems to know what they are, Mr. Rosenberg.

MR. ROSENBERG: So, the original plans, then, are meaningless in that they have - -

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 that 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.

CHAIR SRINIVASAN: So, it's straight forward?

MR. FRIEDMAN: That was amended. That was amended simply.

With regard to my refusal to release information, I simply said that since the attorney would not identify who his clients were and would not enter into any confidentiality agreements; that we did not believe that a policy devised by the Department of Homeland Security and the Buildings Department and - -

CHAIR SRINIVASAN: That's fine, Mr. Friedman.

MR. FRIEDMAN: - - NYPD required us to waive our rights.

And, if he wanted to provide me with that information of who his clients were and we would enter into confidentiality agreements, we could certainly continue the discussion and there was no effort to follow up on that request. That is the sum of it.

Other factoids that emerge here, obviously, we're not requesting a rezoning. You are not the Planning Commission. We understand that.

We're here before you on a series of findings which we believe we have effectively and responsively discussed and provided you with the necessary information to make those findings.

EXHIBIT P

FRIEDMAN & GOTBAUM LLP

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NEW YORK NEW YORK 10012
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ZONING@FRIGOT.COM

2008 JUN 17 AM 8:42

June 17, 2008

BY HAND
The Honorable Meenakshi Srinivasan
Chair
NYC Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

Re: Congregation Shearith Israel ("CSI")
6-10 West 70th Street/99 Central Park West
74-07-BZ /CEQR No.: 07BSA071M

Dear Madam Chair:

This letter provides the Applicant's responses and comments to the material submitted on June 10 by various opponents to the subject Application. In general, the Applicant asserts there is nothing new in any of the points raised in this material. The following documents accompany this letter.

- Financial Analysis. A letter from Freeman Frazier Associates dated June 17, 2008 is enclosed. The FFA Letter once again brings to the Board's attention each of the opposition's many errors of judgment and technical information, as well as disregard in the written submission of June 10 for the Board's longstanding financial methodologies.

- Environmental Compliance. A letter for AKRF dated June 17, 2008 is enclosed. The AKRF Letter responds to each of the comments raised at the April 15, 2008 public hearing and subsequently in the opposition's written submissions of June 10.

With respect to the Statement of Findings, the opposition's June 10 submissions are a futile attempt to lead the Board afield of the findings and its responsibility to uphold them. The deluge of charges of supposed inconsistencies and "failings" of the Applicant and Commissioners alike displays a fundamental misunderstanding of these proceedings, which, in the main, consist of a colloquy between the Applicant and the Board, with public input, to explore all aspects of the case. Many of the so-called inconsistencies cited by the opposition represent nothing of the kind, but rather are responses to the Board's requests for alternate reasonings and presentations. By treating these exchanges as if both the Board and the Applicant

were somehow providing depositions in a proceeding of their own making, the opponents have ultimately added nothing to the discourse.

All of the required findings in ZRCNY Sec. 72-21 have been met. Further comments on the "A" and "B" Findings are as follows.

Finding "A"

The Statement adequately explains the unique physical conditions peculiar to the Zoning Lot and the practical difficulties that arise due to them. The Zoning Lot possesses 144,510.96 sf of developable floor area but the position of an individually designated landmark over two-thirds of the Zoning Lot limits development on the Zoning Lot to two small parcels. One parcel, facing Central Park West has a width of 24.4 ft and a depth of 108 ft. It is improved with what was once a 4-storey single family building and is now known as the Parsonage. While this site is capable of significant theoretical development as a matter of right (it is zoned R10A, its streetwall may rise to 125 ft and its building height to 210 ft, subject to the "sliver" limitations in ZRCNY Sec 23-692 that would limit the height of an enlargement or new development to the height of the streetwall at 91 Central Park West), its narrow footprint, after deduction for elevators and stairs, would be useless for residential or community facility uses. In addition, such development would necessitate the blocking of several dozen windows on the north elevation of 91 CPW. Moreover, development of the Parsonage parcel would do nothing to remedy the significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application.

The only other development parcel on the Zoning Lot, the parcel proposed in this Application, which is also theoretically eligible to use as a matter of right a significant amount of zoning floor area, is also small and has become burdened with the relocation of a zoning district boundary that post-dates the establishment of the Zoning Lot and subdivides the parcel into a minor portion of R10A and a major portion of R8B, with resulting disparate height and setback requirements and a "sliver law" condition that preclude as-of-right development. Moreover, in order to remedy the circulation difficulties in the Synagogue, the footprint of the proposed development on its split-lot footprint must be held captive to the necessary physical alignments with the Synagogue. In addition, the dimensions of the parcel and the Applicant's programmatic needs require that the layout of educational and religious uses at floors 2 through four extend 10 ft into the required rear yard. The resulting configuration of the proposed new residential floor area on the narrow development parcel further requires that such residential uses not begin until elevation 49'1", and end at elevation 75 ft in an R8B district, which will not allow the residential use as proposed.

Adding to the unique restrictions on this site, the Landmarks Preservation Commission has issued, unanimously, a Certificate of Appropriateness for the proposal contained in the Application. Accordingly, the only reasonable way to proceed with development is to build within the envelope and in accordance with the detailed design drawings that the Commission has approved. This is not the case of an applicant coming to the Board to allege that the existence of the Zoning Lot within a historic district or adjacent to a designated landmark constitutes a recognizable hardship. This Applicant worked with the Commission for several

years in gaining approval of a Certificate of Appropriateness that limits the development envelope to the building before the Board. Its request for Landmarks cooperation on a ZRCNY Sec. 74-711 special permit was denied, thus properly bringing this Application to the Board for relief.

The Board has asked for and received an unprecedented amount of material on the educational and religious uses which must be included in the new development. It has heard the religious and educational leaders of the Synagogue attest to the need and the configuration of the new community facility space requested in the Application. It has received material in several formats regarding the utilization of this space, down to each hour of each day, which is a degree of submission beyond the experience of practitioners who routinely have represented or currently represent hospitals and schools before the Board. It has asked for and received detailed information on a tenant school notwithstanding that the Applicant has stated on numerous occasions without condition or qualification that the tenant's programmatic needs bear no relationship to this Application. It has heard testimony from the Synagogue's Rabbi and its chief educator that were there no tenant the religious and educational needs of the Synagogue would still require that it apply for the classroom space requested in this Application.

The Board has requested and received detailed information, both graphically and in site-specific narrative, traveling up and down the length of Central Park West to demonstrate conclusively that there are no other sites that can reasonably be considered development sites that share the specific and unique properties of this Zoning Lot.

The Applicant hopes that the Board can return to the basic elements of this Application, shorn of all the digressions and canards associated with non-existent catering halls, profit-motivated schemes and conspiratorial tenants to the basic elements of the submission, which are in accord with the Board's past practices and its present approach to considering the "A" Finding in applications based on educational and religious purposes, including those applications that propose mixed-uses on their Zoning Lot.

Finding "B"

ZRCNY Sec. 72-21 states in part: "this finding shall not be required for the granting of a variance to a nonprofit organization . . . ."

Notwithstanding the clear language of the Zoning Resolution, the Board has requested and received substantial financial information, near or at a level of specificity that it would require from a profit-motivated applicant. We have been pleased to comply with the Board's interests, but not to the extent of waiving our right to observe with all due respect that consideration of a B Finding in this case, or any semblance of consideration of reasonable return in determining the outcome of this Application, especially given the educational and religious purposes of the Applicant, would exceed the Board's authority. We understand that the Board believes it can legitimately delve into an analysis of reasonable return in this Application because of the mixed-use nature of the Application, and we done our utmost to cooperate with the Board's interests. We further appreciate that it has done so in four cases which it has subsequently approved. However, we understand that the Board believes there is a distinction

between cases such as this where the requested zoning waivers apply to the residential portion of the development on the Zoning Lot, and other cases where the requested zoning waivers apply only to the community facility portion of the mixed-use application, in which case it asks for no financial information whatsoever. We cannot find such a distinction recognized in either the Zoning Resolution or judicial doctrine. The meaningfulness of the distinction disappears altogether with the observation that by simply modifying our Application to put floors of the community house at the top of the proposed building, thereby assigning the height and setback waivers to the community facility, this Application would have been able to pass from one side of the distinction to the other and would not have been asked to provide any of the financial information already in the record.

As you can see from our submission today of more financial information related to reasonable return, we affirm our willingness to cooperate with the Board. We question only the uses such information will be put to in your deliberations of this Application in this and, by extension, how and when such information is used in other applications.

Please note that we accept the error noted by an opponent with respect to page 43 of our Statement of Findings we had compared the rate of return that could be expected from a new building with 15,243 sf of residential floor area with "two hypothetical as-of-right mixed building scenarios." In fact the second scenario was not as-of-right but required a lesser variance.

On behalf of the Trustees of Congregation Shearith Israel, we appreciate the time and attention and Board and Staff have accorded this Application. We respectfully request that the record be closed and that a date for a positive decision can be set.

Very truly yours,

Shelly S. Friedman

Shelly S. Friedman

Enclosures

cc: Hon. Helen Rosenthal, CB 7
Hon. Gail A. Brewer, City Council Member
Hon. Scott Stringer, Manhattan Borough President
Mr. Christopher Holme, Department of City Planning, BSA liaison
Mr. Ray Gastil, Director, Manhattan Office, Department of City Planning
David J. Nathan, Esq.
Peter Neustadter
Dr. Alan Singer
Landmarks West!
Mark Lebow, Esq.
Alan D. Sugarman, Esq.
David Rosenberg, Esq.
Jack Freeman
Ray Dovell

EXHIBIT Q

290-05-BZ
APPLICANT – Stuart A. Klein, for Yeshiva Imrei Chaim Viznitz, owner.
SUBJECT – Application September 19, 2005 and updated April 19, 2006 – Variance pursuant to Z.R. §72-21 to permit a catering hall (Use Group 9) accessory to a synagogue and yeshiva (Use Groups 4 and 3). The site is located in an R5 zoning district.
PREMISES AFFECTED – 1824 53rd Street, south side, 127.95' east of the intersection of 53rd and 18th Avenue, Block 5480, Lot 14, Borough of Brooklyn.
COMMUNITY BOARD #12BK
APPEARANCES –
For Applicant: Stuart A. Klein.
ACTION OF THE BOARD – Application denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Vice Chair Collins and Commissioner Ottley-Brown.....3
THE RESOLUTION:

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated February 28, 2006, acting on Department of Buildings Application No. 301984342, reads in pertinent part:

"Proposed Catering Use (UG 9) is not permitted in an R5 Zone"; and

WHEREAS, this is an application under ZR § 72-21 to permit, within an R5 zoning district, the use of the cellar of a three-story building for a Use Group ("UG") 9 catering establishment, which is contrary to ZR § 22-00; and

WHEREAS, the appeal was brought on behalf of Yeshiva Imrei Chaim Viznitz, a not for profit religious institution (hereinafter "Applicant"), the owner of the building at the subject premises; and

WHEREAS, a public hearing was held on this application on June 13, 2006 after due notice by publication in *The City Record*; and

WHEREAS, a continued hearing was held on August 15, 2006, on which date the hearing was closed and decision was set for September 19, 2006; and .

WHEREAS, at the request of Applicant, the decision date was deferred to September 26, 2006; and

WHEREAS, the Board reopened the hearing on this date, but Applicant's counsel was unable to attend; and

WHEREAS, decision was deferred to October 24, 2006; and

WHEREAS, the matter was again reopened on October 24, and a continued hearing date was set for November 21, 2006; and

WHEREAS, a continued hearing was held on November 21, and a decision was set for January 9, 2007; and

WHEREAS, the site was inspected by a committee of the Board; and

WHEREAS, the Board also notes that at the request of Applicant, the Board's counsel and staff met with Applicant during the hearing process to provide suggestions on how to approach the application; and

WHEREAS, Community Board 12, Brooklyn, recommends approval of this application, on condition that the catering use at the premises close by 1 am and that Applicant consult with elected officials and the Community Board to address traffic concerns on the subject block; and

WHEREAS, certain neighbors appeared and made submissions in opposition to this application; and

WHEREAS, many members of the broader Viznitz community appeared in support of the application; and

WHEREAS, in addition, Applicant provided letters from other individuals supporting the application; and

WHEREAS, the Board notes that while Applicant claimed to have the support of certain elected officials, no elected official appeared at hearing and no letters of support from elected officials were submitted; and

WHEREAS, the subject premises is located in an R5 residential zoning district on 53rd Street between 18th and 19th Avenues and is currently improved upon with a three-story with cellar building (the "Building"); and

WHEREAS, the Building is across the street from and adjacent to numerous two-story semi-detached dwellings; and

WHEREAS, Certificate of Occupancy No. 300131122, issued for the Building on May 26, 1999 (the "CO"), lists the following uses: (i) UG 4 assembly hall and kitchen and UG 9 catering use in the cellar; (ii) UG 4 synagogue and UG 3 classrooms on the first and second floors; and (iii) UG 3 classrooms on the third floor; and

WHEREAS, this CO was the subject of a 2005 application by DOB, who sought to revoke or modify it pursuant to City Charter §§ 666.6(a) and 645(b)(3)(e), on the basis that the CO allows conditions at the referenced premises that are contrary to the Zoning Resolution and the Administrative Code; and

WHEREAS, DOB argued that the catering use did not possess lawful non-conforming UG 9 status and

was therefore illegal; and

WHEREAS, specifically, DOB suggested that the prior UG 16 use on which the status of the UG 9 designation was predicated had been discontinued for more than two years and that the prior building housing this use had been demolished; DOB contended that this had not been revealed by the permit applicant; and

WHEREAS, under either circumstance, DOB alleged that there is no legal basis for a UG 9 catering establishment designation on the CO for the cellar of the Building; and

WHEREAS, a public hearing was held on DOB's application on May 17, 2005, but before the next continued hearing, Applicant obtained a court order, dated July 8, 2005, enjoining the Board from acting on the application and from conducting further proceedings on it; and

WHEREAS, this court order also directs Applicant to file a variance application at the Board; and

WHEREAS, months later, Applicant filed the instant variance application; and

WHEREAS, Applicant also filed an appeal of a DOB determination that the UG 9 catering use in the cellar was not a UG 3 school or UG 4 synagogue accessory use, under BSA Cal. No. 60-06-A; and

WHEREAS, since the two matters were filed at the same time and both concerned the use of the Building's cellar for commercial catering purposes, the Board, with the consent of all parties, heard the cases together and the record is the same; and

WHEREAS, Applicant states that the Building currently contains a UG 3 religious school for approximately 625 boys (the "School"), a UG 4 synagogue space (the "Synagogue"), and a UG 9 catering establishment that serves the needs of the broader orthodox Jewish community in the vicinity of the site (the "Catering Establishment"); and

WHEREAS, the Synagogue is located on parts of the first and second floor mezzanine; and

WHEREAS, specifically, as illustrated on the plans for the first floor submitted by Applicant, stamped May 5, 2006, the first floor Synagogue space is for men, and adjoins a classroom with a removable partition; it is approximately 1,900 sq. ft.; and

WHEREAS, the second floor Synagogue space is for women, and is 1,380 sq. ft; and

WHEREAS, Applicant states that the Synagogue is attended by approximately 300 people on the Sabbath, and approximately 100 people and approximately 400 students on weekdays; and

WHEREAS, the remainder of the first and second floors, and the entirety of the third floor, appear to be occupied by the School's classrooms and other School-related spaces; and

WHEREAS, Applicant claims that the School serves many economically disadvantaged children, and that 85 percent of the children receive government-sponsored school lunch money; and

WHEREAS, both the School and Synagogue are permitted uses in the subject R5 zoning district; and

WHEREAS, the Catering Establishment, which is not a permitted use in the subject R5 zoning district, was listed on the CO on the alleged basis that it is a lawful non-conforming use, as discussed above; and

WHEREAS, the Catering Establishment is located in the cellar of the Building; the same cellar space is also apparently used for the School's cafeteria and assembly hall; and

WHEREAS, the Catering Establishment occupies approximately 18,000 sq. ft. of floor space in the cellar, with a primary event space, two adjoining lobbies and bathroom areas (one for men and one for women), as well as two kitchens; and

WHEREAS, the record indicates that the Catering Establishment has separate management and staff from the School and separate entrances with awnings reflecting the business name, that the food for events is made on the premises, that a guard is provided from 6 pm to 12 pm to assist with guest parking, and that waiters and busboys are hired on an "as needed" basis; and

WHEREAS, Applicant alleges that most events are held from approximately 6 pm to 12 am, and that 90 percent of the guests leave the Building at 11:30 pm; and

WHEREAS, Applicant states that ceremonies (held under Chuppahs, which look like canopies) related to the catered events are often conducted outside; and

WHEREAS, Applicant alleges that attendance at each event ranges between 340 and 400 people, though evidence submitted by Applicant indicates that some events are scheduled to have at least 500 guests; and

WHEREAS, Applicant provided information revealing that 166 events were held in 2004, and 154 events were held in 2005; and

WHEREAS, Applicant states that the catered events are offered at reduced rates relative to other catering establishments, with weddings costing approximately 25 dollars per plate; and

WHEREAS, members of the broader Viznitz community stated that the reduced rates were attractive to members of the larger orthodox and Hasidic Jewish community in Brooklyn; and

WHEREAS, these same members stated that the Catering Establishment serves the needs of this community; and

WHEREAS, the Catering Establishment has a license from the Department of Consumer Affairs for a catering establishment; and

WHEREAS, the Board notes that the Catering Establishment advertises in the Verizon Yellow Pages (both on-line and in print) under the listing "Banquet Facilities" as "Ohr Hachaim Ladies" and "Ohr Hachaim Men", with the address and phone number listed; and

WHEREAS, Applicant does not address the Verizon Yellow Pages advertisement, but in its last submission alleges that it does not pay for similar advertising that apparently runs in the Borough Park Community Yellow Pages, does not desire this advertising, and has informed the publisher of the Borough Park Community Yellow Pages to stop running the advertisements; and

WHEREAS, the applicant, in sum and substance, represents that the finding set forth at ZR § 72-21(a) may be satisfied in the case of a applicant that is a non-profit religious entity solely with evidence that that the requested waiver is necessary because of a programmatic need of the religious entity; and

WHEREAS, ZR § 72-21(a) requires that the Board find that the applicant has submitted substantial evidence of unique physical conditions related to the site that create practical difficulties or unnecessary hardship in using the site in strict conformance with the applicable use regulation; and

WHEREAS, Applicant claims that the Catering Establishment satisfies a religious duty on the part of the broader Viznitz community and also provides a funding stream for the costs of operating the Synagogue and School that cannot be offset by tuition and donations alone; and

WHEREAS, Applicant claims that the Viznitz community totals about 6,500 members, but the Board notes that there is nothing in the record specifying where these 6,500 members reside; and

WHEREAS, moreover, the Board notes that there is nothing in the record to suggest that all 6,500 members of the Viznitz community cited by Applicant are regular members of the Synagogue or students or family members of students of the School; and

WHEREAS, in fact, the Board observes that the Synagogue attendance figures and School enrollment figures provided by Applicant would belie any such claim; and

WHEREAS, nevertheless, Applicant claims that there is a direct relationship based upon programmatic need between the School and the Synagogue and the Catering Establishment; and

WHEREAS, the Board recognizes that many variances it has granted in the past to religious or educational institutions have been predicated, in part, on the programmatic needs of the institution; and

WHEREAS, further, the Board does not question the sincerity of Applicant's belief that the provision of space for weddings, receptions, and other life events in general fulfills a religious need, nor the veracity of the contention that the revenue raised from the catering function is used in part for School and Synagogue purposes; and

WHEREAS, however, the Board does not consider either of the two alleged programmatic needs to be the equivalent of the type of programmatic need that can justify a use variance at this location; and

WHEREAS, first, as to the question of fulfillment of religious duty, while Applicant has claimed that in the Jewish faith there is a custom of incorporating wedding festivities as part of the marriage ritual, no explanation has been given as to how such a custom justifies the location of a UG 9 commercial catering establishment in a zoning district where it is not allowed; and

WHEREAS, the Board observes that Applicant has not made any credible claim that the lawful existence or operation of the School or the Synagogue depends on the existence of a UG 9 catering establishment within the Building; and

WHEREAS, the Board further observes that both the Synagogue and the School are as of right uses, and no claim is made that the Building's square footage is somehow incapable of accommodating the current congregation and enrollment absent the presence of the Catering Establishment; and

WHEREAS, the Board notes that Applicant has not claimed that the Synagogue is used during all catered events; and

WHEREAS, to the contrary, Applicant indicated during the hearing process that most of the celebrants prefer to have the ceremony outside in a Chuppah; and

WHEREAS, specifically, in its July 11, 2006 submission, Applicant notes that the usual schedule for a catered event features a Chuppah, which is held outdoors when possible; and

WHEREAS, further, Applicant has not provided any credible evidence that the School has any operational integration whatsoever with the Catering Establishment; and

WHEREAS, most importantly, the Board notes that it is not the School or Synagogue use that is generating the alleged programmatic need; rather, as conceded on multiple occasions by Applicant, the need appears to arise from general demand for low-cost catered events from the broader Hasidic and orthodox Jewish community in Brooklyn, regardless of any connection to the School or Synagogue; and

WHEREAS, a letter from another caterer, submitted to the Board by Applicant, confirms that the alleged programmatic need has nothing to do with the School or the Synagogue; this letter specifically states "[i]f the [Catering Establishment] would cease to function, it would cause much hardship to the Boro Park Community"; and

WHEREAS, the Board has never granted a variance based on such a broad-based need that is non-specific to the religious institution making the application and occupying the site; instead, the Board looks for a clear nexus between the requested variance and the specific programmatic needs of the institution on the site; and

WHEREAS, the Board observes that none of the cases cited by Applicant in its submission require the Board to grant the requested variance; and

WHEREAS, nor do any of the Board's prior decisions cited by Applicant in its initial submission; and

WHEREAS, three of these prior decisions were for bulk variances, needed by congregations in order to create a building with sufficient square footage to accommodate increased attendance; none of them were commercial use variances for a catering establishment; and

WHEREAS, the record also contains mention of two other occasions on which the Board has considered an application for a commercial catering variance: (1) BSA Cal. No. 194-03-BZ, concerning 739 East New York Avenue, Brooklyn, decided on December 14, 2004; and (2) BSA Cal. No. 136-96-BZ, concerning 129 Elmwood Avenue, Brooklyn, decided on June 3, 1997; and

WHEREAS, first, the Board notes that generally prior variances are not viewed as precedent for future applications; and

WHEREAS, instead, because each variance is based upon special circumstances relating to the site for which it is proposed, the past grant or denial of variances for other properties in the area does not mandate similar action on the part of the Board; and

WHEREAS, second, even assuming that past grants do function as binding precedent, the Board finds that both of these matters are distinguishable from the instant matter, and support the Board's rejection of it; and

WHEREAS, in the East New York Avenue matter, the applicant, a religious school, originally attempted to argue that the variance could be predicated on the alleged programmatic need of creation of a revenue stream for the school; and

WHEREAS, however, the Board rejected this argument, and instructed the applicant to approach the case as if it were a for-profit applicant, since the proposed use was UG 9 commercial catering that would serve the larger community; and

WHEREAS, thus, the applicant was required to establish that the site presented a unique physical condition and to submit a feasibility study in order to establish hardship; and

WHEREAS, as reflected in the resolution for that matter, the applicant was able to meet these requirements and the variance was granted; and

WHEREAS, as conceded by Applicant at the August 15, 2006 hearing, there is no such uniqueness present at the subject site or as to the Building; and

WHEREAS, accordingly, Applicant did not even attempt to make a similar argument in this proceeding, but instead attempted to argue the application based solely on programmatic needs; and

WHEREAS, in the Elmwood Avenue matter, the applicant, another religious school, applied to the Board for multiple bulk waivers related to the proposed construction of a religious school on a site split by M1-1, R3-1 and R5 zoning district boundaries; and

WHEREAS, the applicant applied for a use variance for the school in the M1-1 zoning district, and also for various height, setback and rear yard requirements; and

WHEREAS, as initially argued by the applicant, the site suffered a hardship due to irregular shape, substandard depth, grade condition and adjacency to a railroad cut; and

WHEREAS, a catering hall was also proposed, though initially the applicant did not request a use variance for it; and

WHEREAS, instead, the catering hall was proposed to be located entirely within the M-1 zoning district, on an as of right basis; and

WHEREAS, however, during the course of the hearing process, the applicant revealed that the kitchen for the catering facility (which was also the kitchen for the school) was partially within the residential zone; and

WHEREAS, accordingly, a use variance for this small portion of the catering facility was required; and

WHEREAS, the Board asked that the applicant attempt to isolate the catering use to the M1-1 zoning district through the erection of a wall in the cellar; and

WHEREAS, the applicant explained that the site was split by a district boundary, and it was this unique physical condition that caused the need for the small use waiver for the catering establishment; and

WHEREAS, the Board observes that it was only the presence of the district boundary line that caused the need for a minor use variance for the kitchen; and

WHEREAS, the resolution for this matter also cites to the irregular shape and narrow depth of the site as the cause of the practical difficulties and unnecessary hardship; and

WHEREAS, as noted above, the subject site suffers no unique physical hardship, a fact conceded by Applicant; and

WHEREAS, in sum, neither of the two prior commercial catering variance applications require the Board to grant the requested variance here, since they were predicated on the site's actual physical uniqueness; and

WHEREAS, in addition to the guidance that these two cases provide, the Board notes that when it grants
applications from religious and educational institutions for variances based upon programmatic need, it routinely places conditions in said grants to prohibit commercial catering within the schools or places of worship; and

WHEREAS, the applicants in such cases accept this condition without question, and agree to make only accessory use of the spaces within the buildings; rarely if ever do applicants argue, as has Applicant here, that unrestricted UG 9 commercial catering is a programmatic need; and

WHEREAS, the second claimed programmatic need is that income from the Catering Establishment is purportedly used to support the School and Synagogue and that the School and Synagogue would close without this income; and

WHEREAS, the Board again disagrees that this is the type of programmatic need that can be properly considered sufficient justification for the requested use variance; and

WHEREAS, while the Board recognizes that the Applicant believes that the School and Synagogue are important to the broader Jewish community in Brooklyn, it is not required on this basis to grant a use variance for a commercial use on the same site as the School and Synagogue; and

WHEREAS, were it 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; and

WHEREAS, again, none of the case law or prior Board determinations cited by Applicant stand for this proposition; and

WHEREAS, the Board observes, in fact, that the East New York Avenue case is a repudiation of Applicant's unfounded contention; and

WHEREAS, further, the Board observes that such a theory, if accepted, would subvert the intent of the ZR's distinction between community facility uses, which are allowed in residential districts, from commercial uses, which are not; and

WHEREAS, the Board notes that UG 9 catering establishments are only permitted in commercial zoning districts, and, pursuant to ZR § 32-18, is the type of commercial use that provides "primarily . . . business and other services that (1) serve a large area and are, therefore, appropriate in secondary, major or central commercial shopping areas, and (2) are also appropriate in local service districts, since these are typically located on the periphery of major secondary centers"; and

WHEREAS, the Board further observes that the goals of the commercial regulations in the ZR include the protection of nearby residences against congestion that can result from commercial uses; and

WHEREAS, Appellant has offered no justification for its blanket assertion that a primary commercial use should be permitted in a residential district anytime a religious institution desires to generate revenue by engaging in commercial activity; and

WHEREAS, based on the above, the Board finds that Applicant has failed to establish that it has a programmatic need that requires the requested variance; and

WHEREAS, in a later submission, Applicant also argued that it was entitled to the proposed use variance based upon its good faith reliance on the DOB-issued permit that precipitated the issuance of the CO; and

WHEREAS, Applicant claims that it spent "millions" of dollars constructing the Building and then "hundreds of thousands" more subsequent to the issuance of the CO; and

WHEREAS, the record is devoid of any evidence of these expenditures or the precise amount, but even if such had been established, the Board notes that the Building includes the School and the Synagogue, as well as a cellar that can lawfully be used as the School's cafeteria and for other accessory uses; and

WHEREAS, thus, all such expenditures would not be wasted; and

WHEREAS, additionally, since Applicant has had the benefit of the Catering Establishment since the CO was issued, consideration of the cumulative financial gain over the last seven years would be a relevant consideration; Applicant did not engage in this analysis however; and

WHEREAS, even had expenditures been proven and discussed in any comprehensible manner by Applicant, the Board observes that the good faith reliance doctrine is not a categorical substitute for uniqueness or hardship; and

WHEREAS, rather, expenditure made in good faith reliance upon a permit is merely one of the factors that may be considered by the Board, and physical uniqueness is still relevant; and

WHEREAS, as noted above, Applicant concedes that the site and the Building present no unique physical features; instead, the site is regular in size and shape, and the Building is recently constructed and not obsolete as a school or synagogue building; and

WHEREAS, again, the site itself does not present any hardship; and

WHEREAS, additionally, Applicant made no attempt to establish that the purported reliance was made in good faith; and

WHEREAS, the Board notes that it is Applicant's responsibility to convince the Board that the permit and CO were obtained with all relevant facts being disclosed to DOB by the owner of the premises and the filing professional who obtains the permit; and

WHEREAS, here, the record contains no evidence that this responsibility was met; and

WHEREAS, in sum, the Board notes that Applicant failed to present any evidence as to alleged good faith reliance that would allow it to fully determine this claim, notwithstanding the fact that the Board stood ready to consider such evidence; and

WHEREAS, finally, Applicant suggests that the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a federal law, requires that the Board issue the requested variance; and

WHEREAS, RLUIPA provides that no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest; and

WHEREAS, first, the Board observes that whether the Board grants the variance or not, the School and the Synagogue are permitted uses under the R5 zoning district regulations and may remain legally on the site; and

WHEREAS, further, as expressed in the resolution for the companion appeal, Applicant is free to hold, and charge money for, events in the cellar to the extent that they are accessory to the School or Synagogue; and

WHEREAS, there is no evidence that would support the conclusion that the Board, in denying this variance application, is imposing a substantial burden on or even interfering with the exercise of religious freedom or religious practices of the School or the Synagogue; and

WHEREAS, Applicant's contention that the School and the Synagogue would not be able to cover expenses without the on-site Catering Establishment, even if proved to be a fact, does not lead to a contrary conclusion; and

WHEREAS, additionally, it is difficult for the Board to understand why RLUIPA should function to support the granting of a commercial use variance in order to support a revenue stream for a religious entity that is unable to support its non-commercial uses through traditional means; and

WHEREAS, accordingly, the Board declines to apply RLUIPA in the novel way that Applicant suggests; and

WHEREAS, further, the Board notes that the court in Episcopal Student Foundation vs. City of Ann Arbor, 341 FSupp2d 691 (ED Michigan 2004) held that that zoning regulations that imposed financial burdens on a church do not constitute substantial burdens under RLUIPA; and

WHEREAS, thus, even if the Catering Establishment is required to be relocated at a cost, or if the activities conducted there are limited to events that are accessory, with a resulting decrease in revenue, this is not a substantial burden under RLUIPA; and

WHEREAS, in addition, the Episcopal Student Foundation court held that a zoning ordinance does not infringe on the free exercise of religion where religious activity can occur elsewhere in the municipality; and

WHEREAS, thus, even if the operation of the Catering Establishment can properly be characterized as religious in nature (despite its status under the ZR as a commercial use), since it is allowed in commercial zoning districts that are mapped liberally throughout the City, Applicant's alleged free exercise rights are not compromised; and

WHEREAS, in sum, the Board finds that all of Applicant's arguments as to why the finding set forth at ZR § 72-21(a) is met or why the request for the variance is otherwise justified are without merit; and

WHEREAS, because Applicant has failed to provide substantial evidence in support of this finding or persuade the Board as to why the finding should be overlooked, consideration of the remaining findings is

unnecessary; and

WHEREAS, however, merely because this application was fundamentally flawed and poorly presented does not mean that the Board is blind to the concerns of Applicant; and

WHEREAS, the Board again observes that Applicant can use the cellar legally for accessory purposes; and

WHEREAS, further, if Applicant determines that it must engage in commercial catering activities, there is no reason why these activities may not occur on a site that is commercially zoned; the income that is generated can still be used to support the School and Synagogue; and

WHEREAS, the Board finds that these alternative measures will enable Applicant to pursue its proposed catering use in full compliance with the law without incurring excessive additional costs.

Therefore it is Resolved that the decision of the decision of the Brooklyn Borough Commissioner, dated February 28, 2006, acting on Department of Buildings Application No. 301984342 is upheld and this variance application is denied.

Adopted by the Board of Standards and Appeals, January 9, 2007.

EXHIBIT R

PREMISES AFFECTED - 739 East New York Avenue, Borough of Brooklyn.

194-03-BZ
CEQR #03-BSA-208K
APPLICANT - Sheldon Lobel, P.C., for B'nos Menachem Inc., owner.
SUBJECT - Application June 13, 2003 - under Z.R. §72-21 to permit the proposed catering establishment, Use Group 9, in the cellar of an existing one story, basement and cellar building (school for girls), located in an R6 zoning district, which is contrary to Z.R. §22-00.
PREMISES AFFECTED - 739 East New York Avenue, between Troy and Albany Avenues, Block 1428, Lot 47, Borough of Brooklyn.
COMMUNITY BOARD #9BK
APPEARANCES -
For Applicant: Richard Lobel.
ACTION OF THE BOARD - Application granted on condition.
THE VOTE TO CLOSE HEARING -
Affirmative: Chair Srinivasan, Vice-Chair Babbar, Commissioner Caliendo, Commissioner Miele and Commissioner Chin:.....5
Negative:.....0
THE VOTE TO GRANT -
Affirmative: Chair Srinivasan, Vice-Chair Babbar, Commissioner Caliendo, Commissioner Miele and Commissioner Chin:.....5
Negative:.....0
THE RESOLUTION -

WHEREAS, the decision of the Borough Commissioner, dated May 27, 2003, acting on Department of Buildings Application No. 300988377, reads:

"Proposed catering establishment (use group 9) is not permitted in the cellar in this R6 zoning district as per section 22-00 of the zoning resolution."; and

WHEREAS, a public hearing was held on this application on March 30, 2004 after due notice by publication in *The City Record*, with continued hearings on May 11, 2004, June 22, 2004, August 10, 2004, September 14, 2004, and October 26, 2004, and then to decision on December 7, 2004, on which date the decision was deferred to December 14, 2004; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by a committee of the Board, consisting of Chair Srinivasan, Vice-Chair Babbar, and Commissioners Caliendo, Miele, and Chin; and

WHEREAS, this is an application under Z.R. § 72-21, to permit, within an R6 zoning district, a proposed catering establishment (Use Group 9) in the cellar of an existing one story, basement and cellar building currently used as a religious girls school, contrary to Z.R. § 22-00; and

WHEREAS, Community Board 9, Brooklyn, recommended approval of this application; and

WHEREAS, State Senator Andrews and Council Member Boyland also supported the application; and

WHEREAS, the subject site is located on East New York Avenue between Troy and Albany Avenues, has a total lot area of 17,385 sq. ft., and is currently improved upon with a one-story plus basement and cellar building with a total floor area of 33,646 sq. ft.; and

WHEREAS, the premises is currently owned and occupied by a religious girls school, Bnos Menachem, which is a not-for-profit entity; and

WHEREAS, the existing building was designed for industrial use and was previously occupied by a publishing company, which used the first floor for printing, collating and binding, and the basement level as the storage and shipping facility, as well as for office space; and

WHEREAS, the current certificate of occupancy lists the following uses: on the cellar level "Ordinary Storage; Mechanical Equipment"; on the basement level "Garage; Office; Supply Room; Laundry Room and Office; Building Maintenance; Toilet Room"; and on the first floor "Garage; Office; Conference Room; Lumber Room; Janitor Closet"; and

WHEREAS, the applicant represents that when the girls school purchased the building, a catering facility could have been placed as-of-right on the first floor or the basement, along with a school cafeteria; and

WHEREAS, however, the applicant notes the first floor and basement were needed by the school for classrooms; and

WHEREAS, the proposal before the Board contemplates the use of the cellar as a Use Group 9 catering facility, to be use only after school hours; and

WHEREAS, the applicant represents that approximately 60 percent of the proposed catered events will be for students or employees, or families thereof, and the remainder will be events drawn from the broader community; and

WHEREAS, the applicant agrees that the 60 percent requirement shall be calculated as follows: for any one year period (starting from the date of this grant), school-related functions (related to students, staff, employees, or families thereof) shall comprise at least 60 percent of the total number of events that the catering facility hosts; and

WHEREAS, in the most recent revised statement of facts and findings, the applicant states that the following is a unique physical condition, which creates practical difficulties and unnecessary hardship in developing the subject lot in conformity with underlying district regulations: the size and layout of the building is not feasible for residential use, in that no rear yard exists and requirements for light and ventilation can not be met; and

WHEREAS, the Board agrees that the building can not be feasibly be converted to conforming residential use; specifically, the Board notes that it was designed as a manufacturing building and was configured to accommodate the previous occupant, a publishing company; and

WHEREAS, accordingly, the Board finds that the aforementioned unique physical condition creates unnecessary hardship and practical difficulties in developing the site in conformity with the current zoning; and

WHEREAS, initially, the subject application was filed as a not-for-profit application, whereby no financial feasibility finding would be required; and

WHEREAS, however, the Board determined that such an exemption was not indicated, as the proposed Use Group 9 commercial catering use was a profit-making venture that did not have a sufficient nexus to the religious nature of the school, given that a Use Group 9 designation would allow any type of commercial catering for any type of clientele or event (notwithstanding representations by the applicant that the catering would primarily be used by members of the neighboring religious community); and

WHEREAS, after accepting guidance from the Board as to this issue, the applicant agreed to treat this application as a for-profit application, and submitted a feasibility study purporting to show that a conforming residential scenario would not yield a reasonable return; and

WHEREAS, in response to Board concerns, the applicant made subsequent submissions, clarifying and expanding upon the original feasibility study; and

WHEREAS, in particular, the Board notes that, in response to a Board request, the applicant analyzed both a residential and community facility scenario entailing the full-build out of the available floor area through a vertical enlargement of the existing building, but determined in both instances that neither was feasible given the cost-prohibitive nature of such enlargements; and

WHEREAS, based upon its review of the study and the subsequent submissions, the Board has determined that because of the subject lot's unique physical condition, there is no reasonable possibility that development in strict conformity with zoning will provide a reasonable return; and

WHEREAS, the applicant represents that the proposed variance will not affect the character of the neighborhood and that use of the site for commercial catering purposes is compatible with the uses in the surrounding area; and

WHEREAS, in support of this claim, the applicant has submitted a Community Character Assessment, prepared by the applicant's planning and development consultants; and

WHEREAS, the Assessment analyzed a six block area within a 400-foot radius of the subject site, and surveyed nine blocks for land use composition; and

WHEREAS, the Assessment notes that most of the lots near the site are in residential use, but that the broader study area as a whole consists of a wide range of land uses, with some mixed residential and commercial uses located at key intersections and side streets; and

WHEREAS, the assessment also notes that there are two vacant industrial uses nearby, including a refrigerator factory on East New York Avenue; and

WHEREAS, the Assessment concludes that the proposed catering establishment will be in concert with the existing commercial retail character, since it will be in the cellar of the building, will not be visible from the street, and will not change the scale of the surrounding area; and

WHEREAS, the Assessment also concludes that the proposed catering establishment will not create any negative economic impacts, as there is no similar type of catering business in the neighborhood; and

WHEREAS, the Board agrees that due to the limited use of the catering facility and the scale of the building, impact on the adjoining residential uses and the character of the neighborhood will be minimal; and

WHEREAS, the applicant represents that the parking and traffic impacts of the proposed catering establishment will be minimal; and

WHEREAS, in support of this claim, the applicant has submitted a parking study prepared by its parking consultant; and

WHEREAS, this parking study surveyed streets surrounding the subject site, and estimated that there were a total of 241 on-street parking spaces within a 400 foot radius; and

WHEREAS, the study assumed that the catering facility would require a total of approximately 50 spaces for the weekday peak period, and a total of approximately 60 spaces for the weekend peak period; and

WHEREAS, the study showed that the facility's parking needs could be accommodated with available on-street parking; and

WHEREAS, however, in response to Board concerns, the applicant has also made arrangements to lease parking spaces in nearby lots; specifically, the applicant has entered into long-term lease arrangements for parking spaces located at 840 East New York Avenue (30 spaces, valet parking) and 779 East New York Avenue (45 spaces, valet parking); and

WHEREAS, the applicant has submitted copies of the leases for these parking spaces, and has agreed to a variance term which corresponds to the term of the leases (10 years); and

WHEREAS, the Board also requested a detailed operations plan; and

WHEREAS, the operations plan states that a separate, for-profit company, Razag Inc., has been formed to operate the catering facility, though all profits accruing from the facility will flow through to and be received by the girls school; and

WHEREAS, the applicant represents that the only operator of the catering facility shall be Razag, Inc., and that Razag, Inc. shall not operate any other business at any other location;

WHEREAS, the plan also states that the proposed hours of the catering facility will be from 5 pm to 1 am, Sunday through Thursday; that the maximum number of guests for a catered event (exclusive of staff) shall be 550; and that refuse collection will take place three times a week, on Monday, Wednesday and Saturday, between 10:30 am and 11:30 am; and

WHEREAS, the applicant has explained that a 550 guest occupancy limit is necessary in order to host the type of events that would financially sustain the catering facility; and

WHEREAS, the applicant agrees that during all hours outside of those set forth above, the cellar is to be used only as a cafeteria or event room for the girls school; and

WHEREAS, the applicant consents to the incorporation of certain of the features of the operations plan into this resolution as conditions; and

WHEREAS, the Board has conducted a site and neighborhood evaluation, and agrees that the proposed catering facility will not negatively impact the character of the immediate area, provided that the applicant complies with certain conditions, as set forth below; and .

WHEREAS, therefore, the Board finds that this action will not alter the essential character of the surrounding neighborhood nor impair the use or development of adjacent properties, nor will it be detrimental to the public welfare; and

WHEREAS, the Board finds that the hardship herein was not created by the owner or a predecessor in title; and

WHEREAS, the Board finds that this proposal is the minimum necessary to afford the owner relief; and

WHEREAS, 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 an Unlisted action pursuant to 6NYCRR, 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. 03-BSA-208K dated June 13, 2003; 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; Hazardous Materials; Waterfront Revitalization Program; Infrastructure; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; Construction Impacts; and Public Health; and

WHEREAS, no other significant effects upon the environment that would require an Environmental Impact Statement are foreseeable; and

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

There*fore it is Resolved* that the Board of Standards and Appeals issues a Negative Declaration 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 each and every one of the required findings under Z.R. § 72-21 and grants a variance to permit, within an R6 zoning district, a proposed catering establishment (Use Group 9), in the cellar of an existing one story, basement and cellar building, currently used as a religious girls school, contrary to Z.R. § 22-00; *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 December 8, 2004" - (1) sheet; and *on further condition*:

THAT the term of this grant shall be limited to August 6, 2014, at which time an extension of term application must be made, which shall include a financial feasibility study;

THAT the catering facility shall operate only during the following hours: 5 pm to 1 am, Sunday through Thursday; no catering activity, including preparations, may take place outside of these hours;

THAT the maximum number of guests (exclusive of staff) at the catering facility shall be 550 at any given time during its business hours;

THAT refuse collection will take place three times a week, on Monday, Wednesday and Saturday, between 10:30 am and 11:30 am;

THAT off-street parking for the catering facility shall be provided at 840 East New York Avenue (30 spaces, valet parking) and 779 East New York Avenue (45 spaces, valet parking), and in accordance with the lease agreements entered into the BSA record, and any
change to these lease agreements requires the prior approval of the BSA;

THAT the above conditions shall be listed on the certificate of occupancy;

THAT notwithstanding any notation on the BSA-approved plan, DOB shall review and approve required travel distances;

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; and

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) and/or configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, December 14, 2004.