STATEMENT IN OPPOSITION

TO VARIANCE APPLICATION

OF CONGREGATION SHEARITH ISRAEL

(January 28, 2008)

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!.

This statement responds to revised and new information submitted by Applicant to the Board of Standards and Appeals on December 28, 2007, in advancement of its request for seven zoning variances to construct a new 9-story, 105'-tall building, more than twice as tall as the brownstone that define this and most other mid-blocks on the Upper West Side.[1] If approved, this would be the tallest structure ever allowed to be built in the R8-B contextual zoning district 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).[2] Four of the requested zoning variances allegedly relate to Applicant's programmatic needs.[3] The other three variances relate directly to Applicant's desire to build five floors of luxury condominiums on top of a new community house.[4]

At its November 27, 2007, public hearing, the Board asked Applicant for analysis purposes to separate the proposed new building into its community facility and residential components for the purposes of analysis, having rejected Applicant's assertion that the luxury condominiums bear any relationship to Applicant's programmatic needs.[5]

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[1] Opp. Ex. Y. Images of typical brownstone rowhouses of West 70th Street.
[2] Opp. Ex. X. LW! commissioned a Columbia University graduate student in the School of Architecture, Planning and Preservation to prepare this map in 2002 using the city's land use data. To our knowledge, the map is an accurate representation of building heights in the area shown.
[3] R10A and R8B lot coverage exceedances per the Zoning Resolution of the City of New York, "ZRCNY," Sec. 24-11/77-24, and R10A and R8B rear yard exceedances per ZRCNY Sec. 24-36
[4] R10A and R8B base and building height exceedances per ZRCNY Sec. 633, and R8B rear setback exceedance per ZRCNY Sec. 633.
[5] Chair Srinivasan stated, "[Applicant] need[s] to make a different case for the residential portion in terms of the height and setback and it's not enough to tell this Board that you need as much residential as possible

Applicant still fails to demonstrate that its proposal satisfies the five findings required for approval of variances under the Zoning Resolution (Sec. 72-21) because:

a) At a fundamental level, Applicant's core argument that its inability to convert unused FAR to built floor area constitutes a hardship for the purposes of zoning variances is without merit;

b) All of Applicant's programmatic needs as presented can be met without any the requested variances and indeed within the first four floors of an as-of-right building;[6] and

c) Applicant could develop its site profitably with either a mixed-use or all-residential as-of-right building;[7] and

d) The proposed new building would have direct, adverse impacts on adjacent properties.

The evidence and reasoning behind these conclusions is described below in relation to each of the five required findings.

"Monetization"

There is a fundamental flaw in Applicant's approach to securing its goal. This flaw, which glares out of the first paragraph of Mr. Friedman's December 28, 2007, letter, confuses zoning development rights with real estate value and bases equitable hardship claim on unused zoning "rights." Such an approach looks at zoning as if it were floor area rights alone. Zoning, however, is a complex regulation of often contradictory components. Floor are is tempered by height and setback regulations so that FAR value is often an illusion in a "monetization" sense.

Applicant attempts to argue that "the conversion of 23,000 sf of unused development rights is an "economic wash without generation of either profit or loss to CSI."[8] This is clearly only the case in the sense that Applicant plans to use the proceeds from the luxury condos to finance the construction of the community house.[9] But as the Board itself has affirmed, variances should not be used to enable a non-profit institution to finance its

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because that's going to help fund the congregation" Transcript of November 27, 2007, public hearing, p. 20-1. Commissioner Ottley-Brown reiterated this opinion, stating "residential use to raise capital funds to correct programmatic deficiencies is not in and of itself a programmatic need…And, I think if we open the door, here, and allow that argument in, we're going to have a hard time turning down every other religious institution that wants to place residential in their back yard in order to finance expansion" Ibid, p. 26.

[6] Craig Morrison, AIA, letter dated January 28, 2008, ¶ 7. Attached.

[7] Martin Levine, MAI, Metropolitan Valuation Services, letter dated January 25, 2008, p. 1. Attached.

[8] Friedman & Gotbaum letter dated December 28, 2007, p. 1.

[9] Applicant neglects to mention that the rental income from the tenant school, Beit Rabban, will, over time, fully reimburse costs associated with constructing the new building. Freeman & Frazier Economic Analysis dated October 24, 2007, Schedule A2, p. 9.

mission.[10] A non-profit, religious institution's inability, due to zoning regulations, to use (i.e., "monetize") air rights in order to generate a revenue stream does not constitute a hardship under Section 72-21 of the Zoning Resolution. Therefore, Applicant's assertion that the creation of 23,000 sf of residential floor area on this site generates neither profit nor loss to Congregation Shearith Israel is immaterial to the Board's consideration.

In previous cases, the Board has emphasized religious institutions' responsibility to support its non-commercial uses through traditional means. Certainly other religious non-profit organizations have found it possible to raise large amounts of money to construct facilities in which to pursue their missions. For example, the Jewish Community Center on Amsterdam Avenue at 76th Street recently built a new, 11-story building, as of right without seeking zoning variances, at a cost of $85 million, which it raised from private donors.[11]

By contrast, Applicant seeks seven zoning variances, not to accommodate its own, mission-related programs, but to create space for income generation and, under the veil of "hardship," shift the cost of new construction from its own members and supporters to the community at large. Invoking "hardship" to justify waivers of this kind is an abuse of the term and of the variance process.

Precedent

The basic premise of this application is that non-profit religious institutions may exceed zoning height and setback limitations by claiming the need for income from commercial development. Yet, Applicant argues that "this Application will not serve as precedent for taller buildings, for bigger buildings or for special treatment of buildings located directly on zoning district boundaries unless those zoning lots are also improved with dysfunctional buildings which must either be altered or replaced."[12] Were the Board to accept Applicant's premise that a hardship is constituted by a non-profit, religious institution's own desire to construct a new, self-financing building that does not comply with zoning instead of a compliant building that either addresses the institution's programmatic needs, affords the opportunity to gain a substantial return on investment, or both, then the window of potential for this application to set a precedent for future Board cases is very wide indeed. Applicant's protestations that other sites along Central Park West (e.g., the New-York Historical Society) or in the midblock between Central Park West and Columbus Avenue (e.g., 22 West 70th Street, the building owned and occupied by the Catholic High School Association) have unique lot configurations and development potentials only serves to underscore the importance of maintaining a firm standard for the granting of variances. Applicant has demonstrably failed to meet all five of the required findings under ZRCNY 72-21. Therefore, approval of the requested

[10] Recent evidence of the Board's stance is contained in 72-05-BZ (Congregation Shomlou, 245 Hooper Street, Brooklyn, May 2, 2006) and 290-05-BZ (Yeshiva Imrei Chaim Viznitz, 1824 53rd Street, Brooklyn, January 9, 2007), both cited in Opponents' November 22, 2007, submission to the Board. Opp. Ex. V & W.
[11] Alan Sugarman affirmation dated January 28, 2008, ¶ 12 and Opp. Ex. D-21.
[12] Friedman & Gotbaum letter dated December 28, 2007, p. 16.

variances in this case would lower the bar for future applications, leading to the general erosion of zoning regulations, not just in special, low-rise neighborhoods protected by R8B contextual zoning, but in every part of New York City.

Programmatic Needs

Since this application was first submitted to the Board in April 2007, Applicant's explanation of its "program" has been a moving target.[13] The December 28, 2007, submission makes it glaringly obvious that Applicant has inflated its "program" to justify the building envelope approved by the Landmarks Preservation Commission. In other words, the proposed new building is the largest building Applicant believes it can build; so it has fabricated a program to fill out the proposed building. For example, nowhere in any of its several previous submissions does Applicant mention its Toddler Program, much less its ambition to expand this program, currently involving 20 children on Monday and Wednesday mornings, to an all-day, five-day-per-week staple for up to 60 children. Applicant does not explain the relationship between this program, which is open to non-congregants and presumably not provided free of charge, and its non-profit mission. The Toddler Program would appear to have no greater nexus to Applicant's programmatic needs than the tenant school, Beit Rabban. (Indeed, according to Applicant, because classroom space is rented to Beit Rabban, the Toddler Program must meet in a basement assembly area.) Together with the luxury condominiums, these non-mission-related, revenue-generating programs drive Applicant's quest for all seven variances.

Applicant does not need zoning variances in order to fulfill its programmatic needs nor does it need variances in order to use its site profitably. In any event, Applicant's claimed inability to accomplish both goals within an as-of-right building on the site is irrelevant to the consideration of zoning variances. No relief is warranted. Accordingly, the Board of Standards and Appeals must deny Applicant's request.[14]

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

Despite multiple written submissions to the Board and oral testimony from its Rabbi and Director of Jewish Life and Learning at one public hearing, Applicant still has not provided substantial evidence to meet any of the five required findings. The evidence presented by Applicant is insufficient to support a finding that they have a unique physical condition, which as resulted in practical difficulties in complying with the Zoning Resolution. Additionally, Applicant has failed to demonstrate that its programmatic needs cannot be met and that a reasonable return cannot be realized without the grant of its requested variances.[15] Furthermore, Applicant's proposed 9-story, 105-foot-tall building will have substantially adverse impacts on the use and

[13] Sugarman affirmation ¶ 8 and ¶ 9.

[14] Manhattan Community Board 7's full board voted to deny all 7 variances at its December 4, 2007, meeting. Opp. Ex. T.

[15] While we question the legitimacy of applying Finding (b) to a non-profit, religious institution, it is the opinion of Metropolitan Valuation Services that an economically feasible building could be constructed on this site.

development of adjacent properties. Applicant's desire to incorporate luxury condominiums into its new development drives this request for variances; therefore, any "hardship" is self-created. Finally, since Applicant can accommodate all of its programmatic needs in as as-of-right building, the requested variances are not the minimum necessary to afford relief.

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

In order for the Zoning Resolution to function, as it is intended, to protect the public health, safety and welfare, property owners must make good-faith efforts to follow the rules. Contextual R8B zoning serves a valid and compelling public purpose, that of preserving the low-scale integrity of mid-blocks defined by traditional rowhouses or "brownstones" and limiting the encroachment of large apartment buildings into the mid-block.[16] The constraints that zoning places on any individual property owner, where those constraints serve a valid public purpose and apply to all property owners equally, cannot be construed as constituting a "hardship" for the purposes of granting zoning variances.

The proposed new building site presents no unique physical conditions creating practical difficulties or unnecessary hardship for Applicant. A recent brief submitted by Stroock Stroock & Lavan in opposition to the variance application submitted to the Board by Congregation Kehilath Jeshrun/Ramaz cites numerous cases supporting arguments that:

1) In order for physical conditions to be unique, they may not be ones generally applicable throughout the district. *Douglaston Civic Ass'n, Inc. v. Klein*, 51 N.Y.2d 963, 965 (1980).
2) The grant of a zoning variance is conditioned on the unique physical conditions of the lot and not on one's particular spatial needs. *9 White Street Corp. et al. v. Board of Standards and Appeals of the City of New York*, 122 A.D.2d 742, 744 (1st Dept. 1986).
3) The need for additional space does not "make the existing physical conditions unique and does not create a hardship or practical difficulty within the meaning of

[16] *Zoning Handbook*, January 2006, p. 41. Exhibit B attached to the Friedman & Gotbaum letter dated December 28, 2007, provides further information concerning the purpose of contextual zoning: "The proposed contextual districts seek to ensure that new buildings fit into the scale and character of the existing neighborhood." City Planning Commission, N 840235 ZRY (April 9, 1984), p. 4. "The Commission believes that the proposed demapping appropriately rezones the majority of brownstones currently zoned R10, while minimizing the amount of non-compliance of large apartment houses built deeper than 125' from the avenue." City Planning Commission, C 840236 ZMM (April 9, 1984), p. 11.

the zoning resolution." *9 White Street Corp. et al. v. Board of Standards and Appeals of the City of New York,* 122 A.D.2d at 744.

4) Personal inconvenience arising from need for additional space does not provide substantial evidence to support the Sec. 72-21(a) finding. *Galin v. Board of Estimate of City of New York,* 72 A.D.2s 114, 117-18 (1st Dept. 1980).

5) Practical difficulties arise when a property or a structure on a property cannot be used without conflicting with certain provisions of the Zoning Resolution. *Bienstock v. Zoning Bd. Of Appeals of Town of East Hampton,* 187 A.D.2d 578, 580 (2nd Dept. 1992).[17]

The Stroock brief concludes that, since no such practical difficulties exist on the KJ/Ramaz site, the requested variances must be denied. The facts of Congregation Shearith Israel's case require the same conclusion to be drawn.

No Practical Difficulty in Developing the Site

Applicant cites a number of deficiencies with the existing community house, including lack of handicap accessibility, obsolescence, access difficulties, and lack of space or expansion opportunities. Even assuming that these deficiencies do exist, Applicant has failed to show how they arise from compliance with the zoning resolution. They are certainly not physical conditions that are inherent in the lot. The proposed new building site is rectangular in shape and easily developable. The fact that Applicant cannot use all of its allowed floor area on the development site is neither a unique condition nor a practical difficulty. There is no requirement that a property owner use all of its allowed floor area for the site. Furthermore, the fact that, in Applicant's proposal, "the entire development footprint of the site [is] consumed by the community house volume within the New Building for four stories" and the "residential floors cannot begin until the fifth floor" is not driven by factors inherent in the site, but rather by Applicant's desire to construct a mixed-use building to meet self-imposed programmatic and financial goals. As the Stroock brief points out, such a desire is "one of a personal nature," which does not constitute practical difficulties.[18]

Applicant argues that the split-lot condition resulting from the presence of a zoning boundary on the site is a unique physical condition that creates practical difficulties. Besides the fact that split lots are commonplace throughout New York City, Applicant has failed to demonstrate that, in this case, the zoning boundary imposes any physical difficulty since it is entirely possible to construct a building, in compliance with the zoning, that meets all of Applicant's claimed programmatic needs.

The same can be said for Applicant's assertion that the presence of a specialized religious structure with Landmark status burdens development on this site. Neither building type constitutes a "unique physical condition" in the intended sense of finding (a). In any case, the fact remains that the presence of such a building does not impede the

[17] Ross Moskowitz, Stroock Stroock & Lavan, brief dated November 7, 2007. Opp. Ex. S.
[18] Stroock brief, p. 11.

development on this site of an as-of-right building that addresses Applicant's programmatic needs.

There is no requirement that a property owner use all of the floor area available on his/her site. Therefore, the inability to use floor area in compliance with zoning cannot be construed as a hardship from which relief is necessary.

It should be said that the "As-of-Right Tower Building" described on page 3 of Applicant's December 28, 2007, submission provides an entirely unrealistic basis for analysis of finding (a). This envelope is allowed, but certainly not required under the existing zoning. The fact that it is so manifestly inappropriate aesthetically in relation to the surrounding context and would never gain Landmarks Preservation Commission approval is an argument against posing this scheme as "as of right." Applicant's focus on this obviously impractical scheme (in verbal description only, without drawings) is a blatant and disingenuous attempt to skew the analysis and sidetrack discussion of reasonable, as-of-right alternatives. Most recently in drawings dated October 22, 2007, Applicant presented two such alternatives: Scheme A (as-of-right Community Facility/Residential plan) and Scheme C (as-of-right Residential plan). As explained above, there is no rational reason to believe that an as-of-right building could not accommodate Applicant's programmatic needs. Furthermore, as shall be elaborated in the finding (b) discussion below, Applicant cannot argue that an as-of-right, all-residential building is economically unfeasible.

<u>As-Of-Right Building Would Meet Applicant's Programmatic Needs</u>
Four of the seven variances relate directly to Applicant's desire to use the first four floors of its proposed new building as a new community house. Applicant offers no convincing evidence that an as-of-right building would not address the stated deficiencies of the site. In fact, Applicant's floor plans show that an as-of-right building would meet Applicant's professed need for improved circulation and handicapped access in identical fashion to the proposed new building.[19] Indeed the only improvement a new building offers over the existing building in terms of circulation and access is a modernized elevator system. The construction of an entirely new building is not required to modernize the elevator system.[20] In any case, both the proposed and as-of-right schemes resolve accessibility issues within 10-15 feet of the Sanctuary wall.[21]

Craig Morrison, AIA, reviewed Applicant's materials and concludes that Applicant's stated needs can be comfortably accommodated within the As-Of-Right Scheme A building.[22] However, Applicant does not attempt to satisfy its programmatic needs by using all of the space available on the six floors of this as-of-right building. Rather, it has decided to allocate the top two floors for residential condominium use with associated elevator banks that cut into the usable area on floors one through four. If Applicant used

[19] Opp. Ex. R. Simon Bertrang report dated September 26, 2007, "Objection #5," p. 2. Morrison letter, ¶ 5. See also Sugarman affirmation ¶ 17 and Opp. Ex. M & FF.
[20] Morrison letter, ¶ 6.
[21] Ibid, ¶ 5.
[22] Ibid, ¶ 7.

this upper-floor space to satisfy its programmatic needs, then it would have no need for the rear-yard variances.[23]

Further, Morrison concludes that if Applicant used other structures available on the zoning lot, it could accommodate its asserted programmatic needs in an as-of-right building while still reserving floors five and six for residential use.[24] The education programs described by Applicant, including the Hebrew School, Toddler Program and Family Education Program are generally non-simultaneous and can readily share facilities.[25] The educational floors (floors 2, 3 and 4) show a total of 15 classrooms with combined square footage of approximately 4,640 net. This space is sufficient to accommodate 232 students by code, far beyond Applicant's needs. This potential capacity does not even take into consideration space available elsewhere on the zoning lot, such as the 1,204 feet in the Synagogue expansion, which is ideal for adult education.[26] Flexible use of the classrooms would also be increased by using movable partitions instead of rigidly fixed walls.

Even if 15 classrooms and other space on the zoning lot were needed simultaneously, the number of toilets provided per person is far beyond any reasonable estimation of the site's user capacity. There are sufficient toilets for 840 students by code.[27] Additional space for educational programs could be made available by reducing the area devoted to redundant toilets.

Morrison also notes that additional space could be created on the fourth floor of the new building by moving the proposed custodian's apartment to the Parsonage, which is already configured for residential use. Currently, the Parsonage is rented out for residential use at a reported $15,000-18,000 per month, an arrangement that is clearly unrelated to Applicant's mission in any way beyond financial and therefore cannot be used as a justification for variances.[28] It should be noted that plans submitted to the Landmarks Preservation Commission do not show a caretaker's apartment in the proposed new building, raising questions about the relationship between this amenity and Applicant's true programmatic needs. The Parsonage also provides ample space for office, library and/or educational (for example, tutoring or small classes) uses.[29]

<u>Applicant's Fluid Program and Inflated Statement of Need</u>

[23] Ibid, ¶ 8.
[24] Ibid, ¶ 9-14.
[25] Ibid, ¶ 10. Also see Opp. Ex. BB.
[26] Ibid, ¶ 12. Morrison notes that plans filed with the Landmarks Preservation Commission between 2002 and 2006 did not show any expansion of the Small Synagogue, but rather that the Small Synagogue was to be moved into the new building in its entirety (Point 11) Therefore, we question whether the expansion area is actually needed for Applicant's programs and, if it is, why this area cannot be used for multiple purposes, including classrooms, especially if folding partitions are used to maximize flexibility of use, as they are in many other religious and educational facilities. See also Sugarman affirmation ¶ 9.
[27] Ibid, ¶ 13.
[28] Sugarman affirmation ¶ 10 and Opp. Ex. C; also ¶ 20 and Opp. Ex. P-1.
[29] Ibid, ¶ 14.

Applicant's own drawings over the course of the past six years show that there is no single way to construct a building that meets its programmatic and financial goals.[30] The various texts accompanying these drawings, each offering a different description of Applicant's needs, also suggest that Applicant's program is fluid, not fixed.[31] For example, the April 2007 application calls for 12 classrooms, a number that was reiterated at the Board's November 27, 2007, public hearing. Now, however, that number is 15. Rooms that were labeled "Offices" one month ago are now designated as classrooms.[32] If the program is fluid, then Applicant cannot argue that it is driving the design of the proposed building. If the program is not driving the design, then it is reasonable to assume that the finances are (see discussion of finding (b) below).

Applicant appears to inflate its "need" in order to justify the largest building it thinks will be approved on this site. The increase in the number of classrooms "needed" coincides with Applicant's introduction of its Toddler Program, a program never previously mentioned in any of Applicant's submissions, which Applicant claims it plans to expand dramatically from two weekday mornings to five full days per week, requiring all six classrooms on the second floor of the new building to accommodate 60 children, up from 20 children currently. Six classrooms to accommodate 60 children, if indeed the Toddler Program were to grow to that size, seems excessive, unless of course the classrooms are also intended to accommodate the 36-41 children in Beit Rabban's pre-Kindergarten program,[33] in which case it is not appropriate to consider these classrooms as related to Applicant's "programmatic needs."[34] Applicant does not explain how the Toddler Program, "open to all in the community and enjoy[ing] a diverse and multicultural membership," relates to its mission or how it could be construed as a programmatic need. Applicant describes no coinciding religious services or adult programs that would require childcare during the projected operating hours of the Toddler Program. The Toddler Program appears to be a secondary, commercial use that Applicant is using to inflate its programmatic need in an effort to justify a noncompliant building that is large enough to accommodate not just Applicant's legitimately mission-related programs, but also significant income-producing uses such as the tenant school and luxury condos. Most importantly, now, because of the lease of the community house to Beit Rabban, the Toddlers are unable to use the classrooms, which are being used at the same time by other young children, and must use a basement assembly area. This contradicts the Applicant's claim that Beit Rabban only uses space not needed by the Applicant.

Assuming that the Toddler Program is extraneous to Applicant's mission, there is no basis for rear-yard variances since all of the actual programmatic functions could be accommodated in floors two through four of the proposed building. Even assuming that

[30] Sugarman affirmation ¶ 9 and Opp. Ex. E; ¶ 10 and Opp. Ex. H; ¶ 13 and Opp. Ex. F & G.
[31] Ibid ¶ 8 and Opp. Ex. A.
[32] A revised drawing of the second floor (PROG P-9) dated December 26, 2007, shows the three south-facing classrooms as "Toddler Classrooms," whereas previous drawings dated October 22, 2007, showed them as "Offices."
[33] Opp. Ex. K.
[34] Drawing PROG P-9 (December 26, 2007) notes, "Beit Rabban and CSI will share classrooms as mutual programs require." The allocation of six classrooms apparently contemplates use by close to 100 students and their teachers for a majority of the day from Monday to Friday.

Applicant can demonstrate that the expanded Toddler Program is an essential part of its religious mission, it would still only require about half the space on the second floor of an as-of-right building. The fact that this may limit the number of Beit Rabban students that can be accommodated is an issue that cannot be used to justify variances.

Applicant's desire to include several floors of luxury condominiums on top of the community facility places obvious constraints on the use of the lower floors. But, again, these constraints are not of a nature to justify zoning variances. Were Applicant to eliminate the residential use altogether (perhaps including only a custodian's apartment on one of the upper floors), there is no reason why floors five and six of an as-of-right building could not be used for classrooms, meeting rooms, offices, etc. Eliminating the residential use would also free up approximately 1,500 square feet on the first floor now devoted to the residential lobby.

The inevitable conclusion is that, although Applicant would prefer to accommodate its needs in a manner that is inconsistent with zoning, this preference does not justify the requested variances. All of the programmatic needs asserted by Applicant can be satisfied in a perfectly reasonable and acceptable way, with space to spare. Should Applicant not wish to use the top two floors of an as-of-right building for its programmatic needs, those needs could be satisfied within the lower floors of an as-of-right building, especially if readily available opportunities to use space in other structures on the zoning lot are pursued.

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…"

As demonstrated above, applicant can construct an as-of-right building on this site, without any zoning variances, that would meet its programmatic needs. Furthermore, Applicant can develop this site in compliance with the zoning and realize a reasonable return on the profit-driven aspects of its project (i.e., the luxury condos). Applicant has failed to provide substantial evidence to prove otherwise.

The previously cited Stroock brief argues that:

1) To calculate the reasonable rate of return, the focus "must be on whether <u>any</u> conforming use will yield a reasonable return" [emphasis added]. *Soho Alliance v. New York City Board of Standards and Appeals*, 264 A.D.2d 59, 64 (1st Department 2000) (*affirmed*, 741 N.E.2d 106).
2) This requires a showing that "there is no reasonable possibility that development of the zoning lot in strict conformity with the Zoning Resolution would bring a reasonable return." *West Village Houses Tenants' Association, et al. v. New York*

City Board of Standards and Appeals, et al., 302 A.D.2d 230. 231 (1st Dept. 2003).

3) The applicable standard is whether a reasonable return can be realized without the variance and not whether a higher rate of return is possible with the grant of a variance. *Bath Beach Health Spa of Park Slope, Inc. v. Bennett,* 176 A.D.2d 874, 875 (2nd Dept. 1991).

On the contrary, in the opinion of Martin Levine, chairman of Metropolitan Valuation Services, who is conducting an independent economic analysis, Applicant's Economic Analysis Report is "critically flawed by poor judgment and erroneous mathematical technique" and "its conclusions cannot be relied on."[35] Moreover, the independent analysis shows that the property is able to yield a reasonable return even without the granting of variances. Levine finds, "Development of the unused portion of the Congregation Shearith Israel Site with either a mixed-use or all residential 'as of right' building is in fact economically feasible, providing sufficient entrepreneurial profit to any potential investor/developer."

The errors in Applicant's Economic Analysis Report may be summarized as follows:

- The Report assumes that a potential developer would pay for *all* of the site's potential developable building area, regardless of whether they were used in the project to be built;
- The Report's land value conclusion is wholly unreliable;
- The sales revenues assumed in the Report are substantially underestimated by virtue of undercounted saleable area; and
- The Report assumes very substantial interest carry on the cost of acquiring the site rather than just the development rights actually being acquired.[36]

A detailed report of Mr. Levine's findings will be available at or prior to the Board's scheduled February 12, 2008, public hearing.

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

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. The most egregious impacts on community character and adjacent properties result solely from Applicant's desire to construct commercial, luxury condos on top of a new community house, for which they require three height and setback variances. In addition, the allegedly program-related variances generate

[35] Levine letter, p. 1.
[36] Ibid.

potentially negative effects on adjacent properties in the rear of the development site. As a general matter, the waiving of height, setback and rear yard requirements undermines the very purpose of zoning, especially in mid-block contextual districts where regulations are intended to protect scarce light and air as well as the traditional architectural character of the area.

Concern about such impacts has galvanized widespread community opposition to this proposal. Inspection of Objection Forms received by the Board by the time of its November 27, 2007, public hearing revealed that, of 128 forms expressing opposition to this project, 120 were from residents and owners of "Affected Properties" within a 400-foot radius of the project site.[37]

18 West 70th Street

The construction of the proposed 9-story, 105-foot-tall building would substantially impair the use of property at 18 West 70th Street by blocking up lot-line windows that apartment owners rely on for light, air and overall quality of life.[38] These devastating human impacts would be magnified by the significant loss of property value for the affected units. The as-of-right schemes described by Applicant would not block any windows. In a new maneuver to gain approval of the upper-floor variances, Applicant attempts to cast doubt on legitimate property concerns by suggesting in its latest submission that building codes may require some lot-line to be blocked even in an as-of-right scenario. Yet, despite having had ample opportunity to raise this issue previously, Applicant withholds the basis for this argument.

Furthermore, the Board instructed Applicant to provide information about lot-line windows that provide the only light and air to their units. Applicant has so far failed to provide this information. The President of 18 Owners Corporation has rightly petitioned the Board to postpone its scheduled February 12, 2008, public hearing until Applicant makes a good-faith attempt to gather the information necessary to fully evaluate the impact of the proposed new building on lot-line windows.

Impacts on Other Adjacent Properties

In addition, Applicant has failed to address a range of other, equally important issues concerning the impact of the proposed new building on the surrounding neighborhood. For example, 91 Central Park West and 9 West 69th Street are properties directly to the south of the proposed development site. Both buildings are at least 75 years old and have pre-existing, non-conforming footprints that full out their lots to within several feet of the rear lot line. Applicant's requested rear-yard variances will reduce light and air to units

[37] Board staff was unable to locate forms received subsequent to the November 27, 2007, hearing when a LANDMARK WEST! staff person visited the Board's office to inspect the files on January 25, 2008. LANDMARK WEST! will submit a summary of the objections once complete files are made available.

[38] On November 27, 2007, 18 West 70th Street resident Ron Prince submitted into the record a print-out of a PowerPoint presentation including photographs and drawings of the windows that will be affected by the proposed new building, plus a breakdown of the lot-line windows (7) and courtyard windows (99) that would be impacted by the proposed building, but not by an as-of-right building.

in both 91 Central Park West and 9 West 69th Street, but Applicant has provided no analysis of this impact.[39]

Applicant downplays the impact of a new 9-story, 105-foot-tall building will have on the light, air and overall physical character of West 70th Street by citing the presence of two taller, pre-existing, non-conforming apartment buildings (also at least 75 years old) in the midblock of West 70th Street. These buildings, Applicant argues, justify the construction of yet another tall, noncompliant building, even though the large majority of buildings, including the Individual Landmark synagogue, are less than six-stories tall, in line with the character that R8B mid-block zoning was specifically designed to protect. The proposed building would abut and magnify the visual impact of the existing taller buildings, transforming what is now an almost pristine brownstone block by creating a 9-story wall that extends roughly 250 feet in from Central Park West.[40]

Applicant submits a letter from environmental and planning consultants AKRF reacting to community concerns about the shadows that would be cast by a tall, noncompliant building on this site. The letter confirms that the project would cast some incremental shadows on areas north and south of the project site, as well as Central Park, all sites within the 400-foot "affected properties" radius used by the Board as a standard for judging the impacts of proposed variances. As shown in the diagram attached to the AKRF letter, the proposed building would cast shadows that cover a much wider area than the present community house. Yet, while the letter concludes that the project would "not have a significant adverse shadow impact on Central Park," it does not explain the nature of the shadow impacts on properties north and south of the project site.[41]

Meanwhile, Applicant conspicuously neglects to provide a comprehensive assessment of other environmental impacts addressed in the *City Environmental Quality Review (CEQR) Technical Manual*, including traffic congestion, noise and garbage on West 70th Street, a narrow, one-way side street.[42] These issues are especially important to evaluate now that Applicant has revealed its plans to significantly expand the degree and variety of usage on its site, not just limited to the 6,400-square-foot banquet hall,[43] but now also a spectrum of services including the enlarged Toddler Program at the same time as Beit Rabban's pre-Kindergarten program is in session. Applicant openly admits that the Toddler Program will not be limited to members of the Congregation and offers no written guarantee that the use of the banquet hall will be limited to Congregation members, referring only to bylaws that have not been provided as evidence. Applicant

[39] Residents of both buildings are also concerned about the impact that the elimination of the rear yard on the first floor of the new building will have on their emergency fire egress.
[40] Sugarman affirmation ¶ 29 and Opp. Ex. AA.
[41] A letter to the Board from Nizam Peter Kettaneh, owner of a brownstone at 15 West 70th Street, expresses concern about the absence of shadow studies on the north side of West 70th Street and sight lines comparing the as-of-right and proposed buildings. Mr. Kettaneh also raises concerns about garbage and traffic generated by the proposed banquet hall. Opp. Ex. Q.
[42] Opp. Ex. Z.
[43] Previous plans for this project showed the multi-purpose room labeled as a "banquet hall." Sugarman affirmation ¶ 16 and Opp. Ex. L. Applicant has stated that the permitted occupancy of this space would be 440. This number was adjusted down to 360 in Applicant's latest submission.

has not proffered testimony from anyone having personal knowledge of a) how the bylaws have been interpreted in the past and b) how they can be amended. Moreover, it is essential to know precisely what it takes to become a Congregant in order to ascertain whether the requirement is really an impediment to much wider use of the space than suggested by the vague, unsupported statement of Applicant's counsel. Other possible users – for example, relatives or friends of Congregants who sponsor them – might be included within the ambit of Counsel's description of the supposed limit on usage of the space. In short, the limitation claimed by Counsel may well be no real limitation at all. Further, Applicant's Rabbi has indicated he has plans for significantly increasing the number of people involved in Applicant's education program. Accordingly, the potential increase in traffic congestion, noise and garbage may be considerably greater than suggested by Applicant's Counsel, who has no apparent personal knowledge of the matter and whose unsupported statements are not evidence that can be cited as supporting his conclusion that these adverse impacts on the neighborhood will not be significant.

The net result of the seven requested variances for this site is a building that is, in many important ways, contrary to the zoning vision for this mid-block district. If these variances were granted to this Applicant, then one may reasonably predict that other non-profit institutions would see the opportunity to apply for variances on similar grounds, arguing programmatic and financial need and pointing to the "unique physical constraints" they perceive on their own sites. Approval of comparable height, setback and rear-yard variances in each of these instances would result in the incremental loss of light, air and community character, the very attributes that zoning was designed to protect on behalf of the public.

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…"

As discussed above, there are no unique physical conditions on this site that impose practical difficulties in complying with the zoning resolution. Rather, Applicant creates its own "hardship" by its desire to construct new religious and educational facilities along with five floors of for-profit luxury condominiums, and thereby finance the creation of space for its religious mission. It is not the Board's role to ensure Applicant's ability to pay for a new community house, but rather to assess whether or not zoning impedes the useful development of this site. The site can be developed in a variety of ways that comply with zoning and would produce tangible benefits to Applicant. The fact that Applicant chose not to pursue any of these options is illegitimate grounds for a hardship finding.

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."

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.[44] There is no nexus between the deficiencies cited in the application and at least three of the variances requested (i.e., those related to the luxury condominiums), which, as the Board has determined, bear no relationship to Applicant's religious and educational mission. The residential apartments do not have a functional relationship to the synagogue or its programs. It is also questionable whether services such as the Toddler Program relate directly to Applicant's mission and help justify the four proposed rear-yard variances. Even if the programs described by Applicant are legitimately related to its mission, there is no question that adequate space could be provided in an as-of-right building. An as-of-right building (either mixed-use or all-residential) would be economically feasible and yield a reasonable return.[45]

The "minimum variance" is, in fact, no variance.

Conclusion

In its conclusion, the previously cited Stroock brief points out that:

1) The New York State Court of Appeals has cautioned against piecemeal variances, such as the ones requested by Applicant, which ultimately alter the nature of the neighborhood and may cause "far greater hardships than that which a variance may alleviate." *Village Board of Fayetteville,* 53 N.Y.2d at 259-60; *quoting Matter of Otto v. Steinhilber*, 282 N.Y. 71-, 77-8 (1939).
2) Unjustified variances may destroy or diminish the value of nearby properties and adversely affect those who obtained residences in reliance upon the design of zoning ordinance. *Village of Fayetteville*, 53 N.Y.2d at 260.

As explained above, Applicant meets none of the five findings required for the granting of variances. Granting of these variances would have direct, negative impacts on *property values and quality of life* for property owners in neighboring buildings. Moreover, the granting of variances that are so demonstrably unjustified would have far-reaching, precedent-setting impacts that would, over time, dramatically change the character of this neighborhood and others throughout New York City.

By disapproving this application, the Board will send out a strong signal discouraging the abuse of the variance process (clearly a rising trend) by nonprofit institutions seeking special exemption from the laws that apply to all property owners in order to finance their religious and/or charitable missions.

[44] Morrison letter.
[45] Levine letter.