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June 10, 2008

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

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

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

On May 13, 2008 The Congregation Sherith Israel through their counsel filed yet another revised application for certain variances of the Zoning Resolution. While some of the language may have changed in the application and there has been a bit of massaging of the valuation numbers at the behest of the members of the Board, nothing in the revised application answers any of the concerns and objections that have been filed with the Board during this lengthy process. Based on the record before it, the Board should reject CSI's application and deny its request in its entirety.

In my other filings I have laid out in some detail the standards against which CSI's application must be evaluated and level of scrutiny that the Boad should exercise when considering the various claims of hardship made by CSI in support of its application for variances. In short, each of CSI's claims must be tested not only for veracity but for its relevance to any of the five findings that must be made by the Board with regard to each of the variances sought by CSI. In the interests of brevity and respect for the time of Board members, those discussions are incorporated herein by reference.

Other filings will no doubt highlight the continued failings of CSI's economic analysis in terms of its details and economic assumptions as well as CSI's failure to provide appropriate and straightforward answers to the questions posed to them by the Board; however, there is one particular issue dealing with the economic goals or purpose of the project now before the Board that warrants further discussion. In its new filing CSI takes great pains to discuss the term "monetization" and its function in the world of financial planning and business. In fact CSI is so concerned about the term and its

meaning that complains of the opposition's "mischaracterization" of the "concept of "monetization". CSI Statement in Support Dated May 13, 2008 Page 31. Monetization in the abstract is generally understood to mean taking an asset that is not generating any profit or revenue and converting it into one that is. Wikipedia defines it as follows:

**Monetization** is the process of converting or establishing something into legal tender. It usually refers to the printing of banknotes by central banks, but things such as gold, silver and diamonds can also be monetized. Even intrinsically worthless items can be made into money, as long as they are difficult to make or acquire. Monetization may also refer to exchanging securities for currency, selling a possession, charging for something that used to be free or **making money on a goods and services that were previously unprofitable**.

While there is no doubt that someone who monetizes an asset may, in fact, lose money through a failure to negotiate an appropriate price or in the case of monetizing a future stream of income failing to properly calculate the present value of the stream of income, the reason to monetize an asset is to make money from something that previously did not generate any cash.

CSI's attempt to make the case that the building of the proposed luxury condominium project, to which many of the variances are related, is an "economic wash" strains credulity and quite frankly is an insult to the intelligence of the Board and the members of the public. If no money will be made by this exercise, **why do it!? If no money will be made, how will this project be used to fund the allegedly required programmatic construction?** Why obtain variances from this Board that will impact the other residents of the area and cause significant decreases in their property values and their quality of life if there isn't even any money in it. What is the true purpose? It is obvious. This "economic wash" argument is mere sophistry.

Other sections of CSI new filing and of its earlier filings make it clear that CSI expects to generate revenue that will fund its alleged programmatic building project. See for example page 4 of the current CSI filing "residential use...to be developed as a partial source of funding to remedy the programmatic religious, educational and cultural shortfalls on the other portions of the Zoning Lot." See also Page 54 "22,352.31 sf of new residential space...intended to subsidize the endeavor."<sup>1</sup> Both the courts that have looked at this issue of "revenue generation" and the Board have rejected this argument. For example, in its decision, 290-05-BZ, regarding the application of Yeshiva Imrei Chaim Viznitz for variances to allow the establishment of a commercial catering facility on the basis that the income was needed to support the continued maintenance and existence of the Yeshiva, the Board opined as follows:

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<sup>1</sup> It is interesting to note that CSI has chosen not to identify the profit making section of its application as condominiums but rather refers to the luxury condominium project as "residential space". CSI is well aware that words are powerful tools and that identifying the residential project as what it truly is a luxury condominiums project whose purpose is to externalize CSI's alleged programmatic construction project and force CSI's neighbors to subsidize its programmatic upgrades by significant losses in both property value and quality of life would be detrimental to its hardship claims.



WHEREAS, the second claimed programmatic need is that income from the Catering Establishment is purportedly used to support the School and Synagogue and that the School and Synagogue would close without this income; and

WHEREAS, the **Board again disagrees that this is the type of programmatic need that can be properly considered sufficient justification for the requested use variance; and ....**

**WHEREAS, were it to adopt Applicant's position and accept income-generation as a legitimate programmatic need sufficient to sustain a variance, then any religious institution could ask the Board for a commercial use variance in order to fund its schools, worship spaces, or other legitimate accessory uses; and**

WHEREAS, again, none of the case law or prior Board determinations cited by Applicant stand for this proposition; and

WHEREAS, the Board observes, in fact, that the East New York Avenue case is a repudiation of Applicant's unfounded contention; and

WHEREAS, further, **the Board observes that such a theory, if accepted, would subvert the intent of the ZR's** distinction between community facility uses, which are allowed in residential districts, from commercial uses, which are not; and ....

WHEREAS, Appellant has offered no justification for its blanket assertion that a primary commercial use should be permitted in a residential district anytime a religious institution desires to generate revenue by engaging in commercial activity; and

WHEREAS, based on the above, the Board finds that Applicant has failed to establish that it has a programmatic need that requires the requested variance; and...

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

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

**Preservation of the CSI Landmarked Structure is Irrelevant to the granting of these variances.**

While the maintenance of the CSI synagogue is laudable and important obligation of CSI, its preservation activities are not and should not be considered by the Board as any

reason to grant these variances. The LPC made it clear that it did not consider the first application a "preservation" project and CSI itself admits that the current project is not such a project. However, even in the face of its own admission, CSI spends much ink on the issue of the preservation of its landmarked structure and the need to continue that work. It even tells us that the Vatican is interested in its preservation work. The Vatican's alleged interest is an interesting fact but hardly supportive of the variances now being requested. In fact much of the application now before the Board has absolutely nothing to do with providing the board with a basis for each and every one of the filings it must make regarding each of the variances. Instead, there is an attempt by the CSI to remind the Board of what an important member of the community CSI is and how that fact alone should carry a lot of weight when the Board considers whether or not to grant the variances. CSI's status as a long lived religious organization is not at issue here and should not be considered by the Board.

### **The Board Should Respect and Enforce the Democratically Enacted Contextual Zoning Regulations and Deny CSI's Variances.**

In February of this year the Board received a letter from Dr. Elliot Sclar who was instrumental in the enactment of the Contextual Zoning at issue in the application. (A copy of that letter is provided herewith for your convenience.) While Dr. Sclar's letter speaks for itself I think some of his statements deserve repetition here.

As a general matter, it is inherently improper for any developer, even a nonprofit institution, to seek special exemption from a zoning policy that was crafted with the **meticulous care and community-wide support** that the Upper West Side development plan received. I am fully familiar with the background of this zoning. In the spring of 1982, I directed a graduate studio at Columbia University's Graduate School of Architecture, Planning and Preservation that was the starting point for this zoning change. The "client" for that studio was the Department of City Planning. The student produced work helped to launch the process that led to the adoption of the City's first "contextual zone" on the Upper West Side. The preliminary studio findings were support work for the 1982 West Side Zoning Study, which was in turn central to the 1984 creation of a "contextual zoning district" on the Upper West Side. In total, eight new districts were created that essentially downzoned the midblocks and upzoned the avenues, in keeping with the existing context of that neighborhood. The new zoning identified the midblocks, in which R8B zones were mapped to replace R7-2, as having a strong and identifiable low-rise scale and coherence. The residential avenues, including Central Park West, are defined by their high 130- to 150-foot streetwalls and were accordingly changed from R10 to R10A zones to promote tall construction with a consistent cornice line.

These building types create distinctive "environments," as stated in the City Planning Commission's report (April 9, 1984), and the boundaries between these environments are critical to maintain. The R10A district covering Central Park West gives way to the midblock R8B district at a point 125 feet in from the



avenue. A 105-foot-tall building that is more than 125 feet into the midblock would destroy this crucial boundary. Indeed, it should be noted that the line between the old R10 avenue zoning and R7-2 midblock zoning used to be drawn at 150 feet. The City Planning Commission called this line "abnormally deep" and reduced it to 125 feet in order to contain tall construction closer to Central Park West. **This was not an arbitrary change in policy but a careful and measured response to the Upper West Side's built environment.**

The Upper West Side today is **a delicate balance of intense and highly congested urban living.** The low-rise midblocks give the area the necessary respite of light, air and human scale to remain vital. Once the scale of these midblocks is breached in one place, the case for enforcing the zoning in other places will be severely compromised. **The precedent that the granting of these variances will create may effectively render the carefully crafted land use development plan for the Upper West Side moot.**

The contextual and landmark designations that guide this neighborhood's growth and change were **thoughtfully designed and democratically adopted policies intended to fairly balance the maintenance of this area's character and livability with the real needs for added development. This project will destroy this careful balance.**

Dr. Sclar is absolutely correct. CSI has not carried its burden regarding the five findings required for each of the variances. Further, it has presented absolutely nothing in its application that would support the type of damage that the granting of these variances would do to the delicately balanced environment of surrounding neighborhood. Allowing CSI to go forward with its project would begin a deluge of applications to this Board seeking to take advantage of what would be interpreted as a soft enforcement environment. As opined by the Board in its decision, 290-05-BZ, regarding the application of Yeshiva Imrei Chaim Viznitz discussed in detail above, such a result would **"subvert the very intent of the Zoning Regulations** and in particular the contextual zoning that was instituted in the community to protect the health safety and welfare of the residents as well as their property values".

I thank you for your willingness to include the community in this process. I urge you to reject CSI's application and refuse to grant any of the variances requested therein.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Susan Nial", followed by a circular flourish or mark.

Susan Nial<sup>2</sup>

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<sup>2</sup> This filing is being made on a pro bono basis. Counsel has no financial interest in the outcome of this matter.

February 12, 2008

Hon. Meenakshi Srinivasan  
Chair  
New York City Board of Standards and Appeals  
40 Rector Street, 9<sup>th</sup> Floor  
New York, New York 10007

Regarding the Proposal of Congregation Shearith Israel, 6-10 West 70<sup>th</sup> Street

Dear Chair Srinivasan:

I write to reiterate the serious concerns I voiced in a 2003 statement to the Landmarks Preservation Commission in opposition to the proposal by Congregation Shearith Israel for special permission to construct a tall, noncompliant building in the midblock of West 70<sup>th</sup> Street between Central Park West and Columbus Avenue.

Neither the fact that the proposed building has been reduced in size (from 14 stories to 9) since it was first presented to the Landmarks Commission, nor the fact that the Landmarks Commission approved the 9-story design in March 2006 in any way diminishes the valid concerns that I raised pertaining to the grave and permanent damage this proposal will potentially do to one of the finest neighborhoods in the city. Along the way it will irreparably harm the balanced land use regulatory policy that has helped to make this area one of America's leading urban neighborhoods.

I do not believe that any neighborhood can survive without change. On the other hand, unless there are findings to suggest that the balance between development and protective zoning that the Upper West Side enjoys is no longer functional, or that the applicant in this particular case has special needs and/or constraints that prevent adherence to the zoning code, there is no basis in land use policy for granting the type of ad hoc variances sought. In my opinion, no such case has been made.

Back in 2003, I wrote, "The very fact that this project will require that the various city agencies grant it a series of 'waivers,' 'variances,' 'special permits' and a Certificate of Appropriateness to demolish a landmarked structure should set off alarm bells everywhere in the planning and preservation community." It has done just that, as the Board knows from the Community Board 7 record and its own proceedings, at which advocates representing numerous civic organizations from across the city testified and echoed concerns about the precedent-setting potential of Shearith Israel's application. While it is the case that the Board is not bound by previous decisions where the facts are materially different, the Board must adhere to the criteria (the five findings) articulated in Section 72-21 of the Zoning Resolution, apply equal standards to each applicant and, through this process, establish certain principles that inform future decisions. So, it is completely understandable that citizens from all over New York should watch this decision closely for its implications in other matters.



As a general matter, it is inherently improper for any developer, even a nonprofit institution, to seek special exemption from a zoning policy that was crafted with the meticulous care and community-wide support that the Upper West Side development plan received. I am fully familiar with the background of this zoning. In the Spring of 1982, I directed a graduate studio at Columbia University's Graduate School of Architecture, Planning and Preservation that was the starting point for this zoning change. The "client" for that studio was the Department of City Planning. The student produced work helped to launch the process that led to the adoption of the City's first "contextual zone" on the Upper West Side. The preliminary studio findings were support work for the 1982 West Side Zoning Study, which was in turn central to the 1984 creation of a "contextual zoning district" on the Upper West Side. In total, eight new districts were created that essentially downzoned the midblocks and upzoned the avenues, in keeping with the existing context of that neighborhood. The new zoning identified the midblocks, in which R8B zones were mapped to replace R7-2, as having a strong and identifiable low-rise scale and coherence. The residential avenues, including Central Park West, are defined by their high 130- to 150-foot streetwalls and were accordingly changed from R10 to R10A zones to promote tall construction with a consistent cornice line.

These building types create distinctive "environments," as stated in the City Planning Commission's report (April 9, 1984), and the boundaries between these environments are critical to maintain. The R10A district covering Central Park West gives way to the midblock R8B district at a point 125 feet in from the avenue. A 105-foot-tall building that is more than 125 feet into the midblock would destroy this crucial boundary. Indeed, it should be noted that the line between the old R10 avenue zoning and R7-2 midblock zoning used to be drawn at 150 feet. The City Planning Commission called this line "abnormally deep" and reduced it to 125 feet in order to contain tall construction closer to Central Park West. This was not an arbitrary change in policy but a careful and measured response to the Upper West Side's built environment.

The Upper West Side today is a delicate balance of intense and highly congested urban living. The low-rise midblocks give the area the necessary respite of light, air and human scale to remain vital. Once the scale of these midblocks is breached in one place, the case for enforcing the zoning in other places will be severely compromised. The precedent that the granting of these variances will create may effectively render the carefully crafted land use development plan for the Upper West Side moot.

The contextual and landmark designations that guide this neighborhood's growth and change were thoughtfully designed and democratically adopted policies intended to fairly balance the maintenance of this area's character and livability with the real needs for added development. This project will destroy this careful balance.

I urge you to deny this application for variances.

Sincerely,



Elliott D. Sclar

Professor of Urban Planning

Director, Center for Sustainable Urban Development – Earth Institute, Columbia University