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March 24, 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:

On April 1, 2008 Congregation Shearith Israel (CSI) through its land use counsel filed certain responses to opposition papers filed with the Board of Standards and Appeals (BSA or Board) on March 25, 2008.[1] The contents of the CSI's April 1st filing fail to even begin to candidly answer or resolve the deficiencies of CSI's application and subsequent filings. However, as inadequate as the filing may be, there is something even more telling about what CSI has chosen to ignore and not discuss. To review CSI's filings is to come away with the distinct impression that CSI believes that the function of the BSA is simply to accept any and all representations made by CSI without any critical analysis or scrutiny. The law does not support such a standardless and analysis free process. The BSA must subject the application made by CSI to the same level of critical analysis that it would apply to any other application. Further, it must still make the findings required by the Zoning Resolution and must enforce the zoning laws without bias or favor should it choose to grant any or all of the variances.

CSI comes before this Board demanding quite bluntly and without hesitation or equivocation, that this Board grant complete deference to each and everyone of its representations regarding its alleged programmatic need for a luxury condominium project of such a scope and size that it will undermine and destroy the character of the neighborhood in which it will rise. It makes this demand based on its status as a religious organization and ignores well settled New York state and federal law as well as the clear and unequivocal statements of this Board to the contrary. The law is quite clear that deference is not due when an application involves variances that grow out of a desire for profit rather than the needs of religious exercise. While an applicant can attempt, no matter how cynically, to mislead this Board as to the level of scrutiny that its application

[1] In an effort to avoid unnecessary repetition, this brief incorporates herein the arguments, opinions and factual disclosures and analyses contained in all the Opposition's filings and testimony.

should receive, this Board must be guided by the law. This requirement is not just a nicety but rather an absolute.

As has already been shown in previous filings by the opposition neither the law nor the facts relating to the application support the granting of any of the variances requested by CSI. However, in view of CSI's most recent filing it seems appropriate to highlight the critical legal standards that must be followed in this case and to allay any confusion about the way in which those standards should be applied.

The Board of Standards and Appeals must follow the governing statutes and deny each and every request for a variance.

While courts will give great deference to the decisions of agencies like the BSA, the law is clear that such deference will not be given if the agency fails to comply with the laws. In *Applebaum et al. v. Deutsch et al*., 66 N.Y.2d 975, 489 N.E.2d 1275 (1985) the Court held that 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."** Citing to *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.

The City Charter requires the BSA to "preserve coherent land use determinations and adherence to the zoning plan itself". See City Charter § 666 [6] In furtherance of that goal, the Zoning Resolution requires BSA to undertake a five-part analysis, and mandates that every one of the five criteria be satisfied, before a variance may be granted (ZR 72-21).[2] As a result, The Board has a statutory duty to make specific findings not as to the application as a whole but as to each and every **variance requested.** In the case of the CSI application that means that the BSA must make 7 separate sets of the five findings that must be made and substantiated for each of the variances requested by CSI.

For municipalities other than New York City, local authority to enact zoning ordinances such as the zoning resolution is derived from New York's Town Law. The standards pertinent to granting variances are presently codified in § 267-b. Most New York state case law dealing with zoning matters addresses local ordinances as measured against those general standards. General principles in those cases are applicable, however, to New York City, depending, of course on the specific words of the statutes being interpreted.

The Board's immediate task with regard to the CSI application is to enforce the **words and intent of the New York City Zoning Resolution.** The Zoning Resolution has the force of statute in New York City, and neither its terms nor its overall intent may lightly be cast aside by the BSA. Judicial review of a zoning board's determination,

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[2] Section 72-21 of the New York City Zoning Resolutions governs applications for variances, and as relevant, it provides:

> Where it is alleged that there are practical difficulties or unnecessary hardship, the [BSA] may grant a variance in the application of the provisions of this Resolution in the specific case, provided that as a condition to the grant of **every such** variance, the [BSA] shall make each and every one of five findings.

which is administrative rather than quasi-judicial, is governed by a standard of rationality, and evaluated on the basis whether it is arbitrary and capricious or, where there was an administrative hearing, whether it is supported by **substantial evidence** in the record (*Sasso v. Osgood*, 86 N.Y.2d 374, 633 N.Y.S.2d 259, 657 N.E.2d 254). Mere conclusory statements by the applicant regardless of its status are not evidence no matter how often they are made or how earnestly they are pressed. The variances sought by CSI will, if granted, have substantial ramifications and represent significant departures from zoning norms for the district. As a result, they require specific application of the statutory requirements and warrant particular scrutiny to assure compliance with the Board's well-articulated legislative mandate.

There is no dispute that in order to grant the variance, BSA must make, **and substantiate**, all of the following findings for each variance:

"[a] that 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 ... [which are] not due to circumstances created generally by the strict application of such provisions in ... [that lot's] neighborhood or district ... ;

"[b] that 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[3];

"[c] that the variance, if granted, will not alter the essential character of the neighborhood or district ...;

"[d] that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner ...;

"[e] that within the intent and purposes of this Resolution the variance, if granted, is the **minimum variance necessary** to afford relief...."

As to the threshold issue of "unique physical condition" found in Zoning Resolution § 72-21(a), the applicant for a variance **must demonstrate** the existence of "unique **physical** conditions." Some of the types of unique physical conditions that may fulfill this threshold finding are irregularity, narrowness or shallowness of lot size. Although

[3] CSI and its financial consultant Freeman-Frazier have provided an financial analysis to the Board that attempts to treat the luxury condominium project as a separate for profit component of the application. However, as has already been discussed by the Opposition the various economic analysis are fatally flawed for a variety of reasons including but not limited to the fact that many of the alleged losses to be suffered by CSI with regard to the various hypothetical schemes are directly attributable to the alleged programmatic difficulties that CSI faces and have nothing to do with an issue relevant to the analysis of a for profit residential luxury condominium project. The flaws in these many, varied, incomplete and confusing economic analyses make them insufficient to support any finding regarding "reasonable return".

an applicant may also assert “exceptional topographical or other physical conditions peculiar to and inherent in” the lot, in this case, CSI relies on the following to support its claim of “unique physical conditions”:

- the presence of a unique, non-complying, specialized building of significant cultural and religious importance occupying two thirds of the footprint of the zoning lot, the disturbance or alteration of which would undermine CSI’s religious mission;
- a development sit on the remaining one third of the zoning lot whose feasible development is hampered by the presence of a zoning district boundary and requirements to align its street wall and east elevation with the existing Synagogue building and
- dimension of the zoning lot that preclude the development of floor plans for community facility space required to meet CSI’s on site religions, education and cultural programmatic needs. These physical and regulatory constraints are unique to this zoning lot”... CIS Submission dated March 30, 2008 at page 20.

While this brief is not being offered to provide a line by line critique of CSI’s current filing, this critical look at CSI's arguments regarding the existence of a unique physical condition will also serve to illustrate the way in which CSI inappropriately interjects its status as a religious institution into every issue. Its first claim that the presence of "a unique, non-complying, specialized building of significant cultural and religious importance occupying two thirds of the footprint of the zoning lot, the disturbance or alteration of which would undermine CSI’s religious mission” is a perfect example of this strategy. First, this claim has absolutely nothing to do with a unique **physical** condition that is unique to the lot. CSI makes much of a claim that it needs to provide handicapped access to the Sanctuary, circulation and ADA compliance; however, it has been shown that these needs can be met in an as of right building. Indeed, the evidence is clear that all of these claims relate to the installation of a modern ADA compliant elevator that could be included in the current building. While such concerns are not unimportant to the members of the Congregation who need such access they do not rise to the level of a unique physical condition of the lot. It is understood why CSI would raise such issues in its application. It desires to play upon the sympathy of the BSA and its members and hopes that sympathy will persuade the BSA to ignore its legal obligations; however, the BSA should not be swayed by such cynical arguments. Further, as these access issues can be resolved with in the as of right envelop and, quite frankly, within the current building, a decision by the BSA to deny the requested variances will not disserve any of the members of the Congregation who need such access.

The second claim also has no basis in fact: "a development site on the remaining one third of the zoning lot whose feasible development is hampered by the presence of a zoning district boundary and requirements to align its street wall and east elevation with the existing Synagogue building". As with the first claim, this is not a unique physical condition. The existence of the zoning district boundary does not interfere with CSI’s ability to satisfy any of its alleged programmatic needs. Each and every one of the variances dealing with the upper floor-set backs, realigning of certain street walls or

other issues are related not to the alleged programmatic needs but to CSI's desire to build a non conforming condominium project. The concerns of the Landmark Preservation Commission and focus of its recommendations relating to alignment or other matters was the non conforming condominium project that CSI is committed to building.[4]

The issue of the alignment of the East Wall that is raised in this claim is both confusing and misleading as the East Wall in applicant's as-of-right buildings align and do not require variances.

The third basis claimed by CSI for "unique physical condition" finding is "dimensions of the zoning lot that preclude the development of floor plans for community facility space required to meet CSI's on site religious, educational and cultural programmatic needs. These physical and regulatory constraints are unique to this zoning lot". First, there is nothing about the regular 64 x 100 lot at issue that constitutes a unique physical condition. Second, the size of the lot and or its alleged irregularity does not relate at all to the upper floor variances. Finally there is no relationship and certainly no close nexus between the size of the lot or the upper floor variances and CSI programmatic needs.

None of these alleged unique characteristics constitute a "unique physical" conditions for the purposes of granting a variance. Unique physical conditions are may not be a condition created or a hardship imposed by zoning restrictions. A unique physical condition must be a physical characteristic of the lot itself. As a result based on CSI's own admissions, the BSA **cannot find** that there are unique physical conditions of the subject lots as required by the statutory requirements of the first finding.

As an additional point relating to finding (a) must also be emphasized. The applicants must further show that such alleged practical difficulties or the unnecessary hardship "are **not due** to circumstances created generally by the strict application of such provisions (i.e. use and area restrictions) in the neighborhood or district" where the site is located. This analysis is derived from the landmark ruling in *Otto v. Steinhilber*, 282 N.Y. 71, 76, 24 N.E.2d 851, that "the plight of the owner [must be] due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself." In other words, if the present lot sizes or configurations are not particularly unique when compared with other neighborhood lots, an applicant will be hard-pressed to demonstrate why the applicant deserves special treatment.

This latter consideration, that the condition impinging on permissible uses must also be unique in terms of general neighborhood conditions, has some resonance in this case. An applicant's plea of uniqueness necessarily requires a comparison between similarly situated lots in the neighborhood and the applicant's lot. *Douglaston Civic Association v. Klein, supra*, at 965, 435 N.Y.S.2d 705, 416 N.E.2d 1040. However, it must be emphasized that the touch stone of this finding is that the impediment **must be**

[4] Any issues relating to the appropriateness of granting variances for such a project or the existence of a programmatic need to support any application for variances relating to that proposed project were not in the purview of the LPC and were not considered by the LPC during its hearings. Contrary to the inference CSI would like the BSA to draw, CSI is well aware of the limitations of the scope of the LPC's opinions and the issues considered by the LPC.

physical and must be peculiar to the subject lot. Mere location in an historic district or being subject to the jurisdiction of the Landmark Preservation commission does not suffice. It has long been recognized that if the hardship reflects the unreasonableness of the ordinance itself or that it has become unreasonable in view of changed conditions, the remedy is to change the zoning law rather than to ask the zoning authority to circumvent it by issuing ad hoc variances (*Clark v. Board of Zoning Appeals of the Town of Hempstead,* 301 N.Y. 86, 91, 92 N.E.2d 903, *cert. denied* 340 U.S. 933, 71 S.Ct. 498, 95 L.Ed. 673). Legislative action is preferable to piecemeal exemptions that could ultimately defeat the purpose of the ordinance (*Otto v. Steinhilber*, *supra*, at 77, 24 N.E.2d 851).

Once the applicant has established the existence of a unique physical condition, something CSI has not done, § 72-21[a] requires that the BSA determine whether the established unique physical conditions create or result in the alleged "practical difficulties or unnecessary hardship," in order to justify departures from strict zoning limitations. In view of CSI's failure in any of its papers to carry its burden on the "unique physical condition" prong of the (a) finding, the Board need go no further in its analysis. The long and the short of it is that CSI **cannot carry its burden** to establish that there are any unique physical conditions related to the lot or lots at issue in its applications. As a result, it would be hard pressed to establish the second component of finding (a) that there was any hardship or practical difficulty **caused by an unproven unique physical condition.**

There is no basis upon which the Board can ignore its obligation to make a finding regarding each and every component of the required statutory findings regardless of how creative CSI attempts to be in conflating the statutory findings or to argue that its history or status a religious institution allows the BSA to simply skip or ignore this step. CSI has not borne its burden of proof on any of its variance requests.

No deference is due to any of the representations made by CSI is support of its requests for Variances.

CSI would like the BSA to ignore its statutory duty regarding the five findings and the components of those findings because of its status as a religious institution. In fact, the continued recitation of the history of CSI and its religious, cultural and social role in the history of New York and the Upper Westside would lead one to believe that it is this history alone which should lead the BSA to grant the variances now being sought. CSI has enjoyed from many exemptions from various burdens that other property owners must bear in the City of New York[5]; however, when it comes to the granting of the variances

now being sought the law provides no such exemption or immunity.

New York law makes it clear that it is the **use of the land not the status** of the applicant that must guide any decisions regarding the granting of variances. *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. ("It is the proposed use of the land, not the religious nature of the organization, which must control".) As a result, the level of scrutiny required in the case of the CSI application for the variances it requests does not include any deference to its status as a religious organization as the variances before the board are occasioned by the building of its luxury condominium project.

On the issue of deference to the claims and complaints hardship and impracticality of a religious institution, a review of the Boards decisions makes it clear that such deference has been granted to religious institutions **only when** the variances sough were required by programmatic needs that involved "religions exercise" . In this regard the opposition notes that the Board has recently begun including the following language in its orders:

> WHEREAS, specifically, as held in Westchester Reform Temple v. Brown, 22 NY2d 488 (1968), a religious institution's application is entitled to deference unless it can be shown to have an adverse effect upon the health, safety, or welfare of the community, and general concerns about traffic and disruption of the residential character of a neighborhood are insufficient grounds for the denial of an application; and…

The use of this language in orders relating to the granting of variances to religious institutions might lead some to believe that Westchester *Temple* opinion stands for the proposition that because of its **status as a religious institution** a religious institution's application for a variance or other exemption from the zoning laws cannot be subjected to

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[5] For example because of its status as a religious institution CSI has been exempted from paying property taxes on the very property it now wishes to develop. The following is an estimate of the taxes CSI would have paid or would have to pay if it did not enjoy this exemption.

Full real estate taxes if not exempted.

Fiscal Year	Assessed Value	Class 4 Tax Rate	Real Estate Taxes
2003/04	2,601,000	0.11431	297,320
2004/05	2,322,000	0.11558	268,377
2005/06	2,155,500	0.11306	243,701
2006/07	2,034,000	0.10997	223,679
2007/08	1,800,000	0.10059	181,062
2008/09	1,800,000	0.10059	181,062

any scrutiny and that it must be accepted as true. This is simply not the law. It is **not the status of the applicant** for the variance but the use to which the land will be put that is the critical threshold issue. A thorough reading of the *Westchester Temple* and subsequent cases discussing this ruling clearly shows that the sparse or terse reference quoted above **does not** adequately disclose the factual or legal context in which the court opined that it would grant such deference and thus, does not adequately convey the legal criteria for its application or scope.

To understand the important context of the *Westchester Temple* opinion there are two points that must be emphasized. First, in *Westchester Reform*, the Court made it very clear that it was concerned about arbitrary decisions by planning agencies that were discriminatory with regard to **religious uses** and excluded such uses from residential areas. *Westchester Reform Temple v. Brown*, 222 NY 2d 488, 496-97. All of the cases that discuss or reference the deference due to applications of religious institutions focus not on the status of those institutions but rather the constitutional protection due to such institutions when they seek to engage in "religious exercise". For example, the *Westchester Temple* Court stated:

> We have already held that facilities for **religious or educational uses** are, by their very nature, "clearly in furtherance of the public morals and general welfare" (*Matter of Diocese of Rochester v. Planning Bd.*, 1 N Y 2d 508, 526; see, also, *Matter of Community Synagogue v. Bates*, 1 N Y 2d 445; *Incorporated Vil. of Lloyd Harbor v. Town of Huntington*, 4 N Y 2d 182, 191.) *Westchester Temple* at 494.

In a later case discussing and explaining *Westchester Temple* the Court confirmed that "religious use" not the status as a religious institution is the key part of determining where or not the application deserves any particular deference, exemption or accommodation. Jewish Reconstructionist Synagogue of the North Shore, v. Roslyn Harbor, 38 N.Y.2d 283,288, 342 N.E.2d 534 (1975) (the issue is whether the ordinances " restrict **religious uses** without recognizing their special, protected status under the First Amendment.")

In *Society for Ethical Culture v. Spatt*, 68 A.D.2d 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)[6] the Appellate Division make it very clear what was at stake in *Westchester Temple* and distinguished the facts in *Westchester Temple*

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[6] In its December 27, 2007 filing CSI attempts to dismiss the teachings and guidance provided by the *Society* case. The principles discussed in the *Society* case regarding the ability of local governments to regulate the land use by religious entities are as applicable to this matter as to any case in which an applicant religious institution seeks to avoid land use regulations that may restrict its ability to develop its property for the purposes of generating income regardless of the use to which that income will be put.

In fact, the *Society* court describes the desire of the Society to develop its property as follows:

> As envisioned by the society, the property was, in effect, to be commercially used to generate funds for its charitable purposes. *Society* at 120.

In this case CSI has made it clear that the intent of its condominium project is to provide capital funds for the purpose of funding the programmatic expansion.

Further, in *Society* the court states: "Although any owner is free to develop his property, all property owners, commercial or charitable, are subject to valid governmental land use regulation, including regulation which may deprive the owner of the full exploitation value of his property." *Society* at 120. Far from being irrelevant to the CSI's application for variances to allow it to build its condominium project, this decision provides useful guidance to the BSA.

from a case in which the applicant is seeking to avoid land use regulations for the purpose of making money. The Court in Society said:

> Unlike the congregation in **Westchester [Temple],** 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 abridgement 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…. As envisioned by the society, the property was, in effect to be commercially used to generate funds for its charitable purpose. *Society* at 112, 120.

The *Society* court continues as follows:

> The society attacks the commission's "highest and best use" characterization of its plans for the property as missing the point of its charitable purposed and concomitant freedom to pursue those purpose in whatever way it deems fit. Any regulation which frustrates the charitable purpose of the organization and imposed hardship, the society argues, is unconstitutional. However one chooses to characterize the society's plans, it is settled law that "the fact that [an ordinance] deprives ... property of its most beneficial use does not render it unconstitutional" *(Goldblatt v Town of Hempstead*, 369 U.S. 590, 592, *supra)*, and, to our knowledge, there is no authority which excludes a charitable owner from the application of this rule. Of course, "[t]he economic impact of the regulation ... and the extent to which regulation has interfered with distinct investment-backed expectations are ... relevant considerations" in determining whether the regulation untowardly affects the anticipated use of the property. (*Penn Cent. Transp. Co. v New York City*, 438 U.S. 104, 124, *supra.)* For over 60 years the Meeting House has served the same function for the society for which it was constructed and there is no evidence that the property was ever purchased for investment purposes. *Society* at 121.

As admitted by CSI in its submissions, the condominium component of CSI's application is being built in order to generate income fund the programmatic expansion. As the case law and decisions of the Board make clear the need for income does not constitute the type of programmatic need that can be used to support the granting of any variances nor should the "charitable use" of the income from the development limit in any way the level of scrutiny that is applied to any claims regarding "reasonable return." In the context of the condominium project, CSI is due not greater deference than any secular for profit developer.

The most recent case on religious land use is Westchester *Day School v. Village of Mamaroneck*, 504 F3d 338, 347 (2nd Cir 2007). It is very clear from the language contained in *Westchester Day School* that the **threshold issue** that must be resolved before any deference will be granted is that of whether the regulation involved impinges on **religious exercise**. In *Westchester Day School*, 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.**

As a result based both on previous BSA decisions and the Second Circuit decision in Westchester there is absolutely **no basis in law or fact to grant CSI the type of deference** it is demanding with regard to its claims relating to the impossibility of fitting its alleged programmatic needs with in its as of right foot print as there is ample evidence that it could do so and there is ample evidence that the variances sought before this board are for a project whose goal is not religious exercise but rather profit.

As to the type of analysis that can or should be done with regard to the representations made in an application by a religious institution, the procedures followed in the cases discussing religious land use as well as those cases in which the BSA has granted a variance for a religious use are instructive. For example, in, in Hooper Street, 72-05-BZ, may appear to support CSI's request for a variance, 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;"….**

This type of analysis and limitation on expansion even when "religious exercise" is implicated show clearly in the case of the CSI application the BSA has the right and the obligation to evaluate the application to determine if there is a way in which an as of right footprint could fulfill the real programmatic needs of the congregation rather than the profit related needs that are the engine that is driving the project. It is not required to accept the representations of the applicant.

Further, the Zoning Resolution itself makes it clear that even if the applicant is able to carry its burden regarding each and every one of the findings as to each and every variance requested in its application the variances **should be the minimum required to grant relief.** In order to make an appropriate and non arbitrary finding regarding the

minimum variance consistent with the law, the BSA must probe and test the veracity, good faith and creativeness of the plans of the applicant so as not to turn its back its statutory responsibility of "administering and enforcing the zoning regulations". The opposition papers have shown that CSI has many options with in its as of right foot print to accommodate the changes it alleges are necessary to support its alleged programmatic needs as wells as some uses that clearly would not pass muster as "religious uses" under even the most expansive of definitions because they involve spaces that are rented to non members and or are available for services to non members for a fee.

A stream of Income to support programmatic needs cannot be used to support the granting of a variance.

While the CSI may argue that it requires the stream of income from it for profit luxury condominium project to fund its programmatic expansion, this Board and the courts have made it crystal clear such a claim is not the type of programmatic need that may support the granting of a variance. For example, 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
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> 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, were it to adopt Applicant's position and accept income-generation as a legitimate programmatic need sufficient to sustain a variance, then any religious institution could ask the Board for a commercial use variance in order to fund its schools, worship spaces, or other legitimate accessory uses**; and
>
> WHEREAS, again, none of the case law or prior Board determinations cited by Applicant stand for this proposition; and
>
> WHEREAS, the Board observes, in fact, that the East New York Avenue case is a repudiation of Applicant's unfounded contention; and
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> 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, 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 substantially the same as 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 contextual zoning that was instituted in the community to protect the health safety and welfare of the residents as well as their property values.

Opponents have made a careful study of the Board's prior rulings on variances for commercial expansion by a religious organization for the "alleged programmatic need of an income stream" and it is clear that no such variances have been granted on that basis and that the Board has rejected the "income as a programmatic need" argument.

The CSI's attempt to use the alleged "As of Right Sliver" building to convince the BSA that is should grant the variances it seeks should be rejected by the BSA.

CSI continues to raise the issue of the so called sliver building in its application and its financial analysis regarding "reasonable return". Arguing that it could generate even more income if it built this sliver building and that the BSA should consider its willingness to forego its construction as a sign of its good faith and evidence that it cannot obtain a reasonable return with its contemplated project is simply a transparent attempt to "up the ante" in the hopes both regulators and the opposition will recognize that it could be much worse. Both the Board and the applicant are well aware that the Landmark Preservation Commission would unlikely to approve such an outrageous structure and it is even questionable whether such a structure would ever actually be build even if approved.[7] As a result, this hypothetical sliver building is just that a hypothetical attempt to raise the anti *vis a vis* the value of the land underneath the proposed community center/luxury condominium project. The BSA should not accept this invitation to visit a counterfactual world created by the CSI in order to support its application for these far reaching and damaging variances.

Here too CSI has chosen to ignore the law. There simply is no constitutional requirement that a landowner always be allowed his property's most beneficial use. *Society* at 456 citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592, 82 S.Ct. 987, 988-989, 8 L.Ed.2d 130. CSI desires to make a number of modifications to its property. Substantial all of the variances involve modifications which it admits will be rented, used by non members of the Congregation and further and most importantly in terms of the

[7] Whether or not the sliver building is truly as of right is still a matter of dispute. The New York Administrative Code clearly states that "…no application shall be approved and no permit or amended permit for the construction of, reconstruction, alteration or demolition of any improvement located or to be located on a landmark site or in an historic district…shall be issued by the department of buildings, and no application shall be approved and no special permit or amended permit for such construction…shall be granted by the city planning commission or board of standards and appeals, until the commission [Landmark Preservation Commission shall have issued either a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed pursuant to the provision of this chapter as an authorization for such work" . New York Administrative Code Section 25-305 (3)(b). As a result if the LPC decided not to approve the sliver building the DOB would be unable to grant a permit and no construction would be permitted.

variances before the Board it intends to build a luxury condominium project that will be sold to the general public. While no case presents the exact same set of facts, the decision in *Society* and the Court's opinions regarding development for third party use is instructive and remains good law today. In that regard the Court opines: **"**The Society also contends that the existence of the designation 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 nonreligious 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) CSI's desire to develop luxury condominiums for sale to third parties for a profit is just such a secular activity that does not merit immunity from zoning or any type of land use regulation. CSI expects this immunity not because of the facts relating to its programmatic needs but rather because of its s status. There is simply no support for such immunity.

The zoning regulations from which CSI is seeking relief are generally applicable and neutrally imposed regulations application of which to the CSI application is not occasioned by its status as a religious institution or by any desire of the City or the BSA to discriminate against CSI or exclude it from the neighborhood or City but rather because of CSI's desire to develop its property in order to generate revenue at the expense of its neighbors. The Second Circuit in *West Chester Day* 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 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. (emphasis added)

CSI's application and its assertion that it deserves exemption from the application of the Zoning Resolution because of its status as a religious institution have created just such a collision. CSI seeks to build a luxury condominium project using as the

justification for the project that it needs the revenue to support its alleged programmatic expansion.[8] The grant of these variances would not only be inconsistent with the BSA's statutory obligations and the standards it is expected to apply when granting variances but it would also severely impact the rights of the residents and property owners who live in the area. As a result, it is clear that the generally imposed and neutrally applied zoning regulations should not be abrogated simply because CSI a religious instituton wants to engage in the very secular activity of building a luxury condominium project for profit.

Conclusion

The applications of religious institutions often raise issues of a political and or sympathetic nature; however, the law does not allow variances to be issued because the applicant is sympathetic, well connected politically or well resourced. The law requires that variances only be granted pursuant to the requirements set out in the Zoning Resolution. Based on the law and the facts, the BSA should refuse to grant any of the variances requested by CSI.

Respectfully submitted,

Susan Nial[9]

[8] In its Statement In Support of Certain Variances dated October 25, 2007 CSI states: "Finally, the addition of residential use [luxury condominiums] in the upper portion of the **building is consistent with CSI's need to raise enough capital funds to correct the programmatic deficiencies described through out this Application".Page 22.** This language also appeared in earlier filings by CSI. It must be emphasized that the need for capital to fund the alleged programmatic expansion CSI seeks is not the type of programmatic need that can or should be allowed by the BSA to support any of the variances needed to build the luxury condominium project. This Board has already made this very clear in its ruling 290-05-BZ, regarding the application of Yeshiva Imrei Chaim Viznitz discussed in detail supra wherein the Board stated in part: **"…were it [BSA] to adopt Applicant's position and accept income-generation as a legitimate programmatic need sufficient to sustain a variance, then any religious institution could ask the Board for a commercial use variance in order to fund its schools, worship spaces, or other legitimate accessory uses;…."** The Opposition agrees whole heartily with the Board's warning in 290-05-BZ that allowing such a claim to be used to support variances would "subvert the intent" of the Zoning Resolution. The surrounding property owners and residents should not be forced to subsidize this expansion. It is for the members of the congregation to do so, the traditional means and source for such funding.

[9] This letter brief is being submitted in support of the Opposition on a pro *bono* basis. Counsel has no financial interest in this matter.