SUSAN NIAL, ESQUIRE
nial.s@att.net

2166 BROADWAY
NEW YORK, NEW YORK 10024
917-974-4525

1780 CHELWOOD CIRCLE
CHARLESTON, S.C. 29407
843-769-6103

March 23, 2008
The Honorable Meenakshi Srinivasan
Chair
NYC Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

Re: BSA 74-07-BZ
Congregation Shearith Israel
6-10 West 70th Street/99 Central Park West
Block 1122 Lots 36. 37 – Manhattan

To the Chair and Members of the Board of Standards and Review:

This letter brief is being submitted in opposition to the application of the Congregation Shearith Israel ("CSI") for variances which would allow CSI to build a non conforming luxury condominium project. While CSI has made arguments that it should be given great deference regarding its desire to build luxury condominiums because it seeks to use the profits from those condominium sales to fund its programs and the provision of space to house those programs, it is clear that the variances requested by CSI are occasioned not by its programmatic needs but by its decision to make a profit on the sale of the non conforming luxury condominium project. The residents in the surrounding area would be required to support those programs by a significant decrease in property values and severe adverse impact on their quality of life. While CSI is a religious institution, the law of New York is clear, "It is the proposed use of the land, not the religious nature of the organization, which must control". Yeshiva & Mesivta Toras Chaim v .Henry W. Rose, 136 A.D.2d 710, 711 (1988) citing to *Bright Horizon House v. Zoning Bd. of Appeals*, 121 Misc. 2d 703, 709.

Others will be providing detailed criticisms of the CSI filings as well as expert opinions to support the objections of residents and others regarding the proposed luxury condominium project and I commend those filings to the Board. This filing, however, focuses on the issue of whether a for- profit project by an applicant who happens to be a religious institution should be immune from zoning regulations because of that status.

Land Use by Religious Institutions is not immune from local control.

The classic view of land use regulations as applied to religious organizations in New York is set forth in Society for Ethical Culture v. Spatt, 68 A.D. 112 (NYAD 1979) (Appellate division First Department) affrd. Society for Ethical Culture in City of New

York v. Spatt, 51 NY 2d 449, 415 NE 2d 922 (1980) In this case, the Society for Ethical Culture ("The Society") was appealing the refusal of the lower court to overturn a landmark designation and allow for the demolition of the Society's building. In explaining its refusal to overturn the landmark designation, the Court discussed its view of the scope of the protection afforded to religious organizations in the context of land use regulation as follows:

> In support it [the Society] cites *Matter of Westchester Reform Temple v Brown* (22 NY2d 488), which held unconstitutional, as applied, a zoning statute which would have prohibited the construction of a synagogue with adjacent parking space. Although voiding the application of the statute the court noted (p 496) that "[r]eligious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers, but the power of the regulation has not been altogether obliterated." Unlike the congregation in *Westchester*, 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)
>
> At this time the Society has not been interfered within the exercise of its religion. If, at some point in the future, it decides to seek permission to replace the present Meeting House with a larger one designed to meet the needs which a clearly outmoded building could not provide, and is denied permission, then perhaps a claim of unjust taking or First Amendment impairment might lie. Of course, should the Society seek to replace the Meeting House to develop the property to its full economic potential, any claim of building obsolescence might be suspect. In the final analysis, **obsolescence should be measured by the Society's needs, not on the prospects for development of a valuable piece of property.** (emphasis added)
>
> The Society also contended that "the existence of the designation [Landmark] interferes with the free exercise of its religious activities; however, rather than argue its desire to modify the structure to accommodate these religious activities, the Society has suggested that it is improper to restrict its ability to develop the property to permit rental to **non-religious tenants**. For this reason the Society's reliance on our decision Matter of Westchester Reform Temple v. Brown, 22 N.Y.2d 488, 293 N.Y.S.2d 297, 239 N.E.2d 891, which dealt with restrictions actually impairing religious activities, is **clearly misplaced**. Although the Society is concededly entitled to First Amendment protection as a religious organization**, this does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters** (cf. Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15)." (emphasis added)[1]

[1] The Board's recent decision in the matter of The Merkaz Center Inc., 315-06-BZ issued in January of 2008 does not require that any special deference be given to the application of the CSI. In the cases upon which the Board relies in its opinion the variances for which the applications were made did not involve the

Profit does not Constitute a Programmatic Need Which will Support the Grant of a Variance.

While the Society case was decided some 27 years ago, its conclusions regarding the ability of a locality to regulate the secular and or profit making activities of a religious institution remain good law. Further, a reading of the current cases in New York, both in state and federal courts, would lead one to the conclusion that regulation of "religious" for profit projects is not obliterated. See for example, City of Albany v. Trinity Church, 14 Misc.3d 1205 (A), 2006 WL 3740345 (NY City Ct.) (Unpublished opinion) (Decided December 2006) (Individuals' religious beliefs do not excuse them from compliance with otherwise valid laws prohibiting conduct that a municipality is free to regulate. Zoning laws…are not specifically directed at defendant's religious practices but are valid, content neutral laws of general applicability adopted to promote.*)*

In fact, the BSA itself has taken the same position. In its decision 290-05-BZ issued in January of 2007, the BSA determined that a non conforming catering business was not religious exercise deserving of protection under RLUIPA. Regarding the argument that the religious organization seeking the variance needed the income the BSA opined:

> [the] second claimed programmatic need is that income from the Catering Establishment is purportedly used to support the School and that the School and Synagogue would close without this income. The board disagrees that this is the type of programmatic need that can be properly considered sufficient justification for the request 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.

In support of its opinion in 290-05-BZ, the BSA cites *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp2d 691 (ED Michigan 2004) *(*zoning regulations that imposed financial burdens on a church do not constitute substantial burdens under RLUIPA).

In previous hearings on the CSI application the BSA has recognized the for profit nature of the CSI luxury condominium project. In fact the applicant itself has admitted that the income from the luxury condominiums is a critical factor if not the controlling factor in the project. CSI's legitimate programmatic needs could be served within an as of right envelop without any problem; however, this project is about money not programmatic needs. As a result, CSI's programmatic claims in support of the variances that are required because of CSI's decision to build a for profit luxury condominium project are deserving of no special deference.

---

building of luxury condominiums that would be sold to the general public at market rates. As discussed in *Society, Westchester Reform Temple*, for example, dealt with a decision that **restricted actual religious activities** as opposed to the for profit ones contemplated in Society as well as the CSI application.

The BSA has consistently opined that generating a stream of income or revenue to support programs is no basis for granting a variance on programmatic grounds. If the church or synagogue cannot fund its programmatic needs in traditional ways through its parishioners, it has no right to expect the neighboring property owners to support them. Other catering decisions of the BSA are helpful in separating the legitimately programmatic from the profit making and rejecting arguments that seek to conflate the programmatic claims with the profit making components of the application in order to obtain a strategic advantage as a result of the applicant's status alone. [2]

---

[2] In its decision, 290-05-BZ, regarding the application of Yeshiva Imrei Chaim Viznitz for variances to allow the establishment of a commercial catering facility on the basis that the income was needed to support the continued maintenance and existence of the Yeshiva, the Board opined as follows:

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 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…

The arguments being made in the CSI application are very similar to those being made in the Yeshiva case. Allowing the "income generation/programmatic need" argument being made by CSI in support of the variances needed to build the luxury condominium project presents exactly the same type of danger about which the Board warned in Yeshiva above. The creation of this loop hole with regard to projects of this type would subvert the very intent of the Zoning Regulations and in particular the **290-05-BZ** contextual zoning that was instituted in the community to protect the health safety and welfare of the residents as well as their property values.

Applications rarely are completely coextensive, but the project for which variances were sought in the Hooper Street Project Application is very similar to the project for which variances are sought in the CSI application. In Hooper Street, 72-05-BZ, may no variances were approved until the market rate units were eliminated. The Board opined as follows:

"Whereas, the Board expressed concern about this proposal, noting 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;"….**

The BSA required the applicant revise the application cutting the number of class rooms and providing only one residence to be used by the rabbi of the Congregation and **only** the rabbi of the Congregation and that the rabbi's residence would be the only place in the project where sleeping and living accommodations would be provided. The Board highlighted its rejection of any expansion that did not qualify as a legitimate programmatic need by specifically requiring that **any** change of ownership would require approval by the Board and by requiring that this and the other limitations regarding sleeping and living accommodations be listed on the Certificate of Occupancy.

The Second Circuit would agree with the BSA in this regard. In Westchester Day School v. Village of Mamaroneck, 504 F3d 338, 347 (2nd Cir 2007), the Second Circuit stated:

> "Commenting at an earlier stage in this litigation on how to apply this standard, we expressed doubt as to whether RLUIPA immunized all conceivable improvements proposed by religious schools. That is to say, to get immunity from land use regulation, religious schools need to demonstrate more than that the proposed improvement would enhance the overall experience of its students. *Westchester Day Sch.*, 386 F.3d at 189. For example, if a religious school wishes to build a gymnasium to be used exclusively for sporting activities, that kind of expansion would not constitute religious exercise. Or, had the ZBA denied the Westchester Religious Institute's 1986 request for a special permit to construct a headmaster's residence on a portion of the property, such a denial would not have implicated religious exercise. Nor would the school's religious exercise have been burdened by the denial of a permit to build more office space. Accordingly, we suggested the district court consider whether the proposed facilities were for a religious purpose rather than simply whether the school was religiously-affiliated. *Id."*
>
> [And further], "we need not now demarcate the exact line at which a school expansion project comes to implicate RLUIPA. That line exists somewhere between this case, where every classroom being constructed will be used at some time for religious education, and a case like the building of a headmaster's residence, where religious education will not occur in the proposed expansion".

There is no evidence that any religious exercise will be carried on the in the proposed luxury condominium project. As a result, the luxury condominium project more like the "head master's house" in the Second Circuit's example but the luxury

condominium project has even gone beyond that line because the condominiums will be sold at **market rates to the general public.**

In this regard, there is ample evidence that if the CSI wanted to fulfill its legitimate programmatic needs within the "as of right" foot print it could do so within the "as of right" foot print. CSI has admitted that the non conforming luxury condominium project is being built to provide income to the CSI to build its expansion project which includes the luxury condominiums. The point here is that the cost of the project is significantly increased as a result of the cost of including the luxury condominium project which has no relation to the religious exercise of the Congregation. Further, if the Congregation wants to expand it has an "as of right" foot print to use, it owns the land and it has access to the traditional method of funding-- its parishioners. Refusal by the BSA to grant variances required by the inclusion of the luxury condominium project in this application would not with any programmatic expansion or place a substantial[3] or any burden on CSI's free exercise rights.

---

[3] The issue of substantial burden is one in which the applicant must bear the burden of establishing that the regulation sought to be applied to creates a substantial burden on the applicant's free exercise rights. In Westchester Day School, 504 F3d at 347, the Second Circuit discusses the two components of this analysis. The first is whether the limitation that is being applied is being applied to "religious exercise". As to religious exercise the Second Circuit opined that: Religious exercise under RLUIPA is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."§ 2000cc-5(7)(A). Further, using, building, or converting real property for religious exercise purposes is considered to be religious exercise under the statute. § 2000cc-5(7)(B). To remove any remaining doubt regarding how broadly Congress aimed to define religious exercise, RLUIPA goes on to state that the Act's aim of protecting religious exercise is to be construed broadly and "to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc-3(g). As discussed above, the court made it clear that upon remand from its earlier decision, the district court conducted the proper inquiry and it made careful factual findings that each room the school planned to build would be used at least in part for religious education and practice, finding that Gordon Hall and the other facilities renovated as part of the project, in whole and in all of their constituent parts, would be used for "religious education and practice." In light of these findings, amply supported in the record, the expansion project is a "building [and] conversion of real property for the purpose of religious exercise" and thus is religious exercise under § 2000cc-5(7)(B). Such is not the case with regard to the CSI application and the variances required by its luxury condominium project.

When discussing substantial burden, the second prong of this test, the Court made it clear that the burden analysis does not occur unless the religious exercise prong of this test is met. This simply is not the case here. Religious exercise is not implicated in this application as it is a for profit project. However, if CSI should attempt to recast its application at some latter date and request variances for an expansion which is driven by its programmatic needs, the test of substantial burden in West Chester Day School would not necessarily require approval of its request. In considering such a circumstance, the Second Circuit observed that: We recognize further that where the denial of an institution's application to build will have minimal impact on the institution's religious exercise, it does not constitute a substantial burden, even when the denial is definitive. There must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden on that religious exercise. Imagine, for example, a situation where a school could easily rearrange existing classrooms to meet its religious needs in the face of a rejected application to renovate. In such case, the denial would not substantially threaten the institution's religious exercise, and there would be no substantial burden, even though the school was refused the opportunity to expand its facilities. Id at 349.

The Second Circuit also considered the reality of land use dispute such as the one now before the board and observed that: "We are, of course, mindful that the Supreme Court's free exercise jurisprudence signals caution in using effect alone to determine substantial burden. *See generally* *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (observing that the "line

This trend continues in BSA ruling 194-003-BZ, the companion case to 290-05-BZ, in which variances were requested for a catering facility at B'Nos Menachem, a religious girls' school in Brooklyn. The board ruled in part that "…the applicant a religious school, originally attempted to argue that variance could be predicated on **the alleged programmatic need of the creation of a revenue stream for the school**; the BSA rejected this argument and instructed the applicant to approach the case as if it were a "for-profit applicant"… If the application before the BSA had been made by a for profit developer, it is not hard to imagine that the application would have received a very different response from the Board.

As to the right of a religious institution to ask others to support its programmatic needs, in 290-05-BZ the BSA stated:

> 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 (emphasis added)
>
> 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;

The language that stands out in the BSA ruling cited above deals with a scenario in

---

between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs ... cannot depend on measuring the *effects* of a governmental action on a religious objector's spiritual development" (emphasis added)). This is because an effect focused analysis may run up against the reality that "[t]he freedom asserted by [some may] bring them into collision with [the] rights asserted by" others and that "[i]t is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin." *Braunfeld v. Brown*, 366 U.S. 599, 604, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). Accordingly, the Supreme Court has held that generally applicable burdens, neutrally imposed, are not "substantial." *See Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 389-91, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990)" Id at 350. The opponents in this matter simply ask that the application and the variances requested therein of the CSI be analyzed and scrutinized in the same manner in which any other for profit project would be analyzed and that the BSA will ensure that the rights of the residents of the community whose property and quality of life will be adversely impacted will be given the protection that they have the right to expect from the city agency who is statutorily tasked with the obligation of enforcing the zoning resolution in a manner consistent with the law. Applebaum et al. v. Deutsch et al., 66 N.Y.2d 975, 489 N.E.2d 1275 (1985) (BSA and DOB are responsible for administering and enforcing the **zoning** resolution (New York City Charter §§ 643, 666[7]), and their interpretation must therefore be "given great weight and judicial deference, **so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute.** (*Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman*, 62 N.Y.2d 539, 545, 478 N.Y.S.2d 846, 467 N.E.2d 510.)"

which a religious institution is attempting to use its status as a religious institution to obtain a commercial advantage so that it can generate an income stream to support its religious programming that it is apparently **unable to support through traditional means.**[4] This is exactly what CSI is attempting to do with luxury condominium project. This is exactly the type of argument that is made by CSI. This argument in favor of a variance implicates establishment issues in that there is a transfer of wealth from non religious/secular entities or individuals like the neighbors of CSI who are forced to subsidize the "religious exercise" of CSI members.

It view of the above and the arguments and evidence provided in other filings by the opponents of the CSI variance application, it is respectfully requested that the BSA deny the CSI's application in its entirety.

Respectfully Submitted,[5]

Susan Nial

[4] The traditional means by which a church or other religious institution supports its capital and operational expenses are donations from its parishioners or members of its congregation. Whether or not CSI can obtain such donations is irrelevant to the issue of the grant of variances for the proposed luxury condominium project; however, in view of the fact that CSI has argued that it must support its programs by building a for profit non conforming luxury condominium project, it is neither improper nor unduly invasive for the Board or opponents of the application to point out that the applicant has significant avenues for donations from members who have substantial assets and who have shown a willingness to make such donations.

[5] This brief is being filed on behalf of the opponents of the CSI application on a *pro bono* basis. Counsel has no financial interest in the outcome of this matter.