STATEMENT IN OPPOSITION

TO VARIANCE APPLICATION

OF CONGREGATION SHEARITH ISRAEL

(November 20, 2007)

Affected Premises:

6-10 West 70th Street

Block 1122, Lots 36 & 37

18 West 70th Street
91 Central Park West
101 Central Park West
Other residents of West 70th Street
&
LANDMARK WEST!

NEW YORK CITY
BOARD OF STANDARDS AND APPEALS

Application: 74-07-BZ

Affected: 6-10 West 70th Street
Premise Block 1122/Lots 36 & 37
Manhattan

STATEMENT IN OPPOSITION

Applicant: Congregation Shearith Israel
6-10 West 70th Street
99-100 Central Park West

This statement in opposition to the variance application filed by Congregation Shearith Israel ("Applicant") is submitted by a coalition of buildings and residents of West 70th Street, including 18 West 70th Street, 91 Central Park West and 101 Central Park West, the immediately adjacent neighbors, together with LANDMARK WEST!.

As is explained in greater detail below, Applicant's request for waivers and variances lacks merit as all of Applicant's programmatic needs as presented can be met without the requested variances; Applicant fails to demonstrate that its application satisfies the five findings required for approval of variances under the Zoning Resolution of the City of New York (Section 72-21). Accordingly, the Board of Standards and Appeals must deny Applicant's request for certain waivers and variances because variances for a non-profit institution should not be used to finance a for-profit real estate development project. Such use of the variance process is grossly inappropriate as it is an abuse of the variance process and against the intent and purpose of the Zoning Resolution of the City of New York.

Summary of Proposal

Applicant seeks 7 zoning variances in order to construct a new 9-story, 105'-tall building, half of which would contain profit-generating luxury condominiums, that violates R8-B contextual zoning designed to protect this historic, brownstone mid-block in the Upper West Side/Central Park West Historic District (designated in 1990), adjacent to the Individual Landmark Spanish & Portuguese Synagogue (a.k.a., Congregation Shearith Israel, designated in 1974).

This proposal actually involves two, distinct projects: 1) a new community house to accommodate Applicant's mission-related programs, which Applicant demonstrates could be constructed under an as-of-right scenario,[1] and 2) five floors of market-rate luxury condominiums to generate income for Applicant.[2]

[1] Shown in Applicant's Scheme A
[2] Shown in Applicant's Proposed Scheme, which differs from Schemes A and B in that it adds three floors devoted to Use Group 2 luxury condominiums.

The Board's total of 66 stated objections asking for clarification so that the application could be evaluated on its merits have never been fully answered. First, why does the Applicant repeatedly refuse to respond to the Board's request that it accurately refer to the proposed building as 9 stories rather than 8 stories plus penthouse? Applicant seems to believe that such questions by the Board are not worthy of a response. More importantly, Applicant has submitted materials that appear to be intentionally confusing and contain factual errors, evidently expecting the Board to make its findings based on information that has been withheld.[3]

Second, Applicant claims that "because the creation of the zoning lot predates the enactment of the 1961 Zoning Resolution, the distribution of zoning floor area over the zoning lot uses the averaging methodology permitted as a matter of right by ZRCNY Sec. 72-22." In fact, 10 West 70th Street, part of the zoning lot that Applicant seeks to develop, was not acquired by Applicant until 1965.[4] Applicant is not entitled to average zoning floor area over the entire lot and should be asking for 8 variances, including one for increased FAR.

Third, the basic fact is that no property owner, whether not-for-profit or for-profit, is automatically entitled to variances. The burden is on Applicant to support its request. Applicant has failed to make a case that its proposed mixed-use building merits special exemption from the carefully designed zoning regulations protecting this unique, historic area from overdevelopment.

Required Findings

The Board is required to make 5 findings in order to grant a variance, or in this case, 5 findings on each of the 7 requested variances.[5] Applicant's submission does not enable the Board to make these findings.

Therefore, we urge the Board to disapprove this application for the following reasons, which are organized according to the 5 required findings (a - e):

Finding (a): "…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 Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of

[3] Exhibit A. Letter from Alan D. Sugarman, Esq., to CB7 Land Use Committee, November 15, 2007.
[4] Exhibit B. From title search, page labeled "Party in Title, Continued from Schedule A," as to Parcel C (remainder of Tax Lot 37) states, "Title acquired under deed dated 5/28/65, recorded on 6/1/65 in Liber 5327 cp 339, made by PARKSEVENTY IMPROVEMENT CORP., A DOMESTIC CORPORATION." Applicant tore down the rowhouse that once occupied this site in 1970, a decade or so after destroying the facades of rowhouses at 6-8 West 70th Street to create its current community house.
[5] Zoning Resolution of the City of New York Section 72-21.

such provisions in the neighborhood or district in which the zoning lot is located…"

Applicant does not experience any practical difficulties or unnecessary hardship as a result of unique physical conditions on this site. Indeed, 6-10 West 70th Street is a mid-block lot, the width of several rowhouses, much like many other sites in this zoning district and others throughout the city.[6] Applicant has demonstrated its ability to construct an as-of-right community house to fulfill its programmatic needs. The fact that the site is located in a Historic District and adjacent to an Individual Landmark cannot be accepted as the basis for a hardship finding since to do so would undermine the very essence of landmark protection. The 74-711 special permit process offers the appropriate recourse for any development impediment posed by a designated Landmark; yet, both CB7 and the Landmarks Preservation Commission rejected Applicant's 74-711 application. It was withdrawn in March 2006.

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

To reiterate, there are no unique physical conditions on this site. In any case, Applicant is a private, not-for-profit religious institution benefiting from tax-exempt status. It is inappropriate for Applicant to expect a "reasonable return" (i.e., profit) on a building the primary purpose of which is to serve its religious mission. Furthermore, several recent Board decisions reinforce the fact that Applicant cannot legitimately expect to receive variances to build for-profit, Use Group 2 luxury condominiums that have no nexus with its religious mission other than income generation.[7] Applicant has demonstrated that an as-of-right building, as shown in Scheme A of Applicant's October 24, 2007, submission, would not only produce a brand-new community house, but also space for a tenant school, market-rate condos *and* a net profit of more than $3,000,000.[8]

Finding (c) "…the variance, if granted, will not alter the essential character of the neighborhood or district in which the zoning lot is located; will not

[6] Exhibit C. A map of sites between Central Park West and Columbus Avenue, 59th Street and 110th Street, shows the configuration of lots in the park blocks. Many lots are divided by the R8-B/R10-A zoning boundary. The map also shows the number of sites operated as "Public Facilities and Institutions."
[7] E.g., Congregation Somlou, 245 Hooper Street, Brooklyn (72-05-BZ); Yeshiva Imrei Chaim Viznitz, 1824 53rd Street (290-05-BZ); and B'Nos Menachem, 739 East New York Avenue (194-03-BZ).
[8] Exhibit D. James A. Greer letter dated November 18, 2007, p. 4.

substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare…"

The luxury condominium project amounts to a "transfer of wealth" from adjacent properties to Applicant's property. Out of scale for this location: The luxury condominiums cause the proposed new building to rise to 105' tall, 30' the as-of-right 75' maximum permitted height, with a streetwall of 95', 35' beyond the as-of-right maximum permitted streetwall height in an R8-B district. As a result, the proposed new building would tower over the 50'- to 60'-tall, 19th-century brownstones that define the character of West 70th Street, undermine the visual cohesiveness of the block, and set a precedent for future high-rise intrusions into low-rise mid-blocks here and elsewhere. Blocked windows: The noncompliant height of the proposed building would also cause at least 7 east-facing windows at 18 West 70th Street to be completely bricked over, blocking out light and air to adjacent apartments and undermining property values. Dozens more windows on the courtyard abutting the lot line would be plunged into darkness by luxury condominiums, which would fully enclose the courtyard along the lot line. Decreased light and air: While residents of Applicant's new luxury condominiums would enjoy sunlight and open views, current residents of West 70th Street's mostly low-rise historic buildings would suffer increased shadows along their block. Full range of environmental impacts not yet assessed: In addition, Applicant's proposal shows a vaguely labeled 6,000-square-foot "multifunction room" in the basement that, in the not unlikely event this space is used as a catering or banquet facility, would generate negative environmental impacts including increased traffic congestion, garbage and sidewalk noise on a constant basis.

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

Applicant states that an important goal of the proposed project is to create new, improved space to accommodate its programs and, at the same time, "monetize" its real estate assets. The desire to "monetize" one's assets is not a basis for granting a variance. Since Applicant could clearly meets its programmatic needs within an as-of-right building, without obtaining zoning variances, any hardship that arises from Applicant's own choice to construct Use Group 2 luxury condominiums on top of its community house is purely self-created. Neither the Board nor the public at large is responsible for helping Applicant fund its religious mission through real-estate development. It is incumbent on any religious institution—in this

case, one of the wealthiest congregations in the city[9]—to fund its programmatic mission through traditional means; that is, through member contributions, or else through as-of-right use and development of its property (e.g., the Parsonage).

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

Once again, Applicant has proven that an as-of-right building is sufficient to resolve its "religious, institutional and cultural programmatic difficulties." The sole purpose of most of the requested variances is to enable Applicant to construct luxury condominiums wholly unrelated to its religious and charitable functions. The Board has a record of rejecting nonprofit institutions' financial goals as a basis for approving variances.[10] In any case, were Applicant to provide an accurate economic analysis of the project by including all sources of income and value and also accurately reflecting bona fide cost estimates, which it does not, the analysis would show that both the as-of-right scheme A and lesser variance scheme B would prove profitable. Therefore, the minimum variance required to afford relief in this case is **no variance.**

In addition, Applicant has made public declarations that its proposal has received the official "imprimatur" of the Bloomberg administration.[11] Almost in the same breath, Applicant referred to the Board of Standards and Appeals as "the easier agency,"[12] suggesting that the Board sets a lower bar than the City Planning Commission. We are confident that such claims will prove false, as evidenced by the Board's rigorous approach to previous applications, cited herein as relevant to the present case. Applicant is a supremely well-endowed, nonprofit, religious institution that cannot expect to receive a free pass when its goals to "monetize" its real estate threaten to destroy the integrity of the zoning protecting the quality and character of one of New York's most significant historic neighborhoods.

Background

Congregation Shearith Israel is an Individual Landmark, designated in 1974, also known as the Spanish & Portuguese Synagogue, designed by architects Brunner & Tryon and

[9] BSA decision in 290-05-BZ.

[10] See Footnote 6.

[11] At a public meeting before Manhattan Community Board 7's Land Use Committee, Applicant's attorney Shelly Friedman asserted three times that the Bloomberg administration had approved its application. "Tonight we appear before you with the full imprimatur of the Landmarks Commission, which is approved on behalf of the Bloomberg administration, everything you see here tonight." "We have a design approved by and supported by the Bloomberg administration." "In addition to the imprimatur of the Bloomberg administration…" (Transcript of October 17, 2007, public meeting of Manhattan Community Board 7's Land Use Committee)

[12] Shelly Friedman also stated on October 17, 2007, "So that's why we're at the Board of Standards and Appeals through absolutely no effort of our own to get to the easier agency."

completed in 1897.[13] This important site, including the current community house (on West 70th Street) and Parsonage (on Central Park West), has multiple layers of protection: it is part of the Upper West Side/Central Park West Historic District, designated in 1990; it is also protected by contextual zoning, created in 1984.

Applicant first attempted to exploit its site in order to build a high-rise residential tower cantilevered over the Landmark synagogue in the early 1980s. This project and others like it spurred the Department of City Planning, working closely with Community Board 7 (CB7), to create one of New York's earliest rezoning plans establishing contextual districts. The 1984 Zoning Report states:

> The typical midblock building is the 3 to 6-story, 55 to 60 foot high 'brownstone'…The consistency with which these building types north of 68th Street repeat themselves is the key to the strength and clarity of the image of the West Side. Over 85% of the structures in the midblocks conform to the 'midblock' type…There is warranted concern that new development will weaken the quality and 'intactness' of the existing context by introducing buildings that are out-of-place.

The 1990 Landmarks Preservation Commission's Historic District Designation Report reinforces this characterization:

> On most of the side streets of the district, scattered later apartment buildings have interrupted the original rows, but in general the surviving rowhouses present a strong coherency and are a major element in creating a special sense of place particular to this district on Manhattan's Upper West Side.

Seventy-three percent (73%) of the footprint of the new, 105'-tall building would be located in the midblock (R8B) contextual zoning district, which caps overall building height at 75' with a streetwall of 60'. In the 1980s, CB7 fought for this zoning to protect traditional brownstone mid-blocks and to reduce the depth of the tall-building Central Park West zone from 150' to 100' (it was ultimately set at 125' west of the avenue) so that sites like this one (approximately 100' to 150' west of the avenue) would remain low-rise.

CB7's Parks & Preservation Committee voted overwhelmingly to disapprove an earlier version of Applicant's proposed building in October 2005, citing numerous concerns about its design. The Landmarks Preservation Commission approved a slightly smaller version of Applicant's building in March 2006, but did not approve Applicant's request for a 74-711 special permit.[14]

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[13] Exhibit E. Architectural critic Francis Morrone wrote in the *New York Sun*, "The synagogue, which fronts on Central Park West, may be the most beautiful in the city. That makes any appendage to it a matter of urgent public concern" ("A Classical Gem Off Central Park West," September 20, 2007).

[14] The design approved by the Landmarks Preservation Commission also differs from the one presented to CB7's Parks & Preservation Commission in materials and the absence of a front setback that would have aligned the façade with the traditional rowhouse streetwall that characterizes most of West 70th Street.

On November 19, 2007, CB7's Land Use Committee voted against 4 of the zoning variances Applicant requested from the Board, including variances for initial setback, base height, maximum building height, and rear setback. It is reasonable to assume that Applicant will not do any better, and may well do worse, at the full Community Board 7 meeting scheduled for December 4, 2007.

Applicant Does Not Satisfy the Requirements of Zoning Resolution Section 72-21

Finding (a): There are no unique physical conditions creating practical difficulties or unnecessary hardship for Applicant. Applicant's primary argument for hardship is the presence of the Individual Landmark Spanish & Portuguese Synagogue (a.k.a., Congregation Shearith Israel) on a large portion of the lot it wishes to develop. Applicant attempts to lay responsibility for imposing preservation constraints at the feet of the Landmarks Commission and CB7. However, if either the Landmarks Commission or CB7 felt that constructing a 9-story, 105'-tall, mixed-use building on the site of the current community house in any way furthered the preservation of the Landmark synagogue, both would have approved a 74-711 special permit. Both CB7 and LPC rejected the 74-711 permit application in December 2002, finding that the application did not meet the required standard of fulfilling a "preservation purpose." The 74-711 application was withdrawn in March 2006.

While CSI's site is incredibly important architecturally, culturally and historically, it is not unique in zoning terms.[15] The site of the existing community house plus the adjacent vacant lot is an almost perfectly rectangular, approximately 6,500-square-foot parcel that presents no demonstrable difficulties preventing construction or excavation. Applicant's drawings (Schemes A, B and C) show that the community house footprint could be successfully developed as a mixed-use building that meets Applicant's goals to improve circulation and accessibility while including rental space for a tenant school and events (the 6,000-square-foot banquet space) *plus* market-rate condominium units.

Finding (b): Since the Application fails Finding (a), it also fails Finding (b). In any case, as a nonprofit institution, Applicant is not entitled to a "reasonable return" on the portion of its investment that is directed towards its new community house. Since the majority of the 7 requested variances result from the proposal to construct 5 floors of Use Group 2 luxury condominiums on top of a new community house, disapproval of this application would not interfere with Applicant's religious exercise.

Despite its nonprofit status, Applicant claims that the Board requested it to provide an economic feasibility study, since, as the application explains, "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" (p28). However, in recent decisions, the Board has

[15] Exhibit C. There are at least a dozen lots owned and/or operated by nonprofit institutions, plus hundreds of other private property owners/developers, with site conditions comparable to Applicant's, who would certainly perceive Board approval of Applicant's variances as a precedent for developing their own sites beyond what the zoning permits as of right.

rejected the idea of a direct nexus between a nonprofit's applicant's "financial strategy" and its programmatic needs.

The following discussion also pertains to Finding (e), which deals with not just whether a variance is warranted at all, but whether it is the minimum variance to afford relief.

In its May 2006 decision in the matter of 245 Hooper Street, Brooklyn (72-05-BZ), the Board noted **"that there was no justification for waivers such as FAR and street wall height that arose solely because the application included market rate UG 2 residences."** In that case, the Board directed the applicant (a synagogue, Congregation Somlou) to limit the number of residential units and reduce the overall scale of the proposed building before receiving approval.

Similarly, in the matter of 1824 53rd Street, Brooklyn (290-05-BZ), the Board found that the applicant (a synagogue and school, Yeshiva Imrei Chaim Viznitz) could not claim income from a catering facility as a "programmatic need." The Board's January 2007 decision states:

> The board disagrees that this is the type of programmatic need that can be properly considered sufficient justification for the requested use variance….to adopt the 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.

The yeshiva invoked the Religious Land Use and Institutionalized Persons Act (RLUIPA) to justify the variances. However, the Board responded:

> …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. [emphasis added]

These decisions align with benchmark court decisions reinforcing the power of municipalities to enforce zoning and other regulations intended to serve the public welfare, including Society for Ethical Culture v. Spatt, 51N.Y.2D449, 434N.Y.S.2D932, 415N.E.2D922(1980), in which the legitimacy of local landmarks regulation was strongly upheld. Here the Court stated:

> …the Society does not seek simply to replace a religious facility with a new, larger facility. Instead, using the need to replace as justification, it seeks the unbridled right to develop its property as it sees fit. This is impermissible and the restriction here involved cannot be deemed an abridgment of any First Amendment freedom, particularly when the contemplated use, or a large part of it, is wholly unrelated to the exercise of religion, except for the tangential benefit of raising revenue through development. [emphasis added]

In the case of Congregation Shearith Israel, Applicant requests variances for the same principal reasons as applicants in previous cases: **commercial profit.**

Applicant boasts a healthy congregation comprised of some of New York's wealthiest citizens and, as it has demonstrated through the pristine restoration of its Landmark synagogue, is more than capable of raising funds for its programs using "traditional means."[16] The Board should not grant special waivers for the purpose of funding Applicant's religious mission.

Applicant must be held to the same standard as smaller, less financially robust nonprofit religious institutions in boroughs throughout the city. Certainly, holding Applicant to this standard would not interfere with its ability to practice its religion since the variances have no demonstrated nexus with its religious programs.

At the same time, were the Board to treat Applicant's commercial activity (Use Group 2 luxury condominiums) differently than it would that of a secular developer, the Board would risk running afoul of certain constitutional protections including the Establishment Clause of the First Amendment, which prohibits government from actively promoting or privileging religious interests.

Finding (c): The proposed new building would undermine the essential character of the surrounding neighborhood and amount to an unconstitutional "transfer of wealth" from adjacent properties to Applicant's property. Both the 1984 Zoning Report and 1990 Historic District Designation Report establish the essential character of West 70th Street and other mid-blocks west of Central Park as being defined by low-rise, brownstone-scale buildings that contrast with the taller buildings of Central Park West. Because of the noncompliant luxury condominium stacked on top of a new community house, Applicant's proposed building corresponds strongly to the "avenue type" rather than the "midblock type," a fact reinforced by Applicant's attempts to justify the noncompliant height and bulk of its proposed building by pointing to examples of buildings that face Central Park West or were constructed long before the Zoning Resolution was created. If anything, the very few pre-zoning buildings that extend into the midblock and break the otherwise consistent brownstone scale underscore the importance of the contextual R8-B zoning, which would prevent their construction today.[17]

West 70th Street is, for the most part, "A Block Full of Late-19th-Century Row Houses," to quote the title of a 2003 *New York Times* article by Christopher Gray.[18] Gray goes on

[16] See Congregation Shearith Israel website, www.shearithisrael.org.

[17] The Department of City Planning worked closely with Community Board 7 to set the boundary between the high-rise R10-A district and the low-rise R8-B district at 150' from Central Park West, recognizing that the previous boundary at 200' would have allowed tall buildings to extend too far into the midblock. 73% of the site at 6-10 West 70th Street is solidly in the area that City Planning intended to protect through midblock R8-B zoning.

[18] Exhibit F. "A Block Full of Late-19th-Century Row Houses," by Christopher Gray, *New York Times*, February 16, 2003.

to describe West 70th Street between Central Park West and Columbus Avenue as "largely unchanged since a couple of apartment buildings sneaked in during the first part of the 20th century." Applicant itself sought to preserve this character using an 1896 and later deeds restricting owners of the rowhouse that once occupied 8 West 70th Street from replacing their building with anything taller than the synagogue.[19] Applicant now attempts to downplay the height of its proposed new building by calling it 8 stories plus a penthouse, against the Board's express instructions to call it 9 stories (at 105' tall, it is closer to an 11-story building in reality).

The Board is empowered to consider the impact of the proposed new building on the neighborhood's essential character and adjacent properties. Therefore, the Board is the agency to make finding (c), not the Landmarks Preservation Commission. The Landmarks Preservation Commission explicitly did not consider environmental factors such as zoning, light, air, traffic and noise in its 2006 decision because such issues are not within its purview and instead focused on the building's aesthetics.[20] The Board's test, by contrast, should be whether the proposed building would compromise the purpose of the contextual zoning and impair the use and enjoyment of adjacent properties. Applicant's project conspicuously fails this test on both counts.

In a 2003 statement submitted to the Landmarks Preservation Commission, Professor Elliott D. Sclar[21] wrote:

> The contextual zoning and landmark designations that guide this neighborhood's growth and change (and the neighborhood has grown and changed) were thoughtfully designed and democratically adopted policies intended to fairly balance the maintenance of this neighborhood's charms with the real needs for added development. This project will destroy this careful balance.

A map of land uses in the blocks between Central Park West and Columbus Avenue, 59th Street and 110th Streets, shows that many properties are operated as public facilities and/or institutions.[22] If approved, an out-of-scale, noncompliant building incorporating luxury condominiums on West 70th Street, in the R8-B district, would set a clear precedent for the construction of more intrusive, high-rise buildings throughout the area, eroding the neighborhood's special character and the strong visual distinction between the towers of Central Park West and the brownstone-scale buildings of the midblocks.

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[19] Exhibit G. E.g., restrictive covenant dated 1921.

[20] Many members of the public disagree with the Commissions approval of the design. For example, architectural critic Francis Morrone wrote: "Shearith Israel's exceptional richness requires an addition that speaks to it, that isn't just a crisp block of masonry and glass. Platt Byard Dovell White's tower design, based on the images of it I've seen, looks like it would make a fine apartment house in Yorkville. But its contextual feints aren't nearly enough to mitigate the damage it will do in forming an inappropriate background for the synagogue when viewed from Central Park West. That's why the approval of the Landmarks Preservation Commission is as disturbing as any potential granting of a zoning variance" (*New York Sun*, September 20, 2007, Exhibit D).

[21] Exhibit H. Elliott D. Sclar is Professor of Urban Planning at Columbia University and Director of the Center for Sustainable Urban Development (CSUD) at Columbia University's Earth Institute.

[22] Exhibit C.

Neighbors have clearly demonstrated the impact the noncompliant luxury condominium project would have on adjacent properties by simply superimposing Applicant's drawings over recent Local Law 11 drawings of 18 West 70th Street.[23] At least 7 east-facing, lot-line windows would be completely covered over by the new condominiums. No lot-line windows would be impacted by an as-of-right building at 6-10 West 70th Street. Applicant failed to provide the Board with correct information on this issue, despite the Board's explicit request.

In addition, dozens of windows facing the courtyard of 18 West 70th Street would be impacted by the proposed new building, which would enclose the courtyard along the lot line. An as-of-right building would affect 84 of these courtyard windows. The luxury condominiums would obstruct an additional 15 windows and deepen the shadows for the other 84 windows on lower floors. In total, 106 windows would be affected by the noncompliant condominiums, increasing the negative impact of new construction on this site by almost 80%.

Obstructed windows translate directly to limited light and air and, ultimately, decreased property values. Applicant would reap the benefits of this "transfer of wealth" since its luxury condominiums would gain value as apartments at 18 West 70th Street lost value.

Applicant's proposed new building would also add exponentially to the shadows cast on the midblock of West 70th Street, a fact that Applicant failed to demonstrate in any of its submissions. An important function of contextual, midblock zoning (R8-B) is to protect narrow side streets from shadows cast by tall, bulky buildings. Yet, Applicant did not provide shadow studies demonstrating the impact of its proposed building on light and air along West 70th Street.[24]

Applicant is also reticent about the function of the vaguely labeled 6,000-square-foot "multipurpose room" planned for the basement level of its building. Synagogues traditionally use such spaces for large events that can have severe impacts on neighboring properties in terms of traffic congestion, garbage and noise pollution, none of which Applicant has addressed. Even if the banquet facility were limited to congregation members only, if every member were to have just one weekend event every 15 years, the activity would disrupt the neighborhood every single weekend.

Finding (d): Any hardship that results from Applicant's attempt to "monetize" its real estate assets is purely self-created. Applicant has clearly demonstrated that all of its programmatic needs could be accommodated in an as-of-right building. Such a building could even generate significant income through the sale of residential units or the rental of classroom space, a tactic currently employed by Applicant. Applicant seeks waivers to construct a taller, bulkier building than is allowed under existing zoning not because they need it, but because they want it. By choosing to pursue a new, 9-story

[23] Exhibit I. Slide from "Windows Census" presentation prepared for November 19, 2007, CB7 Land Use Committee meeting comparing impact of an as-of-right building versus Proposed Scheme on east-facing windows at 18 West 70th Street.
[24] See shadow studies prepared by Alan D. Sugarman, Esq.

building designed to meet *both* its programmatic needs *and* its profit-driven goals, Applicant creates its own hardship. Neither the Board nor the public at large has the responsibility to help Applicant "monetize" its real estate assets.

Applicant also claims that design constraints imposed by the Landmarks Preservation Commission and CB7 make it difficult to construct a feasible building on this site. Again, Applicant itself chose to present the Commission and CB7 with a design for a noncompliant building. Neither body was asked to respond to an as-of-right building. Applicant has no basis for arguing that it would experience any hardship resulting from landmark regulation because it was Applicant, not the Landmarks Commission or CB7, that prescribed a 9-story building for this site. Indeed, as stated above, if the Landmarks Commission or CB7 had believed a 9-story building served any preservation purpose, both would have approved a 74-711 special permit. Neither did.

Ultimately, Applicant itself chose to pursue real-estate development over other "traditional means" of generating income for the congregation.

Finding (e): Applicant's proposal is not the minimum variance required to afford relief since all of its programmatic needs could be accommodated in an as-of-right building, including classrooms, offices, facilities for social, religious and educational functions, archives, and residences. The "minimum variance" is, in fact, no variance. Applicant claims, "The Application provides nothing more than the waivers necessary to resolve CSI's religious, institutional and cultural programmatic difficulties." This statement is plainly false. Applicant needs no relief in order to construct its program-related project.

What Applicant means is that waivers are needed to enable it to make a substantial amount of money on this site. But even this statement is misleading. Both as-of-right Scheme A and lesser-variance Scheme B produce a significant profit.[25] Applicant obscures this fact by including the land acquisition cost in its feasibility analysis. But Applicant has long owned the land outright. Furthermore, Applicant has publicly stated that the land is not being sold to a third party (i.e., a developer). The land is a "sunk cost."[26]

Applicant claims that it factored in the land cost at the Board's request. But even so, Applicant has wildly inflated the land value, guaranteeing that no scheme except for the Proposed Scheme shows a profit.[27]

Applicant has also withheld information about other financial opportunities available on its site. For zoning purposes, Applicant argues that the lot includes not only the proposed construction site at 6-10 West 70th Street, but also the Landmark synagogue and the Parsonage on Central Park West. Yet, in its summary and evaluation of possible alternative development schemes, it neglects to consider opportunities for using either the

[25] Exhibit D. Greer letter.
[26] Exhibit J. Thomas Hansen, CPA, letter dated November 16, 2007.
[27] Exhibit J. Hansen letter.

synagogue or the Parsonage to meet its needs. The fact that the synagogue is an Individual Landmark and the Parsonage is in the Upper West Side/Central Park West Historic District does not automatically preclude development of either site, if done appropriately. Indeed, Applicant fails to disclose that the Parsonage is already used as a rental residence generating, by several reports, $18,000 per month or more to a non-related tenant.

In addition, Applicant has removed the significant income it receives from the tenant school, Beit Rabban, from its analysis, while assiduously including all of the development costs associated with the new community house, which would include classrooms for the tenant school.[28] Such manipulations seem geared towards hiding the fact that rental proceeds from the tenant school *by themselves* would pay for construction of the new community house.

Applicant does not show potential income from the 6,000-square-foot banquet facility either. There is also significant space beneath the synagogue sanctuary itself that Applicant has not demonstrably explored for income or program-related opportunities.

For further discussion of the inherent flaws in Applicant's feasibility study, please refer to letters submitted to CB7 by James A. Greer II and Thomas Hansen, referred to in footnotes below.

Conclusion

Recent Board decisions reflect that a nonprofit institution's desire to use its property to generate income, even where that income will be used for programs, is not an acceptable basis for waivers. The sole purpose of Applicant's requested additional height and bulk is to construct 5 floors of profit-generating luxury condominiums with no direct nexus to Applicant's programs. The luxury condominiums will be sold to third parties. No programmatic functions will take place in them. The financial benefit to Applicant that would result from the variances (i.e., that the new building would essentially "pay for itself" without Applicant's having to raise funds from other sources) does not meet the Board's definition of "relief."

Instead, Applicant disingenuously insists that its only feasible option is to squeeze *both* a new community facility *and* 5 floors of luxury condominiums onto a parcel that is small in relation to the entire zoning lot. This makes for a wholly unrealistic economic feasibility analysis, which even goes so far as to factor in land acquisition costs when, of course, Applicant already owns the property. This and other manipulations skew the numbers to suggest greater costs to Applicant than would exist in reality.

Accordingly, no zoning relief should be granted.

[28] Exhibit J. Hansen letter.