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June 20, 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
Applicant Congregation Shearith Israel
6-10 West 70th Street/99 Central Park West
Block 1122 Lots 36. 37 - Manhattan

Dear Chair Srinivasan:

I write this letter opposing the Application, so as to provide our assistance to the Board in analyzing the June 17, 2008 reply papers submitted by the Applicant Congregation Shearith Israel, in anticipation of the Executive Session on Monday, June 23, and the hearing on Tuesday, June 24.

The Applicant continues with its practice of repeating demonstrably false statements in conclusory manner, rather than refuting the fact-based assertions of the opponents. The Applicant must truly believe that repetition of falsehoods substitutes for fact. The Applicant just chooses to ignore other relevant analysis in the opposition statements, on the assumption that ignoring an assertion means that it is incorrect or irrelevant - while, the proper inference to be taken by the Board is to assume as correct those assertions of law and fact ignored by the Applicant.

Financial Analysis

After submitting hundreds of pages of financial analysis, the Applicant now states that no analysis can be required under the (b) finding. Applicant refers to anonymous BSA cases, and cites no other authority. We disagree as to the Applicant's reading of finding (b). If a non-profit applicant wishes to mix profit-making and not profit-making components on a single site, then we believe that the constitutional taking test would be to determine whether the entire site would prevent the owner for obtaining a reasonable return, and that the Scheme C type analysis (if done correctly) is the threshold issue.

Secondarily, it would seem apparent that were a bifurcated analysis, such as Scheme A, to show that the two floor condominium does earn a reasonable return, then the Applicant would not be able to obtain a variance to permit construction of the condominiums. The

reverse is not true - not earning a return on the two floor condominium would not establish that finding (b) was met; because as the courts have recognized, it is possible to bifurcate an uneconomic slice from an economic whole.

Because findings (a), (c), (d), and (e) cannot be satisfied, the Board's decision in denying the variance need not rest on the failure to meet finding (b).

Issues Applicant Ignores or Wishes to Ignore

The Applicant's recitations in Friedman & Gotbaum's letter are truly a work of fiction - e.g., the discussion of Access and Circulation below. But, interestingly the Applicant's colorful summary omits the following:

Explanation of the Relevance of Access and Accessorily to these Variances.
See below.

Purpose of Acquiring Lot 37. The Applicant does not mention that the row houses were acquired, not for investment, but for use of the congregation and the Synagogue.

Financial Support for the Condominiums. The Applicant now ignores the May 13, 2008 Statement in Support and all other statements showing that the purpose of the condominiums is to provide financial support for the construction of the community house to meet programmatic needs.

Fifth and Sixth Floors. Despite the obvious relevance, The Applicant provides no explanation as to why the fifth and sixth floors of an As-of-Right Building are not available for programmatic need.

No Explanation of FAR Discussion. The Applicant provides no explanation as to why it devotes many pages to FAR transfer from Lot 36, when it readily admits that no variance for transfer is required.

No Case Law. The Applicant is still unable to provide any case law for its novel legal positions. It has provided no legal rebuttal to the opposition's legal discussion of bifurcated analysis, unique property condition, use of original cost, and the unavailability of compensation for landmarking and zoning.

Why there is a Lot 37 hardship. The Applicant is unable to explain why, if no hardship exists as to Lot 37 standing alone, the act of creating a zoning lot of Lot 36 and Lot 37 now creates a unique physical condition when none existed previously.

How the Board can make An E finding. Given the continuing adamant and contemptuous refusal of the Applicant to provide information as to existing, as-of-

right, and proposed scenarios in a consistent presentation form (if at all), Applicant has not explained how it has met its burden of proof to permit an (e) finding, and why the Board should not decline to make an (e) finding for that reason alone.

Exaggerated Claims of Attendance. The Applicant has decided to ignore its exaggerated claims of "up to 500", attendance, when the facts are that the actual usage may be ten times less, thereby undercutting claims of urgent need for expansion.

Applicant's Contempt of the BSA Concerning Access and Circulation - The New Admission Re the "Heart" of Applicant's Case

For too long in this proceeding, Applicant has fouled the record and wasted the time and energy of all by its wholly irrelevant assertions as to access and circulation. Rather than explain or respond to our detailed discussion in our June 10, 2008, brief and previously, the only response from the Applicant is to now assert "Moreover, development of the Parsonage parcel would do nothing to remedy the significant egress and circulation deficiencies in the landmarked Synagogue, a remediation that is at the heart of this Application." Page 2, second full paragraph, June 17, 2009 Applicant Reply Statement."¹

We do agree that the Applicant has made remediation of "significant egress and circulation deficiencies in the landmarked Synagogue, a remediation ... the heart of this Application." Since this remediation is wholly unrelated to any variances requested, and the asserted deficiencies are remediated completely within the as-of-right envelope as shown by each and every of the hundreds of drawings submitted by Applicant, then the proper conclusion is that the Application has no heart. Basically, had these facts been fully exposed from the beginning, this Application, having no heart, would have been declared DOA.

In a vain attempt to resuscitate the "heart" of its Application, the Applicant argues that it cannot resolve the "significant egress and circulation deficiencies" unless it receives financial support from the development of condominiums. But, as shown by opponents, the primary element of the access deficiencies is the fact that the existing elevator does not extend to the Levy Auditorium on the existing basement level. The Applicant's architect admits that the elevator could be extended in the existing building. The Applicant's resuscitation efforts fail both on factual grounds and on legal grounds, because financial support for programmatic needs is not grounds for granting a variance under applicable law. Despite repeated requests, the Applicant has failed to even attempt

¹ The reference to the Parsonage is certainly a non-sequitur and a straw man; it was not raised by the opposition. The Application concerns development of Lot 37, not Lot 36 on which the Parsonage is located, and the variances are all for Lot 37.

to provide case law support for a position that has been routinely rejected by the New York and federal courts and by the BSA as well.

Applicant Did Not Provide Even One As-Of-Right Scenarios in its May 13, 2008 submission.

Astonishingly, in its May 12, 2008 submission, Friedman & Gotbaum, Attorneys At Law, falsely state that accompanying the Freeman Frazier report were two As-of-Right scenarios. This was a material misstatement because the Board had immediately previously requested as-of-right scenarios. Then, in its June 17, 2008 reply Friedman & Gotbaum, Attorneys At Law, compounded its "error" by stating that:

Please note that we accept the error noted by an opponent with respect to page 43 of our Statement of Findings we had compared the rate of return that could be expected from a new building with 15,243 sf of residential floor area with "two hypothetical as-of-right mixed building scenarios." In fact the second scenario was not as-of-right but required a lesser variance.

But, this "correction" remains a false statement, for **neither** of the two scenarios is as-of-right. And, since the false statement is claimed to be a correction of an error, then this new false statement was made deliberately and intentionally so as to mislead the Board and any Article 78 court reviewing this matter.

We leave it to the Board to determine what action need be taken in response to this disrespect of the functioning of City government and basic principles of professional responsibility.

Further Errors from Freeman Frazier

- Freeman Frazier admitted error by not supplying the complete construction estimate, and according supplied the missing 13 pages for only three of the Construction Estimates, but failed to provide these missing pages from the important Estimates for Scheme A and Scheme C as-of-right scenarios.
- The newly provided missing cost pages show that McQuilken and Freeman Frazier have systematically inflated residential cost estimates by erroneously including therein the luxury two bedroom caretaker's apartment on the fourth floor. This error appears to be between \$600,000 and \$1 million in every Freeman Frazier analysis.
- There is no methodology described as to allocations between residential and school.

- The new Scheme A analysis continues to ascribe land cost for the entire building to just the two floor condominium (perhaps, the right arm of the Application).
- Freeman Frazier provides no reasoned explanation based on valuation and investment analysis principles as to why a return on equity analysis is not appropriate for a condominium project.
- A revised Scheme C was not provided, the original Scheme C having unexplained high loss factors, and not including a valuable sub-sub-basement.
- Freeman Frazier misdescribes the rationale behind case law which would require consideration in these circumstances of original cost of land. The purpose is not to compute market value of land; rather, the purpose is to evaluate the statutory and case law standard as to whether the land owner is prevented from obtaining a reasonable return.
- Freeman Frazier has yet to decide whether it has or has not provided rental income information from Beit Rabban. However, the IRS filing from Beit Rabban shows 2006 rental to the Applicant of \$480,000. The chart on Page 30 of the May 13, 2008 statement in support shows 2818 sq feet of existing classroom space and 5136 of proposed classroom space, an 82% increase in classroom space. Given that the new building will also modern classrooms plus will have the 6400 sq ft subbasement area available for school recreation, it is entirely reasonable to project \$1.2 million a year in Beit Rabban Rental.

Further Errors in the AKRF Report

The Board might recollect that the initial environmental reports were prepared and signed by a paralegal in the office of Friedman & Gotbaum, and that the latest version was prepared after further information was requested by the Board and deficiencies pointed out by the opposition. AKRF, like Freeman Frazier, believes that going through the motions picking and choosing the minimum rules to follow somehow is indicative of professional analysis. The EAS is required to show adverse impacts on adjoining property - and the failure of the regulations to specify an impact does not mean that the impact should not be shown.

- For this project, omitting the impact upon windows in adjoining buildings is a gross misrepresentation, and omissions of this discussion in the prior versions of the EAS in the matter is one reason a new EAS was required.
- The AKRF report admits error in failing to provide compass roses or shadow studies. AKRF is wrong in stating all shadow drawings it submitted are oriented north south - many are oriented along the avenues.

- A further erroneous omission is failure to indicate GMT - i.e., one cannot validate the studies since the studies do not indicate the absolute time used in the studies.
- AKRF admits that it provided no independent validation of the shadow studies, and merely passed on a third-party analysis of bulking which remains not validated, and may not be appropriate when ascertaining shadow impacts on narrow streets such as 70th Street.
- Although AKRF states that the incremental shadows were based upon incremental shadows from the existing, we would like to point out that this is not the understanding of BSA staff. When the opposition met with BSA staff three weeks ago, BSA staff believed that the incremental shadow was being compared to an as-of-right building. Thus, it is not only the opposition that was misled by the casual and incomplete analysis.
- Since, AKRF claims the incremental shadows are compared to existing, and since there is no building at all on the western part of lot 37, it is easy to see, when comparing with actual photographs previously provided to BSA that the AKRF model is incorrect. We also direct the BSA's attention to the aerial image on Google Maps which clearly shows the light revealed by the absence of the building on the vacant lot.
- BSA rules require submission of information for existing, as-of-right, and proposed, and this was not done.
- AKRF provided no street level perspectives of the three scenarios to help validate the study.
- AKRF falsely states that "An expansion to the school is not proposed as part of the proposed action." This is contradicted by the 82 % increase in classroom space and the increase in all students including toddlers from 145 to 225. The chart on page 30 of the May 13, 2008 statement in support shows 2818 sq. ft. of existing classroom space and 5136 sq. ft. of proposed classroom space, an 82% increase in classroom space.
- AKRF falsely states that it has "discussed" the Beit Rabban school - it makes only two minor references to the school. These references confirm the opponents' April 15, 2008, analysis, which concludes that the proposed building is intended to accommodate approximately 165 Beit Rabban students.
- AKRF statement that "The shadow diagrams demonstrate that this statement is incorrect." in response to my statement: " The proposed building will in fact create a wall of shadows in the winter months along West 70th Street and will eliminate the sunlight and spatial openness that the mid-block zoning was intended to protect." completely undermines the credibility of AKRF."

Alan D. Sugarman to BSA

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AKRF has admitted that the proposed building would cast a shadow similar to 18 West, and its conclusory response only emphasize the lack of confidence that should be accorded any opinion by AKRF in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Alan D. Sugarman".

Alan D. Sugarman

P.S. Supporting Documents are posted at ProtectWest70Street.org.

cc:

Jed Weiss
Jeff Mulligan
Landmark West
Shelly Friedman
Mark Lebow