BEFORE THE

NEW YORK CITY BOARD OF STANDARDS AND APPEALS

Case #74-07-BZ.

FURTHER STATEMENT IN OPPOSITION

TO CERTAIN VARIANCES

Affected Premises:
CONGREGATION SHEARITH ISRAEL
6-10 West 70th Street/99-100 Central Park West
Block 1122 Lots 36 & 37
Manhattan

June 10, 2008

Pro Se and Counsel for Peter Nizzam Kettaneh,
and Other Concerned Residents

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FURTHER STATEMENT IN OPPOSITION

> Our decisions, however, evince a fundamental desire to limit "the power of the board of zoning appeals to grant variances" .... As early as 1927, Cardozo[1] warned, in the course of an opinion annulling the grant of a variance, that "[there] has been confided to the Board a delicate jurisdiction and one easily abused * * * judicial review would be reduced to an empty form if the requirement were relaxed that in the return of the proceedings the hardship and its occasion must be exhibited fully and at large"
> *Village Bd. of Fayetteville v. Jarrold*, 53 N.Y.2d 254, 259 (N.Y. 1981)

A. Introduction

This statement s submitted in further opposition to the application for variances by the Applicant Congregation Shearith Israel in response to the Applicant's filings of May 13, 2008.[2] It is submitted on behalf of Peter Nizzam Kettaneh, the owner of a row house located on West 70th St. opposite the proposed project and the undersigned, a resident of West 70th Street, as well as other community residents opposing the variances.

Rather than repeat prior and concurrent statements and briefs, those are incorporated herein.

We show below that the bifurcated approach considering only the Two Floor Condominium in As-Of-Right Scheme A so as to determine whether the property will provide a reasonable return is not consistent with long standing case law, which requires consideration of the entire property.

B. Overview

Under New York law, the Applicant had no reasonable expectation that its property would not be rezoned in 1984 or subjected to landmark regulation in 1974 and 1990, and such rezoning or landmarking does not provide alone any rights to the Applicant.

> Under New York law, the source of plaintiffs' property rights, a landowner has no vested interest in the existing classification of his property. Shepard v. Skaneateles, 300 N.Y. 115, 89 N.E.2d 619 (1949). Indeed, a zoning ordinance which changes a particular district, if a rational and proper exercise of the police power, Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926), does not offend the Constitution as a "taking" of property; rather, it sets forth the "rules and understandings" which define the property interests of those affected by the ordinance - interests which, when so defined, would be entitled to constitutional protection.

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[1] Justice Benjamin Cardozo was a congregant of Applicant Congregation Shearith Israel.

[2] Applicant filed a 62 page Statement in Support (hereafter "Statement" or "May 2008 Statement", a 44 page Environmental Assessment Statement, and a 24 page letter from economic consultant, Freeman Frazier, and other materials. The within statement is responding to over 130 pages of submissions.

Ellentuck v. Klein, 570 F.2d 414, 429 (2d Cir. N.Y. 1978).

Thus, many of the claims of the Applicant as to issues such as unused air rights and FAR over the Synagogue and the unusable FAR over the R10A sliver are a challenge to longstanding land use legal and constitutional principles.

A "property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State." Orange Lake Assocs. v. Kirkpatrick, 21 F.3d 1214, 1225 (2d Cir. N.Y. 1994) *citing Lucas v. South Carolina Coastal Council*, 505 U.S. 798 (1992).

That the property owner is a religious organization does not immunize that owner from land use regulation.

> So long as the Church can continue to use its property in the way that it has been using it -- to house its charitable and religious activity -- there is no [**26] unconstitutional taking.

Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York, 914 F.2d 348, 357 (2d Cir. N.Y. 1990).

Despite the Applicant's not-so-subtle references to a "taking", there has been no taking here, neither by the 1984 rezoning limiting the height of a building to 75 feet in the R8B portion of its lot 37, nor in the 1974 designation of the Synagogue as landmark, nor the 1990 designation of the district as a historic district. As the Second Circuit stated in *St. Bartholomew's Church*, in describing the U.S. Supreme Court holding as to the challenge to the landmarking of Grand Central Station.

> The Supreme Court squarely rejected Penn Central's claim that the building restriction had unconstitutionally "taken" its property. Central to the Court's holding were the facts that the regulation did not interfere with the historical use of the property and that that use continued to be economically viable: The New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York, 914 F.2d 348, 356 (2d Cir. N.Y. 1990).

There is no interference whatsoever in Applicant's use of the property which, as Applicant stated at page 50 of its most recent May 2008 Statement in Support: "Both were purchased specifically for development of the Synagogue and Community House, respectively."

Moreover, no discriminatory zoning has taken place as to this Applicant. As stated in the *Penn Central* (Grand Central Station) case:

> It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or "reverse spot," zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. See 2 A. Rathkopf, The Law of Zoning and Planning 26-4, and n. 6 (4th ed. 1978). In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, n28 and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 132 (U.S. 1978), aff'g 42 N.Y. 2d 324 (1977).

Zoning laws are no less applicable, even where a religious institution is involved, especially where the zoning law is a neutral law of general applicability. The mid-block zoning law, which protects the scale to that of the row houses, is no doubt of general applicability, and, there can be no claim by the Applicant that it was or has been singled out. See *St. Bartholomew's Church* at 451 F. 3d at 651.

The Applicant can fully satisfy it religious programmatic needs within the zoning envelope of an as-of-right building. Applicant is also able to satisfy the purposes for which is purchased the Lot 37 property, which, in their own words in their own conclusion to their most recent May 2008 Statement in Support, "for development of the Synagogue and Community House, respectively."

The Applicant may, if it wishes, use the property solely to generate income. It may sell the property and earn a handsome return on the property is has productively used for over 50 years (such as the $500,000 a year rental income from the tenant school), it may develop a profitable all residential condominium building, or it may develop a building with income producing activities combined with its own programs on the lower floors, and still earn a handsome return from the sale or rental of the two upper floors. Applicant could also reconstruct, modify, or restore its facility as other individual property owners are currently undertaking of have done on the same West 70th Street block -including

facade replacement, new building stoops, gutting and rebuilding, and row house elevator installations.

But, what the Applicant wants is both - it asserts that is has the legal and constitutional right to use the property for its religious purposes,- the reason it acquired the property - and then set aside zoning to expand the buildable property so as to earn income to support it religious activities.

Finally, the test of reasonable return arises out of case law relating to constitutional issues of taking in land uses cases. The rules of ascertaining a reasonable return are based on general valuation practices as interpreted by the courts. The New York courts have for a hundred years applied the principles of "reasonable return" to land use cases. The zoning regulation merely incorporates this case law. The BSA is not free to create idiosyncratic interpretations of generally applicable economic principles, which serve either to favor or to disfavor one seeking a variance to avoid a taking.

C. The Proposed Project Presents No Complex Issues

This Applicant's zoning variance requests are simple and straightforward, and do not on their face satisfy the five findings. The Applicant has worked diligently to create complexity where none exists, and has prolonged a proceeding for 16 months due principally to the Applicant's refusal to be open and forthcoming.

The Applicant construction site, Lot 37, is a regularly shaped 64 x 100 foot lot with excellent subterranean conditions, at a prime location on West 70th Street just 100 feet from Central Park West. No physical conditions prevent construction of an ordinary as-of-right building. Were this site with perfect physical conditions be found by the BSA to have the requisite unique physical condition for a Zoning Resolution 72-21 (a) finding, then there would be no building site in New York City which would not automatically satisfy finding (a). It is beyond the authority of the BSA to so rewrite its enabling statute.

The building Applicant wishes to build has two components. The first component is a community facility with four floors and two basements; the second component is a two floor condominium to be located above the community facility.

Applicant seeks to construct atop the Community Facility a for-profit condominium of 5 floors rising to 105 feet. An as of right building would permit only two floors of condominiums atop the Community facility and would rise to 75 feet (hereafter the "Two Floor Condominium" or the "Two Floor AOR Condominium.")

The construction site, Lot 37, is part of a zoning site which includes on the adjacent Lot 36 an individual landmarked Synagogue and Parsonage. According to the Applicant, it has suffered an unconstitutional taking because Lot 36 contains "unutilized" bulk air rights/FAR which the Applicant oddly wishes to transfer to Lot 37, although not needed. Lot 37 is subject to height and setback limitations.

The height and setback, and not bulk/FAR rights, are the relevant zoning restrictions limiting Applicant on the construction site on Lot 36. In other words, the bulk rights could be transferred from Lot 36 to Lot 37, and Applicant still would require variances as to height and setbacks. So, the bulk argument are a red herring, and a transparent effort to claim a compensable taking in contravention of accepted land use law. We discuss below other red herrings that Applicant has used to make the complex out of the simple.

The applicant alleges that is needs a new building to meet religious programmatic needs and to resolve serious access and circulation issues - but, there is no dispute at all that all programmatic needs and all access issues can be met in the as-of-right envelope below 50 feet. For, this reason, there is no relationship whatsoever between the asserted circulation needs and the programmatic needs and the variances for the upper floors above 50 feet.

Thus, because the programmatic needs can be met without regard to the upper floor variances required for the condominiums, the fact that the Applicant is a religious non-profit is completely irrelevant as to the upper floor variances.

As to the lower floor setback variances which the Applicant claims are required to remedy alleged religious programmatic needs, the Applicant utterly fails to provide a convincing case that the rear setback variances are required, nor even to make the connection between any unique physical conditions that creates the alleged hardship relating to the rear setback variances. Thus, the Applicant variance request for the lower floors must fail as well.

The Applicant submits two lines of argument as to why is should receive a variance superseding the height and setback limitation.

1. **Because Zoning and Landmark Regulations have negatively impacted the Applicant, the Applicant argues that is should be able to exceed height and setback requirements.**

Applicant argues that it has unused air zoning rights over the Synagogue and Parsonage as a result of the application of landmark laws. Applicant argues that the 1985 rezoning was unfair in that it resulted in limiting the height of building on Lot 37 site, and that the combination of zoning and landmark laws are unfair in that it is difficult to utilize the air rights over the R10 sliver on Lot 37. Although articulated in turns of hardship, the Applicant argues that the bulk air rights should be transferred and that the height and setback limitations on lot 37 should be waived. The essence of the Applicant claim is that it is unfair in some way that lot 37 was rezoned in 1985 and the district and Synagogue landmarked so that it cannot build a tall building with condominiums on the site. This is the essence of the Applicant's argument - and it is tantamount to asking for compensation for the taking of its property rights as a result of the zoning and landmarking. The Applicant claims this is not its argument, for, it knows that such arguments have been soundly rejected in court case after court case. But, Applicant articulates no other argument for the air rights transfer and waiver of height and setback

restrictions. Applicant's argument, in sum, is that a property owner is entitled to compensation when zoning or landmarking negatively affects the owner's property. Put another way, Applicant argues that zoning and landmarking regulations should be set aside if the value of the property is negatively impacted. By so arguing, Applicant ask that over a century of U.S. and New York State land use and zoning law be set aside.

2. <u>Applicant Argues That It Should be Provided Zoning Variances to Construct Condominiums for the purpose of providing financial support for Religious Programmatic Needs.</u>

Applicant next argues that without the financial support from the condominiums, it cannot meet its programmatic needs. This Applicant's asserts that a religious non-profit should be provided waivers of the zoning laws for the sole purpose of providing financial support to that entity's religious programs (and, even without the showing of need.) Applicant has continuously made this argument - before the Landmarks Preservation Commission, Community Board 7, and the BSA. This is not a novel argument - but is an argument that has been soundly rejected by the courts over and over, and even by recent BSA decisions.[3] Even expansive readings of the Religious Land Use and Institutionalized Persons Act (RLUIPA) 42 U.S.C. § 2000cc et seq., do not support this argument. As the Second Circuit said in *Westchester Day School:*

> The legislative history of RLUIPA suggests that Congress's view of its provisions was less broad than that espoused by the district court. The Joint Statement of Senators Hatch and Kennedy introduced upon the Senate's consideration of RLUIPA, noted that, despite the broad definition of "religious exercise"
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> > as the "use, building, or conversion" of real property for religious exercise, not every activity carried out by a religious entity or individual constitutes "religious exercise." In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition or [sic] "religious exercise." For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a

[3] We will not reiterate the discussion of cases and BSA decisions made by other opponents. We do note that despite recent pronouncement by the BSA, the deference to be accorded religious organizations is not all encompassing, especially as to generally applicable land use regulations. Nor does "deference" mean that a religious organization's conclusory claims are accepted without questioning and without hard factual support. Variances based upon programmatic needs and providing preferential treatment must be supported by claims that are factually sound, and not upon plausibility only.

> substantial burden on "religious exercise."146 Cong. Rec. S7774-01, S7776 (July 27, 2000).

Westchester Day Sch. v. Village of Mamaroneck, 386 F.3d 183, 190 (2d Cir. N.Y. 2004)

Moreover, Applicant provides absolutely no evidence to support its claim of financial need; to the contrary, other evidence submitted by opponents and the Applicant suggests the absence of compelling financial need.

D. Request Relief Based on Landmark Status

The Applicant repeatedly invokes the landmark status of the Synagogue and location of the site in a historic district as a hardship which forms a basis for the variances, contending, essentially, that the Applicant should be compensated for the landmarking by be provided a zoning variance. As the case law cited above shows, a taking resulting from landmark status and the impact of landmark status are not a ground for providing compensation to the owner for the taking in the form f granting a variance. Yet, Applicant wishes these well accepted principles to be ignored. Applicant sprinkles its submissions with statements such as the following, but at the same time claims that Applicant is not claiming a taking based upon the landmark status:

- "The original proposed building submitted to LPC was reduced by 6 stories " necessitated due to the LPC's concerns that the height of the initial submission was not in keeping with the character of the Historic District." May 2008 Statement, p. 14
- "In returning to the LPC with the smaller New Building, CSI indicated its willingness to seek the variance requested in this Application." May 2008 Statement, p. 16.
- "By seeking relief from LPC, CSI" thereby exhaust{ed} its administrative remedies prior to the filing of this Application." May 2008 Statement, p. 16.
- "... combined with the interests of the LPC in providing a front elevation harmonious-with both the designated landmark and the historic district --render it impossible to provide any useful development" May 2008 Statement, p. 40.
- "... and has been limited by the LPC to the same height as 18 West 70th to its west." May 2008 Statement, p. 45.
- "Inasmuch as the zoning floor area being transferred was being taken from air space over the designated landmark, and because the proceeds of the development of the residential portion of the New Building (ten floors in the initial Application) were being directed to the continued restoration and maintenance of the landmarked Synagogue." May 2008 Statement, p. 15.
- "Zoning and landmarked restrictions now severely limit significant reconfiguration of the site." May 2008 Statement, p.6.
- "In every category the demand for these programmatically required elements is increased, and CSI considers it essential to provide these services without compromising the landmarked Synagogue building." May 2008 Statement, p. 53.

Having repeatedly invoked the landmark status as a basis for the variances, Applicant qualifies that "no claim is made herein for the granting of a variance based solely on the landmark status of the Synagogue or its location within a historic district." (May 2008 Statement, Page 5). Applicant does not state what basis it seeks a variance, other than landmark status and the 1985 rezoning.

Although Applicant states that the landmark status is not the sole basis for a variance, Applicant still asserts that the landmark status may be a factor in granting the hardship. There is no legal basis for this claim, to the contrary.

Quite clearly, the landmark status cannot be any factor at all in granting the variances. This was the holding in the seminal cases of Penn Central and Ethical Culture, and, Applicant seems to suggest that these cases are not correct and should be revisited. But, the BSA cannot do this. It must follow the law as articulated by the highest court in the land.

Applicant must establish a hardship based upon a unique physical condition and the strict application of the zoning law. It has not done so.

E. The Applicant has Employed a Number of Contrivances to Make the Variance Request Seem Complex

For over 15 months, Applicant has struggled to articulate a coherent and legally valid basis for its proposition that a variance should be granted for its income producing condominiums. What has resulted, however, is incoherence. With each successive submission, the argument degenerates. Applicant refuses to withdraw patently false claims, forcing opponents to repeatedly correct the same repeated falsehood. Thus, most seriously, though, are the numerous statements that are untrue or intended to mislead either the Board, or to pollute the record so as to mislead an Article 78 appeals court. These statements are either just plainly false, or are conclusory statements which are not only false, but which lack any supporting facts in the May 2008 Statement or elsewhere.

It would be most appreciated were the Board to question the Applicant on these palpably false statements and have them corrected in the record by clear statements or clear admissions by the Applicant in response to complete clear questions.

1. False and unsubstantiated statements made in latest May 2008 Statement:

(a) False Claim that New As-Of-Right Analyses Submitted

Applicant latest May 2008 Statement falsely claims that new As-Of-Right feasibility studies were provided, by falsely claiming that the Freeman/Frazier study had submitted two new as-of-right scenarios, AOR #1 and AOR #1. May Statement, pp. 43-44.. The Statement continues describing "two hypothetical as-of-right mixed-use building scenarios". It seems to be generally accepted in BSA proceedings, and in this proceeding as well, that AOR means "As-Of-Right."

The Board at the last hearing on April 15, 2008, asked for more clarification as to AOR schemes A and C previously submitted, and said that the AOR analysis was a threshold issue. But, in fact, the two scenarios submitted by Freeman/Frazier are not As-Of-Right scenarios. See Page 2 of the Freeman/Frazier's May 13, 2008 statement. Thus, the May Statement misleads on a threshold issue and, we believe that this is a deliberate and grave misrepresentation.

(b) False Claim that Congregation Attracts 500 Worshipers

In order to bolster its claim of growth and pressing need for expansion including expansion of the second small synagogue, Applicant falsely represents the actual number of attendees at its services. Page 20 of the May 2008 Statement falsely claims

> "The Main Synagogue is a highly formal 5,050 sf room seating 380 in pews on a main floor and an additional 320 in the balcony. Saturday services attract up to 500 worshippers."

As another opponent's submission will state, the claim that Applicant's Saturday services attract up to 500 worshipers is false and misleading. Observations show that the actual number of Saturday worshipers is closer to 50-75. Opponents previously have offered to the BSA videos of the entrance to the Applicant's facilities, for all services in January and February 2008, which also show that the number is closer to 50-75. Applicant makes this gross mischaracterization to deceive the Board into believing that growth of its Congregation has resulted in a pressing need for expansion. The quoted statement also indicates that the Main Synagogue has 380 seats for men and the 320 seats for women on the upper floor, providing seating for 700 attendees. It is apparent that Applicant's claim of a pressing need for expansion, including the extension for the small synagogue, is a gross exaggeration.

(c) False Claims as to LPC Approvals

In an effort to steamroll the BSA, Applicant continues with false statements as actions attributed to the LPC. On Page 4 of the latest May 2008 Statement, Applicant falsely states once again, ignoring the opposition of LPC Commissioner Gratz who opposed the penthouse and referred to the ample space being provided to Applicant, that

> "Landmarks Preservation Commission [which] has approved unanimously both the massing and the design of the New Building."

Then on page 52 of the May Statement, Applicant falsely states

> "the CSI zoning lot is the only zoning lot in which the LPC has approved a plan for approving (sic) internal circulation of a sacred site through features which can only be provided in an adjacent new building."

Not only would such a determination not been within the jurisdiction of the LPC, but, we would challenge Applicant to document this falsehood, which they continue to repeat. And, of course, to be accurate here, as noted below, the features in fact are provided by the As-Of-Right building. So, even assuming the accuracy of the statement, this could be read that the LPC concluded that these features could be provided by an as-of-right building.

Finally, there are repeated misleading statements which allege that that LPC has required the elimination of the front setback on West 70th Street to make the new building harmonious. But, even under this distorted reasoning, at no time did the LPC ever require or suggest that a setback in an as-of-right building would not harmonious, and, second, at not time did Applicant ever advise LPC that the elimination of front setbacks resulted in the blockage of apartment windows of 18 West 70th Street.

This fact is clear: Applicant did not and did not present an as-of-right scenario for approval to LPC, and, if it did, there is absolutely nothing to indicate that LPC would reject the same scaling that historically existed on the site when it was occupied by the historical row houses demolished by the Applicant.[4]

Given that LPC is requiring property owners up and down West 70th Street to restore, at very great expense, their row houses to their original state, it is doubted that LPC would object to restoring the row house scaling and bulk that once existed on Applicant's Lot 37. Accordingly, the opposition request the following findings:

> Whereas, the Applicant asserts that the LPC unanimously approved its project, but, the record shows that LPC Commissioner Gratz did not vote for the project, objected to the penthouse, and stated that the project "will still add generously to the already generous space that the synagogue enjoys", thereby suggesting ample space to accommodate Applicant's programmatic needs;
>
> Whereas, the Applicant suggests that the LPC has required the Applicant to provide setbacks on the upper floors, but there is no evidence in the record to show that LPC was presented with an as-of-right building which would not tower over the Sanctuary as did the building considered by the LPC and which therefore would present scaling issues to the LPC;
>
> Whereas, the Applicant suggest that LPC " approved a plan for approving (sic) internal circulation of a sacred site through features which can only be provided in an adjacent new building" without offering any substantiation for this statement, and, even if so approved by LPC, was not within the jurisdiction of the LPC.

[4] Nothing in the LPC record includes any suggestion that the proposed building would brick up the facing windows in 18 West 70th Street.

(d) Availability of Ground Floor

On page 37 of the May 2008 Statement, there are allegations that the ground floor is "entirely unavailable for educational purposes. This is not so, is a self-imposed restriction and is a purely conclusory statement devoid of factual substantiation. At no time has the Applicant acknowledged how little of the 6400 sq. ft. first floor is devoted to is pet programmatic need of access and circulation; unfortunately, the Board has not narrowed the issues as to this claim. The bald assertion as to the first floor raises the question of why the 5th and 6th floors are not available for educational purposes, or even why the caretaker's apartment cannot be moved to the 5th and 6th Floors

(e) Purpose of School Facilities

Applicant falsely claims that the primary purpose of the school facilities is for religious programmatic needs of the Congregation. All analysis of the use of the school building shows that: at present, the Applicant never fully utilizes more than a small portion of the existing classrooms. The same situation exists as for the proposed building - the building is being built to accommodate the classroom needs of the tenant, not the classroom needs of the Applicant. Nor is there any evidence to show that the classroom needs of the Applicant could not be met by classrooms on floors 5 and 6. It would be more accurate to state that the Applicant's proposed use is an accessory use of the Beit Rabban school rental facility, and not the reverse.

(f) Inability to Modify Existing Structure

At page 4, the May 2008 Statement asserts that there is a lack of feasible options to modify existing structures. This is not a true statement. The Applicant's architect admitted that the elevator, which creates all of the access issues, could be extended down to the basement floor. Thus, there is a feasible option to modify the elevator. Other individual owners of row houses on this block of West 70th Street have undertaken even more complex and more expensive modifications to their buildings, without obtaining variances.

(g) The Caretaker Must Live on 4th Floor

At page 27, the May 2008 Statement asserts that the caretaker must live only in the 4th floor of the new building, providing at best a barely plausible explanation. This statement has no factual basis - the true reason is that if the caretaker's apartment was not located on the fourth floor, there would be adequate classroom space on floors 2-4 without a need for rear-yard variances... Quite clearly, the Applicant has never attempted to provide a reason why the caretaker's unit cannot be on the 5th or 6th floors. Similarly, this apartment, containing two bedrooms, two baths with walk-in closet and utility room seems to be equivalent if not better than similar living facilities the Parsonage. Nor does the Applicant assert that the caretaker is required to remain at the facility 7 days a week, 24 hours a day, and so the arguments of security are unfounded. Bare plausibility inconsistent with

common sense and facts cannot be the basis of a preferential waiver for a religious non-profit.

(h) Requirements to Align Building

The falsely statement on page 33 asserts that "the presence of a zoning district boundary and requirements to align its streetwall and east elevation with the existing Synagogue building" will be discussed under the section discussing unique physical condition. No one is able to explain what the Applicant is trying to articulate and this is a completely untrue statement.

(i) Dimensions of Zoning Lot Preclude Development

The false statement on page 33 that "dimensions of the Zoning Lot that preclude the development of floorplans for community facility space required to meet CSI's on-site religious, educational and cultural programmatic needs" has no factual basis. This assertion is discussed under the section concerning unique physical condition.

2. Irrelevancies

Not only does the Applicant employ falsehoods to create confusion and complexity, but Applicant peppers its May 2008 Statement with irrelevancies and distractions, and in fact, the May 2008 Statement consists mostly of irrelevancies and distractions.

(a) Irrelevant Recitations of History

Twenty percent of the May 2008 Statement consists of recitations of the history of Congregation Shearith Israel. See pages 4, 5, 6, 8, 9, Part 9, 11, and 13. The history of the Applicant is irrelevant to any issues before the BSA.

(b) Irrelevant Discussion of Access and Accessibility

As discussed elsewhere herein, Applicant brings up the issue of access and accessibility on over 30 pages in the single May Statement, and this issue is wholly irrelevant to the variances requested herein. Yet, by this repetition, Applicant suggests that this is a relevant issue in the proceeding.

(c) Irrelevant Discussion of Unused Bulk/FAR

As discussed elsewhere, the entirety of Applicant multiple extended discussions of FAR and bulk and FAR transfers is wholly irrelevant to any variances - the variances requested by Applicant are not for FAR.

3. Incomplete Information

Applicant continued to refuse to provide the information needed to evaluate its proposals. Other opponents will provide further detail on this issue and missing information has been previously identified. So, the following are merely some examples of the missing information.

(a) Does not disclose fully impact on 18 West

The Applicant has continued with is fraudulent misrepresentation and omissions as to the impact of its building on 18 West 70th Street. Indeed, the latest Environment Statement is a regression to the same problems in the initial April 2007 submissions.

The drawing P-4A rev. provided May 13, 2008, does not properly mark the windows that will be blocked by the proposed building. Applicant does even bother to provide window impact drawings for the two alternative schemes discussed in the latest submission. There is no discussion of the impact on windows in the interior courtyard of 18 West.

There is no discussion in the May 13, 2008, Statement or Environmental Statement as to the blocking of windows, and, importantly, as to the possibility that the courtyards will still required sprinklering and screens in the 18 West windows. This is an absolute failure to comply with BSA requirements.

(b) No Schematics of New Proposed Alternatives

This is critical if there is to be any consideration of the proposed alternatives (columns 2 and 3 of Freeman/Fraser 5/13/2008). Omitted information includes floor area schedules, impact on 18 West windows, cross-sections, etc. Thus, the new proposed alternatives must be disregarded by the Board.

(c) Construction Estimates - Missing References and Pages

All Construction Cost Estimates, provided in all of Freeman/Frazier's submission have omitted pages 3-16, which would provide information as to assumptions, qualifications, definitions, etc. In addition, the Estimates never refer to the drawings for which the estimates are being provided, does not define what is mean by the term "School' (Is it the Community House including the banquet hall?). For example, notes to the Scheme A As-Of-Right building may explain why the construction estimates allocated all costs of the roof to the condominium, when all such costs should be allocated to the school. The notes might also explain other questionable allocations.

F. BSA Should Impose Consequences for Applicant's Failure to Provide Material Information Needed To Make Findings

Applicant continues to refuse to provide the information requested repeatedly by Commissioners or required under BSA's rules and policies.

For example, the 72-21(e) finding requires a determination that a variance granted is the minimum variance. This requires that comparables information be provided for existing, as-of-right, and proposed scenarios. But, Applicant has not done this. In such a situation, the proper course for the BSA is to find that the minimum variance is no variance.

Despite requests by the BSA, the CSI has systematically failed to include comparable information for the current and as of right scenarios. Applicant has failed to provide current as as-of right analysis programmatic needs, shadow studies, and economic analysis. These analyses should be provided in the exact same format as provided by

Applicant for the proposed schemes. Without comparative information, opponents, for example, are deprived of the due process right to show that as of right scenario is the minimum variance required.

This is not the first proceeding at which BSA commissioners have requested information from Applicant's feasibility consultant, Freeman Frazier, but Freeman Frazier did not provide the information. Freeman Frazier was asked for, but refused to supply, additional information requested by commissioners in *160 Imlay Street Real Estate LLC*, No. 256-02-BZ, (BSA December 23, 2003) (*appealed, sub nom*, *Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Stds. & Appeals, infra.*). Unfortunately, in that proceeding, the BSA imposed no adverse consequences for non-cooperation upon that applicant or upon Freeman/Frazier. As Judge Yvonne Lewis of Supreme Court New York County stated:

> [I]it is clear that providing an analysis for a single permissible use group was woefully inadequate in this case. Indeed, during the course of the public hearings, the BSA itself recognized this fact and specifically directed Imlay to provide economic analysis for other permissible use groups. FN4
>
> > FN4 Commissioner Caliendo, who voted in favor of the variance, told Imlay's representative during the public hearings: "There is a whole host of uses that are permitted in a . . .that we don't see on paper which I don't know if you guys analyze. It needs to be done. It needs to be documented.
>
> However, Imlay never provided such additional analysis. Instead, Imlay merely submitted two letters by Freeman/Frazier & Associates containing conclusory statements to the effect that other permissible uses, such as a retail store, hotel, or office building would not yield a reasonable return. As noted above, such conclusory statements are not sufficient under ZR § 72-21 (b). In short, these claims need to be supported by economic evidence in the form of a dollars and cents analysis.

Matter of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Stds. & Appeals, 12 Misc. 3d 1165A (Sup. Ct. Kings County 2006, *rev'd*, 49 A.D.3d 749 (2nd Dept. 2008) (The attorney for the community group has advised me that an appeal is being taken to the Court of Appeals.)

In *120 Imlay/Red Hook*, ultimately the BSA failed it responsibilities and excused Freeman from not providing the information requested; but the story does not end here. After first insisting that Freeman/Frazier provide further information, Commissioner Caliendo voted for this variance, without receiving the information he had earlier demanded from Freeman/Frazier. One Commissioner in that proceeding did oppose the variance, the Chair Chin. Chair Chin was removed from the BSA Board by Mayor Bloomberg a few weeks after opposing the variance. As Supreme Court Judge Yvonne Lewis stated:

> The Coalition maintains that, after hearing these comments, Imlay hired a lobbyist, met with a Deputy Mayor, and made a $ 100,000 donation to a project supported by the Deputy Mayor. According to the Coalition, after this meeting, two of the three Commissioners who were opposed to granting the variance changed their positions and the third Commissioner (Chairman Chin), was removed from his position as Chairman of the BSA shortly after he voted against issuing the variance.

Id.

After the free pass provided by the BSA to Freeman/Frazier in *120 Imlay/Red Hook*, does Freeman Frazier and Applicant now believe that they can so easily flaunt the requests of the Board? We do note that all of the Commissioners in the Red Hook case have now been replaced. We hope that the BSA does not perpetuate the problems in *120 Imlay/Red Hook*, problems that reputedly were a factor in the replacement of prior Board members.[5]

The remedy for the adamant and persistent refusal of an applicant to provide information requested and needed to evaluate each of the five findings is not to submit to the bullying of the applicant, but to disallow the variance: *Sakrel, Ltd. v. Roth*, 176 A.D.2d 732, 737 (N.Y. App. Div. 2d Dep't 1991) ("Finally, turning to the claim that the denial of the petitioner's variance application constitutes a confiscatory taking of its property, the failure of the petitioner to divulge its purchase price is fatal (see, *Matter of Kransteuber v Scheyer*, A.D. 2d [decided herewith]). Although it cannot erect a house on its land, the petitioner's adamant and persisting refusal to divulge the amount of its original investment precludes us from determining whether or not all but a bare residue of the economic value of the land has been destroyed.").

We regret to observe that the BSA, by providing unlimited opportunities to the Applicant to provide requested material information, is sanctioning dysfunction in BSA proceedings, and a return to the *120 Imaly/Red Hook* era.

G. Assertion of Access and Circulation Problems Are Irrelevant Because An As-Of-Right Building Remedies Asserted Problems

In an effort to either waste time, create complexity where none exists, or attempt to deceive the Board or a later court reviewing this matter, Applicant has peppered its submissions with references to circulation and disabled access to the sanctuary and lower

[5] The circumstances of *120 Imlay/Red Hook* demonstrate why the methodology of the BSA proceedings results in such prolix submissions. by opponents, who may not placed reliance upon ad hoc vague statements made by commissioners during hearings as proof in a later Article 78 proceeding.

floor of the sanctuary. Because the as-of-right and proposed building resolve these issues in identical manner, the issue is moot, irrelevant, and, indeed, is contemptuous.

The argument seems to be that because there is an existing hardship, principally access by the infirm and disabled to the basement floor, a hardship that is resolvable by modification of the existing elevator, the Applicant should receive a variance to build the condominiums above that allowed as-of-right. The applicant does not connect this hardship to any unique physical condition (a), there is no connection shown between the hardship and the variances requested (a), and there is no showing that an as-of-right building does not represent the minimum variance required (e).

Ordinary people would assume that an issue that is repeated so many times in the primary statement supporting a variance application would bear some relationship to the variances requested. After all, the essence of a variance application is that the applicant is claiming a hardship, and that the variances are required to remedy the hardship.

Since April, 2007, when this application was filed, opponents have demonstrated repeatedly, backed up by analysis of the drawings, detailed exhibits, and fact based expert testimony, that all access and accessibility issues are addressed in an identical manner by the as-of-right and proposed schemes. The Applicant has never in any way attempted to controvert the opponent's substantial proof that, for example, the as of right building resolve access issues.[6]

Applicant refers to this irrelevant issue over 30 times in its latest May 2008 Statement in Support, as it has in the prior versions of its Statement in Support. The result is unnecessarily long responses from the opponents, extra paper, and longer proceedings.

When the BSA slams opponents with the 3 minute timer, claiming that there is not sufficient time for opponents, it might consider the possibility of shortening and expediting the proceedings by using standard adjudicatory techniques to narrow the issues, and eliminate argument as to irrelevant assertions.[7]

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[6] So, why does the Applicant persist with its irrelevant assertions? Primarily, because the BSA allows them to do so The BSA Board does not engage in questioning of the witnesses of Applicant's in such a way as to create a clear record of the facts - here the clear fact that the as of right and proposed buildings resolve access issues identically. One result, is that 15 months and thousands of pages into this proceeding, the BSA has utterly failed to narrow the issues, which it quite clearly could accomplish if it so wished. So, rather than the BSA board engaging in a few minutes of careful questioning of the Applicant and its consultants (and not only the Applicant's conclusory attorney) designed to elicit clear admissions, we have again the same irrelevant, and indeed false statements polluting the record and creating complexity out of nothing. Unlike most administrative adjudicatory proceedings, the BSA does not allow opponents to cross-examine of the applicant's for relief.

[7] As to these repetitious access and circulation statements, Applicant's claims are not provided under oath.. It is worth noting that should Applicant initiate a RULIPA proceeding in the U.S. District Court for the Southern District of New York, for, there, its statements will be under oath, the Applicant and its consultants will be deposed, the Applicant's will be cross-examined, again under oath, and all statements made by the Applicant and the consultants in this proceedings will be available to impeach the credibility,

As to the asserted claims of access and circulation, the Opposition respectfully requests that the Board make the following findings:

> Whereas, Applicant has asserted that its existing buildings create and present practical difficulties or unnecessary hardship as to the access, circulation, and accessibility to and within the Applicant's Sanctuary and other facilities;
>
> Whereas, the Applicant has presented drawings of an as-of-right building, in addition to the drawings for the proposed building;
>
> Whereas, a comparison of the as-of-right drawings to the proposed drawings show that the elevators, access, lobby, entryways, and all other physical aspects relating to access, circulation, and accessibility, are identical in the as-of-right as compared to the proposed buildings;
>
> Whereas, notwithstanding the claim of the Applicant, less than half of the first floor of the as-of-right and proposed building are required to resolve the access, circulation, and accessibility;
>
> Whereas, because an as-of-right building resolves all access and circulation hardships asserted by Applicant, these hardships do not result from complying strictly with the zoning resolution;
>
> Whereas, accordingly, the minimum variance required to resolve the access, circulation and accessibility difficulties presented by Applicant as required under finding (e) is no variance, since no variances are required on the lower or upper floors to resolve these difficulties;

Regretfully, however, because of procedural infirmities and inadequacies as to which Applicant has abused to its advantage, we must once again rebut the irrelevant, and we hope the Board will bear with us. This following list are instances of references to this irrelevancy as found in the May 13, 2008 Statement in Support.

REFERENCES TO ACCESS AND CIRCULATION IN MAY 2008 STATEMENT

Page	"Excerpt from Statement in Support of May 13, 2008" **Opposition Comment**
3	"The Synagogue has severe circulation limitations which interfere with its religious programming." **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**

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of testimony. Then, there will be the opportunity for motions to strike, request for admissions, and motions for sanctions. And, finally most federal judges would not be at all amused by Applicant's antics..

Page	"Excerpt from Statement in Support of May 13, 2008" **Opposition Comment**
3	"[N]ew horizontal and vertical □circulation systems for the Synagogue to eliminate systemic shortfalls in its construction …" **This is untrue to the extent, for the Applicant does not propose any changes in the internal circulation of the Sanctuary.**
4	"… limit barrier-free access to its sanctuaries and ancillary facilities …" **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
4	"… the lack of any feasible options to modify the existing structures consistent with the Zoning Resolution that will address these severe programmatic difficulties …" **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.** **Not true - the existing elevator could be modified to extend to the lower level.**
9	"… monumental entrance is anything but monumental as once it is entered, without vestibule or foyer, it is reduced to small interior doors …" **No relevancy of this statement to anything in this application.** **The proposed building does not alleviate the entrance situation.** **The proposed building had a lobby in the same place as the existing lobby.** **Both the proposed and existing buildings provide access from the lobby to the sanctuary via an elevator.**
10	"… altar and narrow passages to circumnavigate it." **Same as above.**
10	"This access was only moderately improved by the construction of the □Community House in 1954, which provided additional doors but only through indirect means □and in any event did nothing to alleviate the need for the stairs." **This is untrue - there is direct access.** **Resolved identically by the as-of-right and proposed building.**
10	"CSI can no longer ignore the programmatic impacts caused by this inability to enter the Synagogue and move around it in a proper manner." **CSI has chosen to ignore handicapped and disabled access for 54 years by not extending the elevator.** **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
10	"Access to its sanctuaries and their ancillary facilities are not barrier-free." **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
11	"… new contiguous building designed with circulation systems that can be appended to Synagogue ..." **There is no factual predicate or explanation of the "circulation system."** **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
18	"In order to provide for the appropriate connections between the Synagogue and the New Building …" **The existing, as-of-right and proposed buildings have essentially identical connections.** **Resolved identically by the as-of-right and proposed building.**
19	"Synagogue Accessibility." **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**

Page	"Excerpt from Statement in Support of May 13, 2008" **Opposition Comment**
20	"Handicapped congregants, and those who are ill and/or elderly are either entirely unable to attend these services and related functions, or must be physically carried down stairs from either sanctuary in order to attend religious functions in the cellar-level Levy Auditorium." **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
20	"… difficulties associated with lack of access to these facilities transcended mere inconvenience for many of the congregants, especially the older ones for whom the activities in the Synagogues and the associated rooms are the staple of their social interaction ..." **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
20	"… of having to be carried between these religious rooms, in many cases serves as an impediment to attendance at all ..." **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
21	"At CSI, most of these continuing rituals of faith can only occur in the sub-grade Levy Auditorium (2,726 sf), which shares all of the accessibility hardships attributed in the preceding paragraph to the Synagogues." **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
21	"Under existing physical conditions, many who would like to attend Kiddush are unable to descend the existing stairs that link the two sanctuaries to the Levy Auditorium." **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
22	"It will be easily and fully accessible from the sidewalk on in." **There is the same access from the sidewalk in the existing building.** **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
22	"… compromised by the limitations in the Levy Auditorium (in addition to the accessibility limitations discussed elsewhere …" **Resolvable by extending current elevator to lower level.** **Resolved identically by the as-of-right and proposed building.**
24	"Programmatic and accessibility issues that face current and future students are resolved in the New Building: (1) all classrooms are accessible by elevator and/or stairs …" **Untrue statement: Current classrooms on floors 2-4 are served by elevators and stairs.** **Addressed identically by the as-of-right and proposed building.**
29	"Both the programmatic and accessibility issues that now face these very young children are resolved in the New Building: (1) the second floor toddler classes would be accessible by elevator (or stairs) …" **Untrue statement: Current classrooms on floors 2-4 are served by elevators and stairs.** **Addressed identically by the as-of-right and proposed building.**
31	"For all of the reasons set forth above, CSI can no longer meet its religious, educational and cultural programmatic needs without significantly modifying the access and egress for the sanctuaries." **Resolved identically by the as-of-right and proposed building.**

Page	"Excerpt from Statement in Support of May 13, 2008" **Opposition Comment**
32	"As stated, there are hardships getting into the buildings and once inside there just as severe hardships associated with conducting CSI's religious, pastoral, educational and cultural missions" **Resolved identically by the as-of-right and proposed building.** **Severe access issues resolvable by extending current elevator to lower level.**
35	"This alone creates practical difficulties in this case; as it is essential that the New Building's massing accommodate its role in providing circulation space." **Untrue - resolution of alleged difficulties unrelated to building massing.** **Resolved identically by the as-of-right and proposed building."**
36	"… to remedy the improvement of the circulation space within the Synagogue and the replacement of the dysfunctional Community House …" **Resolved identically by the as-of-right and proposed building.** **Severe access issues resolvable by extending current elevator to lower level.**
37	"[T]he Synagogue's continued use as a house of worship can no longer be compromised by accessibility issues which can only be addressed by "taking" the full footprint on the New Building's first floor." **This is completely untrue - all access issues are addressed within a small portion of the first floor.** **The residential lobby, synagogue extension, offices etc on first floor unrelated.** **Resolved identically by the as-of-right and proposed building.**
43	"… provide the necessary circulation space and to …" **Resolved identically by the as-of-right and proposed building.**
44	"[I]ncluding the need to address the Synagogue's circulation problem " **Resolved identically by the as-of-right and proposed building.**
50	"The incorporation in the New Building of a system of circulation designed to provide improved and barrier-free access to the sanctuaries in the Synagogue …" **Resolved identically by the as-of-right and proposed building.**
52	"[T]the CSI zoning lot is the only zoning lot in which the LPC has approved a plan for approving internal circulation of a sacred site through features which can only be provided in an adjacent new building …" **This is a complete lie. LPC has no internal jurisdiction, never ruled on this, and the claim is unsupported by the facts.** **Resolved identically by the as-of-right and proposed building.**

H. Religious Programmatic Needs Are Unrelated To The Upper Floor Condominium Height And Setback Variances.

As to the issues of programmatic needs for the school facilities, that subject has consumed disproportionate attention in this proceeding.

A danger exists, when discussing school programmatic needs, of conflating the upper floor variances relating to the income producing condominiums with the lower floor variances relating to the school facilities.

Even accepting the truth and validity of every single conclusory assertion of the Applicant on the issue of programmatic need, the fact remains that the programmatic need hardship is completely unrelated to the upper floor variances.

Thus the Opposition respectfully requests the following findings be made by the BSA:

Whereas, the Applicant has asserted that it requires a new Community House on Lot 37 so as to meet its religious mission and to satisfy programmatic needs relating to that mission, including construction of a new and enlarged school facility, expansion of its small synagogue, and a lobby to serve the sanctuary;

Whereas, review of the plans submitted by the Applicant show that the Community House facilities will be located entirely on the fourth floor and below and may be built without the need for the upper floor variances which affect only floors above the fourth floor;

Whereas, there is no connection between the asserted programmatic needs and the upper floor variances;

Whereas, the Applicant has not shown the existence of any "practical difficulties or unnecessary hardships" related to the upper floor variances and no finding may be made under 77-21 (a);

I. Applicant Has Offered No Legally Cognizable Basis for the Upper Floor Variances.

This section can be mercifully brief. Once the distractions of accessibility and programmatic need are properly disregarded, the Applicant cannot offer any cognizable basis for the upper floor variances.

As to the upper floor variances, Applicant has no basis to claim special privilege because it is a religious institution, since, the as-of-right zoning in no way infringes upon the right to the free exercise of religion.

J. Applicant's Unsubstantiated Assertions that Lower Floor Variances Are Required to Satisfy the Programmatic Needs of Applicant.

Even with the incomplete presentations provided by the Applicant as to its programmatic needs for the Community House, it is apparent that no variances in the form of rear yard setback waivers are required in order to satisfy the programmatic needs of the Applicant. The Applicant is not entitled to unquestioned deference to its claims that only certain space can be used in certain ways to satisfy needs that do not even exist and are conjecture as to the future. Unsupported plausible assertions are not sufficient.

What is most troubling is that the Applicant has decided, on it own and without questioning by the BSA Board, that all of its classroom and education needs must be met only within two and a half floors of the proposed building or as-of right building.

The Applicant responds, if at all, with sweeping conclusory statements in response to challenges of its real needs. For reasons never explained by the Board, the record is quite clear that Board does not inquire, and the Opposition is rendered mute as to asking questions of the Applicant as to clearly relevant issues that have been carefully and specifically articulated by the opposition.

- The Applicant has not explained at all why the fifth and sixth floors of an as-of-right building cannot be used for classrooms (nor has any Commissioner asked for an explanation, remarkably.)
- The Applicant has not adequately explained why it needs a separate elevator bank to serve condominiums on the fifth and sixth floors, if the entire as-of-right building were used to fulfill the asserted programmatic needs.
- The Applicant has not explained adequately why the caretaker's apartment must be located only on the fourth floor, rather than on the fifth and sixth floor or in the Parsonage.
- The Applicant has not explained why it is allocating a luxury apartment with two bedrooms, two full baths, walk-in closet, washer-drier room, and large living room for its caretaker.
- The Applicant has no explained, if its usage is primary, and the Beit Rabban usage is secondary, why by every metric, Beit Rabban uses far more space and has far more student hour usage of the facility than the Applicant.
- The Applicant has not explained why, if the proposed building was designed to meet specific needs for a toddler program, which is open to members and non-members, why this program was only ever mentioned nine months after the Application was file, only after opponents challenged the rationale for the lower floor variances.
- The Applicant has not explained why only the floors 2-4 can be used for adult and older teenage educational program, when the facility will have available large assembly areas, some subdividable, such as the 6400 square foot banquet hall, the Elias Room, the Levy Auditorium, and the small synagogue "expansion" space.
- The Applicant has not explained why the non-member non-denominational day care center aka "Toddler Program" is a religious programmatic need of the Applicant justifying a variance, when the evidence also shows that the controlling tenant for the classroom space is the Beit Rabban School which will be paying $1.2 million a year to the Applicant as rent in the new building.

As the U.S. Court of Appeals observed in the *St. Bartholomew* case,

> "Fatal, however, to the Church's claim is the absence of any showing that the space deficiency in the Community House cannot be remedied by a reconfiguration or expansion that is consistent with the purposes of the Landmarks Law. … While expanding the amount of available space in the Community House may not provide ideal facilities for the Church's expanded programs, n8 it does offer a means of continuing those programs in the existing building."

Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York, 914 F.2d 348, 358 (2d Cir. N.Y. 1990), *cert. denied*, 499 U.S. 905 (1991).

As LPC Commissioner Gratz observed, the proposed building adds generously to the already generous space enjoyed by the Congregation.

K. Applicant has Failed to Establish Religious Programmatic Need for the Lower Floor Variances

This discussion applies only to the lower floor variance request, since the upper floor variances are unrelated to any programmatic need.

From 2002 and in the course of this proceeding, Applicant morphed the programmatic need claims for the Second Floor. Initially, Applicant slated the Second Floor for office use. Then, it redesignated the Second Floor as classroom space for the Beit Rabban, which is a tenant school currently providing $500,000 of rental income to the Applicant, and is projected to provide $1,200,000 a year. When the opposition claimed this was merely a commercial rental operation to an independent school, Applicant came up with a new story.

One part of the story was weaved to make it sound like Beit Rabban was in some way a Shearith Israel program with "shared goals."

To the contrary, Beit Rabban is an independent non-denominational Jewish School - the school operates completely independently of the Applicant. The Beit Rabban's web site does not even mention Congregation Shearith Israel. Nor does the Congregation's web site mention Beit Rabban. Beit Rabban is in the progressive Jewish tradition whereas the Applicant follows Orthodox traditions including separate prayer areas for men and women. Beit Rabban is at the opposite end of Jewish orientation. It describes itself as follows:

> Beit Rabban is a day school that weaves together exemplary and creative practices of academic and Jewish education. The school's diverse learning community brings together families from across the Jewish denominational spectrum. The school is committed to intellectual openness regarding the diversity of belief and practice found within Judaism. In an environment that is progressive in orientation, yet serious about engaging children in the Jewish textual tradition, students learn in an open spirit, and in a way that fosters a love of learning.

Thus, Beit Rabban is basically a private school like many others in the city, but within the progressive Jewish tradition. http://www.beitrabban.org. So, merely because the Applicant rents its facilities to a private school within the progressive Jewish student does not make Beit Rabban a program of the Applicant.

The new part of Applicant's post-application revisionist story is that the second floor was only for the "Toddler" program. The Applicant's description of the Toddler program sounds more like a day care center. It currently operates for four hours a week. It is open to members and non-members. The Applicant charges $1300 a year for one hour/one day a week for members and more for none members. Applicant's submission claims that there are 20 toddlers enrolled, but carefully never states that there are 20 Toddlers present at any one time. Indeed, given the description of the program, it conceivably it could have 5 Toddlers at a time.

Apparently, there is insufficient interest or demand for Synagogue member use, so it is open to the general public. The Toddler Programs as states on the Applicant's web site is "For ages 16 months-33 months" and "Caregiver attendance required. In order to concoct a religious programmatic need, the Applicant decided that it had an urgent religious programmatic need to expand the program to 60 Toddlers, 10 hours a day, and decided that all Toddler facilities must be on the Second Floor. If Applicant only had an urgent need to provide facilities for 40 simultaneous Toddlers, then under Applicant's reasoning no variance would be required for the second floor.

Now, Applicant has been unable to keep its story straight as to its own program and Beit Rabban. Beit Rabban, which apparently would be paying $1.2 million a year for space in the proposed new building, presumably will set up its classrooms for the purpose of its own program for young children over 33 months. And, we are being asked to believe that the Applicant, which is unable to run its own day school, is now going to run a program of 60 toddlers on the second floor and share space with the same number of older children on the same floor in a school paying $1.2 million a year in rent. The Toddler Program, open as it is to non-Jews and non-members, sounds more like a day care center.

Anyway, even if credible, we submit that the so-called Toddler Program is not part of the religious mission of the Applicant. Although such an extensive 'Toddler Program" might be an accessory use to a Synagogue use under the use regulations of the zoning code (see, e.g. *Unitarian Universalist Church of Central Nassau v. Shorten*, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup. Ct. Nassau Co. 1970)), that does not necessarily mean that it is a religious mission use requiring waiver of the zoning regulations.

Under RLUIPA as interpreted in the Second Circuit, there would be no need for deference for this type of a Toddler Program:

> Moreover, as the legislative history of RLUIPA recognizes, "not every activity carried out by a religious entity or individual constitutes 'religious exercise.' In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions." 146 Cong. Rec. S7774-01 (July 27, 2000).

Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 390-391 (E.D.N.Y. 2005).

It is hard to conceive that reducing the number of toddler's from 60 to 40 by not allowing a set-back waiver would in some way be a substantial burden on the free exercise of religion by the Congregation and a violation of RLUIPA, certainly within the Second Circuit. The Applicant may have a Toddler Program, but just not a Toddler Program for 60 toddlers with all toddlers only on the second floors, which far exceeds the number of Toddlers who a children of members of the Applicant today. It is not even clear demographically if the Applicant could generate so-many toddlers who are children of its membership located close enough to the Applicant's locations to fill up the program with its own member toddlers and who desire the program. To extend beyond its own membership would mean that the Applicant is running another commercial day care center.

L. There Are No Unique Physical Conditions Which Result in Any Hardship That Would Not Be Addressed by An As-Of-Right Building

The Applicant is unable to satisfy any of the three tests set out in 77-21 (a):

> The unique condition that exists must be a physical condition.
>
> The condition must result in practical difficulties or unnecessary hardship/
>
> The unnecessary hardship must result from the strict application of the zoning resolution.

As will be seen, the Applicant alleges all kind of uniqueness, conditions, hardships, difficulties and other problems, but, one thing is clear - the strict application of the height and setback zoning law are not the cause of any of the difficulties and hardships alleged by the Applicant. Zoning Resolution 72-21(a) states;

> (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; 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;
>
> (a) The unique condition must be physical.

Applicant has been asked on multiple occasions by the Board and by CB7 to provide case law to support its novel propositions. As to the meaning of "unique physical condition", there are countless court cases which state that the condition must be physical.

As part of its effort to distract and confuse, Applicant peppers its May Statement with references to allegations of all types of unique situations and conditions, none of which are unique physical conditions. For example:

- unique attributes at page 7
- unique environment at page 8
- unique role at page 18
- unique non-complying building at page 33
- regulatory constraints are unique at page 33
- zoning lot's unique conditions at page 37
- unique aspect at page 40
- singular and unique condition at page 41 (twice)
- singular and unique condition at page 42 (twice)
- unique and substantially distinct zoning lot at page 52

- unique an substantially distinct 52

None of these references to "unique" have anything whatsoever to do with the "unique physical condition" required for the (a) finding. This is all a part of the disingenuous effort by Applicant to create complexity out of nothing.

Court cases have consistently determined that the condition must be physical as well as unique. In a decision rejecting the BSA finding of unique physical condition, a court found:

> The BSA so found, premising its conclusion on the narrowness and depth of the subject lot, ignoring the undisputed evidence on the record that the two adjoining lots are identical in size and that such narrow lots are characteristic of the neighborhood. Indeed there was no evidence before the BSA that this lot was unique in its dimensions or in any other physical characteristic. In making its finding that there was a lack of substantial evidence to support this BSA [**934] finding, the Board of Estimate properly concluded: "There are no unique physical conditions peculiar to and inherent in the subject zoning lot compared to the lots in the neighborhood, resulting in practical difficulties or unnecessary hardship".

Galin v. Board of Estimate, 72 A.D.2d 114, 116 (N.Y. App. Div. 1st Dep't 1980), *aff'd*, 52 N.Y.2d 869, 870 (N.Y. 1981),

Another case reversing a BSA finding of unique physical condition is *Matter of Vomero.* There the owner asserted:

> GAC claims in its answer that the existing one-family house located on the property suffered from an adverse location and the effects of economic obsolescence such that it would never be capable of producing a sufficient cash flow. GAC also claims that the irregular shape of the lot reduces its development potential, and that the commercial character of the surrounding areas constitute a unique circumstance precluding viable residential development. In addition, GAC claims that its land use study shows that there are only two other corner lots within 30 linear blocks of the subject property that retain a residential character, thereby demonstrating it's claim that the likelihood of producing a reasonable return from residential development is negligible.
>
> * * *
>
> Similarly, the Court finds that so much of the BSA's determination as is predicated upon the supposed "uniqueness" of the lot finds no support in the proceedings before it. The lot itself is of a substantial size (approximately 5800 sq. ft) which, according to the land use map submitted by GAC, is approximately the same size as the other residential lots situated in the subject area, i.e., on the southeast side of Hylan Boulevard between Otis Avenue and Bryant Avenue.

> Pertinently, each of these others parcels is encumbered with a conforming use of the land. Thus, there is no proof that the size of the property was ever an issue making it unsuitable for residential development. In this context, while the limited potential for on-site parking may render the lot unsuitable for use as a medical office or a multiple dwelling, there are other permissible uses not so affected. The fact that such usage may not provide GAC with the rate of return which it expected is not a permissible basis for granting of a use variance (see infra).

Matter of Vomero v. City of New York, 13 Misc. 3d 1214A, 824 N.Y.S.2d 759 (N.Y. Sup. Ct. 2006)

In *Douglaston Civic Asso. v. Klein,* 51 N.Y.2d 963, 965 (N.Y. 1980), however a swampy nature of the property was found to be a physical condition. No such physical condition exists here. There is no irregular shape of the property as discussed in *Kingsley v. Bennett*, 185 A.D.2d 814, 816 (N.Y. App. Div. 2d Dep't 1992) finding that the irregular shape was not unique. In *Kallas v. Board of Estimate*, 90 A.D.2d 774, 774-775 (N.Y. App. Div. 2d Dep't 1982), *aff'd*, 58 N.Y.2d 1030, 1032 (N.Y. 1983), the physical condition found not to be unique was "the subject lot is not as deep as some of the lots in the area, does not itself support a finding of uniqueness", overruling a BSA determination finding unique physical condition. *See also Albert v. Board of Estimate*, 101 A.D.2d 836, 837 (N.Y. App. Div. 2d Dep't 1984) (the peculiar wedge shape of the subject lot constitutes a unique physical condition militating in favor of the grant of a variance."). *SoHo Alliance v. New York City Bd. of Stds. & Appeals*, 95 N.Y.2d 437, 441 (N.Y. 2000) (were L-shaped, measuring only approximately 25 feet deep in place). *Matter of Vomero v. City of New York*, 13 Misc. 3d 1214A, 824 N.Y.S.2d 759 (N.Y. Sup. Ct. 2006) ("the mere fact that the subject parcel is narrow is insufficient to establish that it is unique under the governing Zoning Resolution (see, New York City Zoning Resolution § 72-71[a];").

The Applicant construction site is a completely regular 64 x 100 rectangle with an excellent foundation permitting construction of two basements. The Zoning Site as well is a perfect rectangle with no known physical condition. All the conditions referred to by Applicant are regulatory conditions: i.e., zoning and landmarks regulations.

(b) The physical condition must result in "practical difficulties or unnecessary hardships."

A unique physical condition standing alone does not satisfy the (a) finding for an applicant must also show that the particular unique physical condition results in "practical difficulties or unnecessary hardships."

For example, the Court of Appeals in the Fayetteville case was careful to note that merely having a sloped property did not in and of itself created the hardship:

> On the present record, therefore, it must be concluded that the facts adduced at the hearing did not justify the grant of a use variance. The conclusory testimony of the witnesses, unsupported and unsupplemented by underlying concrete facts in dollars and cents form, provides no basis for the board or the courts to evaluate whether the property at issue is being subjected to unnecessary hardship. Indeed, even the dissenting opinion points to no fact on the record that demonstrates the inability of the landowner to realize a reasonable return. While the dissenting opinion notes that the parcel is sloped and will require special preparation for residential development, it does not and cannot specify the extra cost of the preparation, the potential value of a house on the site, the cost of the property and other such information. Without this proof, it is simply impossible to say, other than by pure speculation, whether residential development will or will not yield a reasonable return.

Village Bd. of Fayetteville v. Jarrold, 53 N.Y.2d 254, 260 (N.Y. 1981)

(c) Then, the hardship must be caused by the strict application of the zoning resolution

Even if a site possesses a unique condition, the unique condition must bear a relation to the variance being requested. In other words, the hardship must result from the strict application of the zoning resolution. That would mean that even if a unique physical condition caused a difficulty such as access, the access difficulty must be caused by the strict application of the zoning resolution. In this situation, an As-of Right building is one that will strictly comply with the zoning resolution. So, if an as of right building resolves the access issues, then the hypothetical condition would not be a condition satisfying the (a) finding.

2. Examining the unique physical conditions claimed by Applicant

The first challenge is ascertain what Applicant asserts are the unique physical conditions which result in a hardship created by strict application of the zoning resolution.. On page 4 of the latest May 2008 Statement, Mr. Friedman advises us that:

> Freeman Frazier concluded that due to existing physical conditions on the Zoning Lot, including the need to address the synagogue's circulation problems and the need to replace and enlarge the functions in the Community House, there is no reasonable possibility that a financially feasible mixed-use building could be developed in strict conformity with the Zoning Resolution

So, one would assume that Freeman/Frazier's latest submission would explain the "existing physical conditions." So, we then reviewed Mr. Freeman's latest statement at page 4 where he states:

> MVS states in point three that, "The Freeman/Frazier reports do not specify any unique physical conditions, and confuse "site" conditions with "physical" conditions... "
> We note that the unique conditions are consistent with those identified in the Facts and Findings.

Mr. Freeman says that Mr. Friedman has described the physical conditions and Mr. Friedman says that Mr. Freeman has described the physical conditions.

Applicant's May 2008 Statement and Findings has a separate section at n page 33-34 which is devoted to the (a) finding. It claims as follows:

> The unique physical conditions peculiar to and inherent in CSI's Zoning Lot include:
>
> (1) the presence of a unique, noncomplying, 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;
>
> (2) 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 streetwall and east elevation with the existing Synagogue building; and
>
> (3) dimensions of the Zoning Lot that preclude the development of floorplans 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.

In this important section, and 14 months after the filing of the application and after multiple hearings, it is expected that Applicant would be able to articulate its claims of a unique physical condition, and indeed to provide a complete list of the "unique physical conditions" and not have to suggest there are others.[8]

Next, after listing the unique "physical" conditions, the May 2008 Statement acknowledges that the list includes both "physical and regulatory" constraints. These three "conditions" will now be discussed individually.

[8] Applicant, notably, does not claim here that the alleged obsoleteness of the building is a "unique physical condition" under finding (a) - probably because it would been unable to demonstrate that this alleged that condition created a hardship resulting from the strict application of the zoning law." As hardships from alleged obsoleteness is cured by the as-of-right building.

(a) (1) the presence of a unique, noncomplying, 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;

We assume that the unique physical condition #1 relates to the Applicant claim that in order to provide access and circulation for the Synagogue, the Applicant needs an elevator and lobby in the new building, similar to the elevator in the existing building. But this is not clear, and Applicant does not specify any specific physical condition.

If so, then this condition fails to satisfy finding (a) since the hardship resulting is not created by the strict application of the zoning regulations. The strict application would permit Applicant to resolve these issues in an as of right building. Thus, even accepting the hypothesis that condition #1 is a physical condition resulting in a hardship, condition #1 fails to meet the requirements of the (a) finding..

Condition #1 fails because it has been demonstrated that no hardships arise in connection with complying strictly with the zoning law. In other words, all of the access and circulation issues are resolved identically in the as-of-right as compared to the proposed buildings. Thus, condition #1 does not satisfy the (a) finding.

Also, the strict application of the zoning regulations does not prohibit Applicant from modifying and modernizing the existing lobby and elevator. Nothing prevents Applicant from constructing a highly profitable condominium building on the site, carving out only the small area needed for an elevator, access corridors, and a lobby.

(b) (2) 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 streetwall and east elevation with the existing Synagogue building; and

First, it is hard to ascertain any physical condition. With all due respect to Applicant and its counsel, this claim is unintelligible. Applicant devotes page 32-42 attempting to explain these three so-called conditions. Nowhere in that discussion do we find, after diligent inquiry, any explanation of this language. It is hard to understand how aligning the street wall and east elevation with the Sanctuary creates any type of hardship or even what Applicant is trying to say.

The reference to the zoning district boundary is odd, in that this would suggest that the Applicant is arguing that the rezoning of its property resulted in an unconstitutional taking. Yet, this, still is not a physical condition.

Finally, there is no explanation as to how strict application of the upper floor height and setback requirements in any way create a hardship as a result of condition #2. As to the lower floor variance, it is difficult to understand how the split lot has anything to do with the rear lot extension for the school classrooms.

Further, Freeman/Frazier provides no specific discussion as to the financial hardship created by the alleged condition, and how and why it would apply to any specific variance.

> (c) (3) dimensions of the Zoning Lot that preclude the development of floorplans for community facility space required to meet CSI's on-site religious, educational and cultural programmatic needs.

In physical condition #3, Applicant discusses the dimensions of the Zoning Lot rather than the development site referred to in condition #2. Second, the dimensions of both the Zoning Lot and the Development Site are highly regular, so this is an unsupportable assertion. Third, clearly condition #3 bears no relationship to the upper floor variances. So, condition #3 would only bear relevance to the lower floor variances, but, the problem there is that as discussed below, this is not a unique physical condition.

M. The Feasibility Study - the (b) finding.

This section is only relevant if the Applicant has satisfied the conditions of 72-21 by showing a unique physical condition and that as a result of such unique physical condition, practical difficulties or unnecessary hardship arise in complying with the zoning regulations. Having not satisfied finding (a), and since all of Applicant's alleged programmatic needs would be satisfied by an as-of-right building so that neither an (a) nor and (e) finding could be made, there would be no need to then address finding (b).

Notably, Freeman Frazier's and the Applicant's attempts to show hardships blur the fundamental difference between the upper and lower floor variances. They conflate these variances and do not even identify the conditions and how they relate specifically to any specific condition.

1. There is no Taking because Development of the Entire Site as an As-Of-Right Scheme Provides A Reasonable Return to the Owner

As a preliminary issue, Applicant could exercise its right to commercially develop the entirety of Lot 37 for condominiums and other commercial spaces. Hence, the Board asked for an all residential as-of-right analysis, which is described as AOR Scheme C/FAR 4 Scheme. The last analysis by Applicant of this Scheme C was in the December 21, 2007 filing, and is shown as column 4 in the Freeman/Frazier analysis. This analysis suffers from several fatal defects including the following:

- The return is computed based upon return on total project cost, rather than return on equity.
- The analysis ignores the reasonable return to the owner resulting from the return on the original acquisition cost by the owner - and, in the analysis the return to the owner would result from the "sale" of the development rights for $14,816,00 to the Applicant as well as the use of the property during its ownership which would include rentals ($500,000 a year from Beit Rabban) and use.

- The use factor for this analysis is 62% as opposed to the normal 85% to 90%. Since the $500 per sq. ft comparable value assumes ordinary use factors, the $500 should have been adjusted downward.
- Scheme C does not fully develop the property. It does not develop the 6400 sq ft. sub-basement which would have commercial value for a number of permitted uses.

Other submissions by opponent consultants and individuals demonstrate other defects in the analysis, and show that the property indeed would provide a reasonable return to an owner. Indeed, only an imperfect valuation process would have yielded a negative return - either overvaluation of the land or excessive construction and other costs.

2. For a Religious Entity, There is no Taking Since the Applicant Can Meet it Programmatic Needs Within an As-Of-Right Development

Zoning Resolution 72-21(b) does not require a showing that a reasonable return cannot be earned if the owner is a non-profit entity. For a religious entity, apparently a showing that programmatic needs cannot be met in an as-of-right structure was intended to substitute for this finding to show hardship that rises to the constitutional level that would result in a taking. The Applicant here argues for a unique proposition - although it is able to meet its programmatic needs within the lower floors of an as-of-right structure, it argues that should be able to earn a reasonable return on just a small portion of the property that it does not wish to use for programmatic need. This distorts the constitutional taking principles that underlying the concept of evaluating the reasonable return, and that is whether the government has deprived the owner of the use of its property. The Applicant thus argues for a bifurcated approach which has no support in land use law.

3. Zoning Law Provides No Authority for A Bifurcated Feasibility Study of Only a Portion of the Property

Analysis of a reasonable return to the owner is intended to avoid an unconstitutional taking of property resulting from the arbitrary application of zoning laws. The issue presented is whether the zoning regime imposes a burden on owner by making it not possible to earn a reasonable return from the property. If the owner can profitably use his property under the strict application of the zoning laws, then the fact that the owner intends to reserve part of the site for non-income purposes, and is unable to earn a reasonable return on the remaining portion is not a taking.

The Applicant suggests that even if it is shown that a reasonable return can be obtained by developing the entire development site, which is the Scheme C analysis, that it can demonstrate financial hardship if it cannot obtain a reasonable return from two floors of air rights consisting of the 5th and 6th buildings of an AOR building. This is the scheme described as AOR-Scheme A, and the resulting development is referred herein as the "Two Floor Condominium" or the "Two Floor AOR Condominium".

This is not the proper standard. First, 72-21 (b) refers to development of the "zoning lot" and does not speak of earning a return from just a portion of the zoning lot. Second, case law provides that reasonable return it to be analyzed based upon the total property.

The problem presented is that an owner can easily pull out a part of its property that is not economic, and claim that based upon its non-profitability, it needs a variance to create a profitable development. For example, in this project, Applicant could have decided that it needed 70 feet of space for seven 10 foot floors of a Community House. But, zoning allows 75 feet of height, so the owner could claim the 5 foot slice available was uneconomic and request a variance for several more floor so that the development would be "economic."

This approach of analyzing only a portion of the property is not accepted in the case law, most notably in the Penn Central U.S. Supreme Court decision:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the "landmark site."

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (U.S. 1978)

New York state courts have followed the same approach. *See Northern Westchester Professional Park Associates v. Bedford*, 60 N.Y.2d 492, 503-504 (N.Y. 1983) ("An owner will not have sufficiently established his confiscation claim, therefore, if the adverse factors demonstrated affect but a part of the property but do not prevent a reasonable return from the tract as a whole."); *Koff v. Flower Hill*, 28 N.Y.2d 694 (N.Y. 1971) ("because there was no proof that financial returns on the whole tract would not permit recovery of the purchase price if the property were developed as permitted by the ordinance, there was no showing of confiscation"); *Concerned Residents v. Zoning Bd. of Appeals*, 222 A.D.2d 773, 774-775 (N.Y. App. Div. 3d Dep't 1995)("The primary deficiency is that its analysis of the rate of return of the property as currently zoned is limited to its 8.2-acre leasehold rather than the 96.4 acres owned by Lebanon Valley ... Thus, given these deficiencies, we concur with Supreme Court's finding that the evidence before the ZBA did not support the granting of a use variance to KRM.").

4. <u>Still, A Feasibility Study of the Two Floor Condominiums in As-Of-Right Scheme A Shows that the Applicant obtains a reasonable return for its property.</u>

Even if it were appropriate to consider a bifurcated analysis addressing only the Two Floor Condominium in the top two floors in Scheme A, the analysis of separately provided financial analysis by MVS and others shows that the Two Floor Condominium of Scheme A is indeed profitable.

In making such an analysis, the proper approach is to consider the incremental cost associated with the upper two floors, which will be described herein as the "Two Floor Condominium" or the "Two Floor AOR Condominium."

In Applicant's version of Scheme A, it has attempted to assign to the Two Floor Condominium the land value for the entire 75 foot as-of-right structure. This is patently absurd, and, it appears the Board has rejected that approach and was hoping for a new analysis. Applicant also allocates the cost of the roof and other costs to the Two Floor Condominium, when those would be features in a 4 floor community house building. Applicant also, does not adjust for the "acquisition costs" of the two floors for the fact that the floor are less valuable since a "developer" would need to provide elevators and space for the elevators only for seven floors, when two floors of space are being sold. All of the allocations of construction costs are suspect once one sees these basic errors.

If one appropriately values the development rights, only charges for incremental costs, appropriately allocates costs, and analyzes return on equity, then a two floor condominium could be developed at a good profit on this location.

It is the Applicant's burden to provide a transparent and rational analysis. Once the opponents have shown the inaccuracies and improper assumptions, then the Board should consider it "not proven that "there is no reasonable possibility that the development ... will bring a reasonable return." The Board does not need to fill in the gap left by a highly experienced applicant team. Accordingly, the Board should find that:

> Whereas, the feasibility studies of Applicant analyzing the possibility of a reasonable return for a two floor condominium on the top two floors of an as of right building fail to prove with substantial evidence that there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of this zoning resolution will not bring a reasonable return.

5. <u>The BSA Guidelines Are Based on Sound Economic Analysis Consistent With the Constitutional Underpinning of Such Analysis</u>

The BSA Instructions for feasibility studies, also referred to as Item M provides an inclusive list of factors to be considered in evaluating reasonable rate of return. As testified to by opponents' valuation expert, Martin Levine, these practices are reflective of accepted practices in real property valuation. Freeman/Frazier, however, contends that ignoring these instructions is the proper methodology as Freeman/Frazier has followed in other cases, which it does not cite. All of the deviations recommended as proper by Freeman/Frazier result in a bias for an owner attempting to minimize the determination of return. The Board should follow generally accepted economic practices as reflected in its written guidelines, which are consistent with case law.

(a) <u>Return on Equity is the Proper Standard to Apply</u>

In an earlier round of submissions, opponents convincingly showed that using return on equity as the basis of analysis substantially increases the return and provides a positive return to the owner. Item M requires an analysis based on return on investment and Martin Levine testified that this was the proper approach. In response, Freeman/Frazier states:

> Whereas, return on equity is a typical measurement for income producing residential or commercial rental projects, the rate of return based on profits is

> typically considered on an unleveraged basis, not only for submission prepared for the BSA but in typical condominium and/or home sale analyses.

Yet, many reported court cases show that return on equity is the factor commonly used. For example, even Freeman/Frazier has used return on equity in analysis for the BSA as discussed in the *120 Imlay/Red Hook* decision:

> During the course of the public hearings process, the BSA heard from people both in favor of and opposed to the variance and reviewed numerous documents which were submitted. Among these documents was a "dollars and cents" economic analysis performed by Freeman/Frazier & Associates, Inc., which projected a rate of return of only 1.56% if the premises was developed as a conforming manufacturing building as opposed to a projected return of 11.41% if the premises was developed as the proposed residential building.
>
> * * *
>
> Moreover, Imlay submitted a "dollars and cents" analysis which concluded that a return on equity for as-of-right conforming "manufacturing" use would be 1.56%, while the return on equity for a nonconforming residential use would be 11.41%.

Matter of Red Hook/Gowanus Chamber of Commerce,(N.Y. Sup. Ct. 2006), Id.

Many other cases mention return on equity as the measure of determining reasonable return: *Kingsley v. Bennett*, 185 A.D.2d 814, 816 (N.Y. App. Div. 2d Dep't 1992) 9("the petitioners claim that the subject premises would only realize a 3.6% return on equity"); *Morrone v. Bennett*, 164 A.D.2d 887, 889 (N.Y. App. Div. 2d Dep't 1990) (Appeal from BSA) ("On this appeal the petitioners allege, inter alia, that their financial analysis unequivocally satisfies finding (b), as the existing 8% return on equity is a lower return than is paid on a government-secured stock investment."); *Lo Guidice v. Wallace*, 118 A.D.2d 913, 915 (N.Y. App. Div. 3d Dep't 1986) ("The statement indicates that its present use results in a cash flow as a per cent of equity invested of 3.6%, while the proposed use as a restaurant will yield a 14.2% of invested equity.").

(b) The Original Acquisition Cost is a Factor

The BSA guidelines specify that an applicant should provide the original acquisition price. Applicant, indeed wishes to have the Board complete ignore the fact that when the Freeman/Frazier "acquisition cost" is paid to the Applicant, that the Applicant has received a return on its original investment, a value to which should be added as well the use of , and income derived from, its property over the years. But, the Applicant, which has mentioned its extensive archives, has refused to disclose this information.

> We would merely add that in affirming the decision below we do not intend to imply our approval of the Appellate Division's statement that the board acted correctly "in apparently concluding that a projected return of income, for a parcel for which a variance is sought, may be based on present value, rather than its

> original cost." (43 A.D.2d 739, 740.) While present value most often will be the relevant basis from which the rate of return is to be calculated, it is important that the "present value" used be the value of parcel as presently zoned, and not the value that the parcel would have if the variance were granted. … We would note further that the original cost becomes relevant where, despite the prohibition upon converting the land to another use, the land has nevertheless appreciated significantly to the extent that the owner may have suffered little or no hardship. (See Matter of Jayne Estates v. Raynor, 22 N Y 2d 417, 421-422, 293 N.Y.S.2d 75, 239 N.E.2d 713.)

Douglaston Civic Asso. v. Galvin, 36 N.Y.2d 1, 9 (N.Y. 1974)

> Rather, the proper test is whether the owner can presently receive a reasonable return on his property" (McGowan v Cohalan, supra, p 436; Loretto v Teleprompter Manhattan CATV Corp., 53 NY2d 124). Such an owner must establish affirmatively that the regulation eliminates all reasonable return (Penn Cent. Transp. Co. v City of New York, 42 NY2d 324; Williams v Town of Oyster Bay, 32 NY2d 78; Mary Chess, Inc. v City of Glen Cove, 18 NY2d 205), and this must be accomplished by "dollars and cents" proof (Matter of Village Bd. of Vil. of Fayetteville v Jarrold, 53 NY2d 254; Spears v Berle, 48 NY2d 254; Matter of National Merritt v Weist, 41 NY2d 438). To establish de facto confiscation, evidence of the market value of the property at the time of acquisition as well as the value of the property as presently zoned is required (H.J.E. Real Estate v Town of Hempstead, 55 AD2d 927; see Matter of Village Bd. of Vil. of Fayetteville v Jarrold, supra).

Curtiss-Wright Corp. v. East Hampton, 82 A.D.2d 551, 553-554 (N.Y. App. Div. 2d Dep't 1981)

> The owner must submit proof of the market value of the property at the time of the acquisition as well as the value of the property as presently zoned.

Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267, 272 (N.Y. App. Div. 2d Dep't 1983). *See Also Sakrel, Ltd. v. Roth*, 176 A.D.2d 732, 737 (N.Y. App. Div. 2d Dep't 1991) (", the failure of the petitioner to divulge its purchase price is fatal"); *Varley v. Zoning Bd. of Appeals*, 131 A.D.2d 905, 906 (N.Y. App. Div. 3d Dep't 1987).

N. Environmental Study

As part of the May submission, Applicant included a new environmental study by AKRF. This is deficient in many ways. However, as it pertains to the upper floor variances for which there is no basis whatsoever for those variances, the study is irrelevant. It also is apparent that if the Applicant was not building this income producing banquet hall, or configured a less extravagant hall, reprogramming of programmatic needs would be possible, and, there would be no basis for the rear yard variances.

Even so, on key issues, the study drops the ball, surprisingly since this study should have been submitted in April 2007.

The study has no reference whatsoever as to the fact that all of the proposed scenarios submitted on May 13, 2008 block or impact windows in 18 West 70th Street. No mention whatsoever was made of this serious impact. On the front of the building, windows will be bricked up. In the rear, it is no clear if the 18 West apartments facing the cut out courtyard will require sprinklering and heavy screens. No reference is made to the inner court yards windows whose light and air will be blocked. This is not a serious study.

The study discusses the CSI toddler program at exquisite length, but completely ignores the even larger Beit Rabban school, and the fact that a school that will grow even larger in the future. There is no mention of the school bus traffic that is a constant disruption.

As to the banquet hall, the study ignores the traffic from the standard catering trucks bringing food and equipment. With a capacity of 350, this will be a substantial impact every weekend. For garbage, the Applicant still has not addressed the problem.

Finally, the Applicant finally provides a shadow study showing the impact on the street (the study of Central Park is an irrelevancy - no opponent has mentioned this issue at any time). The shadow study of West 70th St. is problematic.

1. The new street shadow views refer to incremental shadows, but do not show the non-incremental version and what it is incremental from.
2. The new shadow study provide no information as to the existing, as-of-right and proposed building being modeled. So, the model cannot be analyzed. The study does not identify the drawings upon which the study is based.
3. The new shadow model views do not have compass roses, so, it is not possible to verify if the model takes into account the fact that Central Park West does not run true north and south.
4. It is not possible to differentiate shadows case by the existing, as-of-right and proposed buildings. If existing shadows were shown, it would be easy to validate or invalidate the study by comparing with actual photographs previously submitted by opponents in this proceeding.
5. In earlier submissions, AKRF claimed that because of shadows from existing surrounding buildings (i.e. 91 CPW) there was little impact from a proposed building as compared to the as-of-right building. This claim was not consistent with photographs. The new ARRF study does not make this claim anymore, calling into question their professionalism in making the statement previously.
6. The new AKRF study at B-11 admits that the shadows cast by the "New Building" would be similar in length to those cast by the adjacent building at 18 West 70th St.." What the study did not say, but should have said, is that the shadows cast by an as-of-right building should be similar to those cast by the row

houses since the height and setback of the mid-block zoning were consistent with the row house heights and setback. Yet, the AKRF studies show an almost non-existent incremental shadow between the fully set-back as-of-right 75 foot building and a 105 foot building with no setbacks. This is not credible and inconsistent with actual photographs.

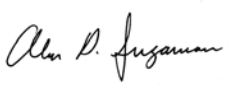
Accordingly, the Board should reject the AKRF study (filed 15 months after the initial application), and in considering the application assume that that the proposed building will in fact create a wall of shadows in winter months along West 70th Street and will eliminate the sunlight and spatial openness that the mid-block zoning was intended to protect in 1984.

O. Reservation of Rights as to Recusal

Finally, the opposition reserves all rights as to its initial request timely made prior to commencement of the proceeding for the recusal of the Chair and Vice Chair for having met with the Congregation's officers, attorneys, feasibility consultant, and architects in an improper ex-party meeting. The opposition has not waived its objection, having timely requested recusal. Unlike in *Matter of Lucas v. Board of Appeals of the Vil. of Mamaroneck*, 2007 NY Slip Op 50032U (N.Y. Sup. Ct. 2007), opponents have not waited to raise this issue until an appeal: "petitioners were obviously not sufficiently concerned about the social ties at the outset of the ZBA proceedings to seek to have the ZBA members recuse themselves based on conflicts of interest".

We note that the Board has not narrowed the issues in this cases by asking questions and obtaining admissions from the Applicant, has repeatedly failed to require the Applicant to comply with requests for information made by the Board and by the Board's rules and guidelines, has not allowed cross examination of Applicant by opposition counsel, has entertained and even suggested revisions by the Applicant that run afoul of zoning, has refused to consider the objective jurisdictional and other issues involving the Department of Buildings,[9] has consistently and repeatedly to provide in response to FOIL requests any handwritten notes and notes of meetings and communications with applicant and third parties, appears willing to accept conclusory statements of the Applicant as to physical conditions in the current buildings while not even responding to the opponents repeated requests for inspection, and prematurely invoking the proceedings.

Respectfully Submitted, June 10, 2008



Alan D. Sugarman

[9] Also, recently Vice Chair Collins made comments as to the basis of claims by opponents as to the mysterious removal of the Eighth Variance by DOB and said he was not aware of any mysterious circumstances. Vice Chair Collins seemed to believe that after the DOB 8th Objection was made, that changes to the plans were made relating to building separation. That is not true: even the plans reviewed at the ex-parte meeting in November, 2006 show the same building separation as exists today.