

Testimony of Bruce H. Simon

Board of Standards and Appeals

February 12, 2008

Re: Congregation Shearith Israel

BSA 74-07-BZ

I've lived on the Upper West Side for 48 years. I do not live within BSA's 400 feet target range -- it is probably more like 500 to 600 feet to West 67th Street. Therefore, my views are not affected. My windows are not blocked. Perhaps that gives me license to take a slightly broader view of what is before you.

My broader view was triggered by a talk a few months ago by the Chair at City Law, about the functioning of the BSA.

She reported, not surprisingly, that part of the Board's mission was to protect the zoning law from constitutional challenge.

We all have a stake in that.

Because zoning restricts individual property owners' unrestricted exploitation of the development potential of their property, in the exercise of government's police power to protect community interests. That is to say that private interest profit maximization yields to government restriction in the interests of the community as a whole. And that holds true whether the private property owner is profit or non-profit, secular or religious.

This Board, the Chair reminds us, is a "safety valve" -- a device to provide relief - - when justified -- from the automatic, mechanical application of the standard zoning rules to a particular situation, when circumstances warrant.

Put aside for the moment the devilish question of when "circumstances warrant," but let us just focus on the safety valve concept.

What it really means is that a “variance” -- an authorized departure from the norm -- is basically provided as a shield -- to protect an individually deserving applicant an exception from the general rule applicable to all.

But a variance is not a sword -- an aggressive exploitation of an intended safety valve to use as a mechanism to rewrite -- or by-pass -- the generally applicable rule for the advantage of a particular owner.

The issuance of a variance -- a departure from the standard rule otherwise applicable -- is not a frivolous act. Nor is it the grant of an indulgence for obeisance offered. Nor is it a token of friendship. And readers of the New York Times last week describing Rudin family political donations and friendships will not miss my meaning.

This Board must be rigorous in its examination of the bases proffered for issuance of these requested variances. The deference afforded to religious institutions in respect of their pursuit of their religious missions -- and the land use decisions that are made to accommodate institutional programmatic needs -- fit within our constitutional mandate not to interfere with freedom of religion.

But the other side of that constitutional coin must also be respected. The grant of variances to an applicant to build high-rise luxury apartments merely to monetize an air rights asset, and to substitute that monetization for the normal fund-raising a non-profit organization would undergo to erect a new building to house programmatic functions -- when that new programmatic space could be built as-of-right, without variances -- raises serious first amendment “establishment” issues.

In fulfillment of your mission to protect to zoning law from constitutional challenge, please proceed with that distinction in mind.