STATEMENT IN OPPOSITION

TO VARIANCE APPLICATION

OF CONGREGATION SHEARITH ISRAEL

(July 29, 2008)

Affected Premises:

6-10 West 70th Street

Block 1122, Lots 36 & 37

18 West 70th Street
91 Central Park West
101 Central Park West
Other residents of West 70th Street
&
LANDMARK WEST!

NEW YORK CITY
BOARD OF STANDARDS AND APPEALS

Application: 74-07-BZ

Affected: 6-10 West 70th Street
Premise Block 1122/Lots 36 & 37
Manhattan

STATEMENT IN OPPOSITION

Applicant: Congregation Shearith Israel
6-10 West 70th Street
99-100 Central Park West

This statement in opposition to the application for zoning variances filed by Congregation Shearith Israel ("Applicant") is submitted by a coalition of buildings and residents of West 70th Street, including 18 West 70th Street, 91 Central Park West and 101 Central Park West, the immediately adjacent neighbors, together with LANDMARK WEST! ("Opposition").

This statement responds to Applicant's submission to the Board of Standards and Appeals ("Board") on July 8, 2008, and summarizes arguments set forward in previous submissions by Opposition.

Applicant fails to demonstrate that its application satisfies the 5 findings required for approval of variances under the Zoning Resolution of the City of New York (Section 72-21).

- The purpose of the requested variances is not to address **Applicant's programmatic needs, all of which can be met in an as-of-right building**, but to finance for-profit real estate development that would result in the construction of the tallest building ever allowed in the R8B low-rise midblock contextual zoning district.[1] Such use of the variance process is a grossly inappropriate abuse of the intent and purpose of the Zoning Resolution.

- A nonprofit, religious institution's inability, due to zoning regulations, to "monetize" air rights in order to generate a revenue stream does not constitute a hardship under Section 72-21.[2] **Applicant is clearly able to gain a reasonable return from an as-of-right building on this site**.

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[1] See Opp. Ex. X, submitted to the Board on January 28, 2008.
[2] Norman Marcus, former General Counsel of the Department of City Planning and a neighbor who testified at numerous public hearings before the Landmarks Preservation Commission and the Board, stated at the Board's November 27, 2007, hearing: "I was a real estate lawyer so I understand it and there's nothing immoral about monetization. The question is does it meet the standards of 72-21?" See Opp. Ex. PP-21, attached. Marcus also testified in opposition to the application on February 12, 2008. See Opp. Ex. PP-25, attached.

- Approval of these unwarranted variances would do **irreversible damage to the character and quality of life** of the immediate neighborhood and open the door to other non-profit developers pursuing zoning exemptions as a fundraising strategy.

Applicant has also repeatedly ignored the Board's questions, comments and requests for information concerning key issues. Applicant's submissions are riddled with conclusory statements, unsupported by germane fact and insufficient under Section 72-21.

Approval of this application would significantly lower the bar for future applications, leading to the general erosion of zoning regulations, not just in special, low-rise neighborhoods protected by R8B contextual zoning, but in every part of New York City.

Accordingly, the Board of Standards and Appeals must deny this application.

Background

On April 2, 2007, Applicant submitted an application to the Board for variances to construct a non-complying building adjoining its landmarked synagogue at Central Park West and West 70th Street in Manhattan. On June 15, 2007, the Board issued a Notice of Objections itemizing 48 objections and requiring Applicant to address each objection point by point.

Applicant submitted a revised application on September 10, 2007. The Board issued a Second Notice of Objections on October 12, 2007, this time itemizing 22 objections, some of which reiterated previous objections that Applicant had failed to address as instructed. Applicant submitted a second revised application on October 26, 2007.

The Board raised additional questions and concerns at three subsequent public hearings on November 27, 2007, February 12, 2008, and April 15, 2008, each of which resulted in an application revised in certain aspects, but still providing inadequate information about the proposal. Manhattan Community Board 7 voted to deny all 7 variances at a full board meeting on December 4, 2007.[3] Inspection of the Board's files also revealed that Board received nearly 200 Objection Forms, of which over 160 (80%) were from neighbors within the 400-foot radius that, for BSA purposes, defines the area of impact.[4]

Opposition outlined many of the inadequacies with the proposal in a "Summary of Flaws Preventing Reasoned Analysis of Applicant's Request for Variances," submitted to the Board on June 10, 2008. Applicant submitted additional materials on June 17, 2008, but failed to address many of the issues raised by Opposition and the Board.

[3] Transcripts of Community Board 7's public hearings on this item are attached to this Statement in Opposition.

[4] Applicant collected nearly 300 forms from individuals consenting to the project. But, significantly, only 14 (5%) were from people within the 400-foot radius. And not one was from an *owner* of an "affected property."

Surprisingly, at a public review session on Monday, June 23, 2008, and a public hearing on the following day, the Board dropped the concerns it had raised in numerous earlier proceedings and expressed overall satisfaction with the application. The application was scheduled for a decision date on August 26, 2008.

Summary of Proposal

Applicant seeks 7 zoning variances in order to construct a new 9-story, 113.7-foot-tall mixed-use building consisting of a community house with 5 floors of profit-generating, luxury condominiums stacked on top ("New Building"). The New Building would be more than twice as tall as the brownstones that define this and most other midblocks on the Upper West Side, in direct contravention of the intent of the 1984 R8B contextual rezoning designed to protect the character of low-rise midblocks in this historic neighborhood.[5] This site is also protected as part of the Upper West Side/Central Park West Historic District (designated in 1990) and is adjacent to the Individual Landmark Spanish & Portuguese Synagogue (a.k.a., Congregation Shearith Israel, designed by architects Brunner & Tryon in 1897 and landmarked in 1974).[6]

Applicant first attempted to exploit its site in order to build a high-rise residential tower cantilevered over the Landmark synagogue in the early 1980s. This project and others like it spurred the Department of City Planning, working closely with Community Board 7, to create one of New York's earliest rezoning plans establishing contextual districts. The 1984 Zoning Report states:

> The typical midblock building is the 3 to 6-story, 55 to 60 foot high 'brownstone'…The consistency with which these building types north of 68th Street is the **key to the strength and clarity of the image of the West Side.** Over 85% of the structures in the midblocks conform to the 'midblock' type…There is warranted concern that new development will weaken the quality and 'intactness' of the existing context by introducing buildings that are out-of-place.

The 1990 Landmarks Preservation Commission's Historic District Designation Report reinforces this characterization:

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[5] R8B low-rise contextual zoning serves a valid and compelling public purpose, that of preserving the low-scale integrity of midblocks defined by traditional rowhouses or "brownstones" and limiting the encroachment of large apartment buildings into the midblock. *Zoning Handbook*, January 2006, p. 41. See also Friedman & Gotbaum letter dated December 28, 2007, Exhibit B: "The proposed contextual districts seek to ensure that new buildings fit into the scale and character of the existing neighborhood" (City Planning Commission, N 840235 ZRY, April 9, 1984, p. 4) and "The Commission believes that the proposed demapping appropriately rezones the majority of brownstones currently zoned R10, while minimizing the amount of non-compliance of large apartment houses built deeper than 125' from the avenue (City Planning Commission, N 840235 ZRY, April 9, 1984, p. 11).

[6] Architectural critic Francis Morrone wrote in the *New York Sun*, "The synagogue, which fronts on Central Park West, may be the most beautiful in the city. That makes any appendage to it a matter of urgent public concern" ("A Classical Gem Off Central Park West," September 20, 2007). See Statement in Opposition dated November 20, 2007, Exhibit E.

> On most of the side streets of the district, scattered later apartment buildings have interrupted the original rows, but in general **the surviving rowhouses present a strong coherency and are a major element in creating a special sense of place** particular to this district on Manhattan's Upper West Side.

The New Building is precisely the type of noncontextual development that the R8B zoning and historic district were created to prevent.[7] Yet, **for no other reason than the desire to accommodate luxury condominiums and a tenant school, both income-producing uses that bear no relationship to its religious, educational or cultural mission,** Applicant seeks to push bulk from the portion of its zoning lot in the R10A zoning district that lines Central Park West to the portion in the R8B district that covers the midblock of West 70th Street, violating zoning regulations for height, setbacks and lot coverage.

The Variances

Applicant seeks variances in two basic categories: Height and Rear Yard.

Height variances (4 variances):

- The proposed overall building height is 113.7 feet, which is 38.7 feet—the equivalent of 4 stories—taller than the limit set by Section 23.633 (1 variance)
- The proposed base height rises to 94.8, which is 34.8 feet—the equivalent of more than 3 stories—beyond the limit set by Section 23-633, completely blocking 4 windows and creating a shaft condition that impacts dozens of windows in apartments at 18 West 70th Street (1 variance)
- The proposed initial streetwall setback is 3 feet less than that required under Section 23-633, increasing the visibility and bulk of the penthouse from West 70th Street (1 variance)
- The proposed rear setback is less than that required by Section 23-633, placing a brick wall within feet of 3 apartment windows at 18 West 70th Street while increasing the sense of bulk affecting adjacent buildings at 91 Central Park West and 9 West 69th Street (1 variance)

Rear Yard variances (3 variances):

- The proposed rear yard setback falls 10 feet short of setback required under Section 24-36, diminishing the space between the New Building and adjacent buildings at 91 Central Park West and 9 West 69th Street (2 variances)
- The proposed lot coverage exceeds maximum allowed under Section 24-11 and 77-24 (1 variance)

[7] 73% of the footprint of the New Building would be located in the R8B contextual zoning district, which caps overall height at 75 feet with a streetwall of 60 feet. In the 1980s, Community Board 7 fought for this zoning to protect traditional brownstone midblocks and to reduce the depth of the tall-building Central Park West zoning from 150 feet to 100 feet (the boundary between the R10A avenue zoning and the R8B midblock zoning was ultimately set at 125 feet west of Central Park West) so that sites like this one would remain low-rise.

In order to approve the application, the Board must measure each of the 7 requested variances against each of the 5 findings set forth in Section 72-21. Only if all 7 variances meet all 5 findings can the Board determine the existence of a hardship meriting zoning relief. Despite the voluminous record created over the past 18 months since this application was originally submitted (in April 2007), Applicant falls far short of establishing the existence of any hardship. Therefore, the variances cannot be granted.

Finding (a): "…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…"

No Unique Physical Condition Inherent in the Lot

Applicant attempts to establish the unique physical conditions of the zoning lot in terms of access and circulation difficulties, lack of space to accommodate its programmatic needs, the presence of a Landmark, the obsolescence of the existing community house and the existence of a zoning district boundary placing a small portion of the total zoning lot into the low-rise contextual R8B district. None of these are unique physical conditions inherent in the lot as contemplated by the language of 72-21(a).[8]

Indeed, were the Board to find that the strict application of contextual height and setback requirements to this site creates a hardship meriting zoning relief, it would open the door to a barrage of applications from many other Central Park West institutions occupying similarly challenged facilities on comparable sites along the R10A/R8B boundary.[9]

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[8] The Statement in Opposition dated January 28, 2008, cited a brief submitted to the Board by Stroock Stroock & Lavan regarding variances requested by Congregation Kehilath Jeshrun/Ramaz, particularly with regard to standards for "unique physical condition": 1) In order for physical conditions to be unique, they may not be ones generally applicable throughout the district. *Douglaston Civic Ass'n, Inc. v. Klein*, 51 N.Y.2d 963, 965 (1980). 2) The grant of a zoning variance is conditioned on the unique physical conditions of the lot and not on one's particular space needs. *9 White Street Corp. et al. v. Board of Standards and Appeals of the City of New York*, 122 A.D.2d 742, 744 (1st Dept. 1986). 3) The need for additional space does not "make the existing physical conditions unique and does not create a hardship or practical difficulty within the meaning of the zoning resolution. *9 White Street Corp. et al. v. Board of Standards and Appeals of the City of New York*, 122 A.D.2d at 744. 4) Personal inconvenience arising from need for additional space does not provide substantial evidence to support the Sec. 72-21(a) finding. *Galin v. Board of Estimate of City of New York*, 72 A.D.2s 114, 117-18 (1st Dept. 1980). 5) Practical difficulties arise when a property or a structure on a property cannot be used without conflicting with certain provisions of the Zoning Resolution. *Bienstock v. Zoning Bd. Of Appeals of Town of East Hampton*, 187 A.D.2d 578, 580 (2nd Dept. 1992). The Stroock brief, dated November 7, 2007, was submitted to the Board as Opp. Ex. S on January 28, 2008.

[9] The Statement in Opposition dated March 25, 2008, discussed and included as an attachment a draft report entitled "Central Park West: Potential Futures," prepared by Weisz+Yoes Architecture, together with the firm's CV. The report identifies 10 "soft sites" along Central Park West between West 63rd and

Applicant's proposed development site is site much like many other sites in this zoning district—a level, rectangular parcel, the width of several rowhouses, on a prime midblock just west of Central Park.[10] Applicant's drawings indicate that the site's subterranean conditions permit a cellar and subcellar. The fact that Applicant has unused FAR that it claims cannot be used elsewhere on the zoning lot is immaterial since property owners are not automatically entitled to maximize FAR when other legitimate regulations, such as contextual height and bulk restrictions, are in effect.

Furthermore, the fact that, in Applicant's proposal, "the entire development footprint of the site [is] consumed by the community house volume within the New Building for four stories" and the "residential floors cannot begin until the fifth floor" is not driven by factors inherent in the site, but rather by Applicant's desire to construct a mixed-use building to meet self-imposed programmatic and financial goals. Such a desire is "one of a personal nature," which does not constitute practical difficulties.[11]

The location of the site in a Historic District and adjacent to an Individual Landmark cannot be accepted as the basis for a hardship since to do so would undermine the very essence of landmark protection.[12]

Applicant repeatedly invokes the approval of its design by the Landmarks Preservation Commission, implying that no other design solution would be acceptable given the site's Landmark status.[13] There is no basis for this misleading assertion since the Commisison was never asked to review an as-of-right scheme.

No Practical Difficulty or Unnecessary Hardship

Even if Applicant could establish a unique physical condition, Applicant has not demonstrated that it would experience any practical difficulties or unnecessary hardship as a result.

At the "heart" of its request, Applicant argues, is the need to address access and circulation issues that prevent it from effectively pursuing its mission.[14] However,

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97th Streets, each with conditions similar to Applicant's: the presence of specialized buildings of Landmark status; the availability of FAR, the use of which is limited by contextual zoning and Landmark designation; the presence of the R8B/R10A zoning district boundary; and ownership by an institution that could use additional space to meet programmatic needs.

[10] See Weisz+Yoes report. Maps showing the configuration of lots in relation to the R8B/R10A zoning boundary are provided on pages 18-23.

[11] See Stroock brief, p. 11.

[12] The 74-711 special permit process offers the appropriate recourse for any development impediment posed by a designated Landmark; yet, both Community Board 7 and the Landmarks Preservation Commission rejected Applicant's 74-711 application, and it was withdrawn in March 2006.

[13] Applicant states that the Landmarks Preservation Commission "has approved unanimously both the massing and the design of the New Building, and by so doing has expressed views substantially similar to CSI regarding the need to protect the architectural heritage of the landmarked Synagogue." Applicant inaccurately reflects the position of the Commission—the approval was not unanimous since one commissioner voted against the proposal.

[14] Friedman & Gotbaum letter dated June 17, 2008, p. 2.

Applicant has failed to show that either Height or Rear Yard variances are needed to resolve these issues. In fact, Applicant's architect, Charles Platt, has acknowledged on the record that access and circulation could be addressed by simply updating the elevator in the existing community house,[15] confirming the observation of Opposition architect Craig Morrison, AIA.[16] Furthermore, Applicant's own drawings show that the New Building and the alternative as-of-right "Scheme A" handle access and circulation in identical fashion.[17] A very small portion of the New Building is programmed to meet access and circulation.[18] The Height and Rear Yard variances are clearly irrelevant to Applicant's ability to address the "heart" of its purpose in developing this site.

Height Variances

The Height variances bear no relationship whatsoever to Applicant's ability to use this site for a new community house since all of Applicant's programmatic needs (including classrooms, offices, facilities for social, religious and educational functions, archives, and residences) can be comfortably accommodated on floors 2 through 4 of an as-of-right building.[19] The Height variances relate solely to Applicant's desire to build 5 floors of luxury condominiums. Despite the Board's efforts to expunge the record of Applicant's many references to the condominiums as a revenue source,[20] Applicant continues to state that one of the primary functions of the New Building is to serve as "a partial source of funding to remedy the programmatic religious, educational and cultural shortfalls on the other portions of the Zoning Lot."[21] The role of the Height variances as the "economic

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[15] Charles Platt letter dated February 4, 2008.

[16] Craig Morrison, AIA, letter dated February 11, 2008. Also, in testimony before the Board on April 15, 2008, Craig Morrison pointed out, "It appears that the only required change is to replace the existing elevator with one that is ADA compliant and that extends to the cellar levels." 4/15/08 transcript, p. 27, lines 603-4.

[17] In its January 28, 2008, submission, Opposition used Applicant's drawings to provide the missing analysis, showing that all of the access and circulation needs claimed by Applicant can be resolved within the footprint of the existing building and, indeed, within a small portion of this footprint. Opp. Ex. GG, submitted as an attachment to the Statement in Opposition dated March 25, 2008. See also Morrison letter dated February 11, 2008, and Simon Bertrang letters dated June 28, 2007, and September 27, 2007, submitted to the Board as Opp. Ex. R on January 28, 2008.

[18] See Morrison letter dated March 24, 2008, and Opp. Ex. GG, both submitted as attachments to Statement in Opposition dated March 25, 2008.

[19] See Morrison letter dated March 24, 2008, p. 3. See also Opp. Ex. LL and OO, submitted as attachments to James A. Greer letter dated July 28, 2008, attached.

[20] For example, at the June 24, 2008, public hearing, Chair Srinivasan stated, "If you can just clarify that and I think this – the comment that Commissioner Otley-Brown made about the programmatic need, regarding revenue generation, I recall we said that many times, that we feel that in of itself is not part of programmatic need. I think you still have it in your papers. The Board may reject that argument, but I think it – I know it would be better for the papers to take that out." 6/24/08 transcript prepared by Yaffa Kaplan, Notary Public, signed June 30, 3008, p. 54, lines 5-14.

[21] Friedman & Gotbaum Statement in Support revised July 8, 2008, p. 4. Also, p. 54-55: "Having begun the work to preserve this sacred site with a world-class restoration, CSI must how address with equal conviction the gap between what its facilities can provide and its programmatic goals. The gap is presently wide, but through careful analysis a plan has emerged that leaves the Synagogue untouched but requires that CSI utilize 42,406.35 sf (or 36 percent) of the 116,751.76 sf of unused floor area available to it on its Zoning Lot to redress these deficiencies. **The successful deployment of that floor area resolves a complex matrix of Synagogue circulation issues, educational issues and administrative issues. Successful deployment includes the construction of 22,352.31 sf of new residential space, a small**

engine" driving the development is beyond debate. Applicant has put forward no other legitimate justification for them.

The Board has already roundly rejected this fundraising purpose as a basis for zoning variances.[22]

These comments echoed previous Board decisions. For example, in its May 2006 decision in the matter of Congregation Somlou, 245 Hooper Street, Brooklyn (72-05-BZ), the Board noted **"that there was no justification for waivers such as FAR and street wall height that arose solely because the application included market rate UG 2 residences."** Similarly, in the matter of Yeshiva Imrei Chaim Viznitz, 1824 53rd Street (290-05-BZ), the Board found that the applicant could not claim income from a catering facility as a "programmatic need." The Board's January 2007 decision states:

> The board disagrees that this is the type of programmatic need that can be properly considered sufficient justification for the requested use variance…to adopt the applicant's position and accept income generation as a legitimate programmatic need sufficient to sustain a variance, then any religious institution could ask the board for a commercial use variance in order to fund its schools, worship spaces or other legitimate accessory uses.[23]

These decisions align with benchmark court decisions reinforcing the power of municipalities to enforce zoning and other regulations intended to serve the public welfare, including *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980), in which the legitimacy of local landmarks regulation was strongly upheld:

> …the Society does not seek simply to replace a religious facility with a new, larger facility. Instead, using the need to replace as justification, **it seeks the unbridled right to develop its property as it sees fit.** This is impermissible and the restriction here involved cannot be deemed an abridgment of any First Amendment freedom, particularly when the contemplated use, or a large part of it, is **wholly unrelated to the exercise**

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fraction of the available floor area intended to subsidize the endeavor. This successful deployment cannot occur without the approval of this Application. "

[22] At the Board's November 27, 2007, public hearing, Chair Srinivasan stated, "[Applicant] need[s] to make a different case for the residential portion in terms of the height and setback and it's not enough to tell this Board that you need as much residential as possible because that's going to help fund the congregation." Transcript of November 27, 2007, public hearing, p. 20-1. Commissioner Ottley-Brown reiterated this opinion, stating "residential use to raise capital funds to correct programmatic deficiencies is not in and of itself a programmatic need…And, I think if we open the door, here, and allow that argument in, we're going to have a hard time turning down every other religious institution that wants to place residential in their back yard in order to finance expansion." Ibid, p. 26.

[23] When the applicant invoked the Religious Land Use and Institutionalized Persons Act (RLUIPA) to justify the variances, the Board responded: "…it is difficult for the Board to understand why RLUIPA should function to support the granting of a commercial use variance in order to support a revenue stream for a religious entity that is unable to support its non-commercial uses through traditional means."

of religion, except for the tangential benefit of raising revenue through development.

Applicant must be held to the same standard as smaller, less financially robust nonprofits in boroughs throughout the city. Applicant's congregation is comprised of some of New York's wealthiest citizens[24] and, as it has demonstrated through the pristine restoration of its Landmark synagogue, is more than capable of raising funds for its programs using "traditional means".[25]

At the same time, were the Board to treat Applicant's profit-driven activity differently than it would that of a secular developer, the Board would risk running afoul of certain constitutional protections including the Establishment Clause of the First Amendment, which prohibits government from actively promoting or privileging religious interests. It is well-established that an applicant's status as a nonprofit religious institution does not entitle it to exemption or special treatment under the laws that apply generally to all property owners.[26] Refusal by the Board to grant zoning variances would in no way burden Applicant's ability to pursue its mission.[27] Awarding special deference to a religious institution's profit-making activities pushes the line between constitutional protection of religious free exercise and unconstitutional preference of religious property owners.[28]

In summary, the fact that R8B zoning limits Applicant's ability to construct luxury condominiums on top of its new community house does not pose any practical difficulty or unnecessary hardship warranting zoning relief. The Height variances are not justified under Finding (a).

Rear Yard Variances
Applicant claims that the Rear Yard variances relate to its need to accommodate classrooms and a caretaker's apartment on the 4th floor. Only in its most recent

[24] Sugarman affirmation dated January 28, 2008, p. 8, and Opp. Ex. D, submitted to the Board on January 28, 2008.
[25] Certainly other nonprofit religious organizations have found it possible to raise large amounts of money to construct facilities in which to pursue their missions. For example, the Jewish Community Center recently built a new, 11-story building—without seeking zoning variances—on Amsterdam Avenue at West 76th Street at a cost of $85 million, which it raised from private donors. See Alan D. Sugarman affirmation dated January 28, 2008, ¶ 12 and Opp. Ex. D-21, both submitted to the Board on January 28, 2008.
[26] For in-depth discussion of this issue as it relates to the current application, including citations of relevant case law, refer to Susan Nial, Esq., letter dated March 23, 2008, submitted to the Board as an attachment to Statement in Opposition dated March 25, 2008, and June 10, 2008, submitted to the Board as an attachment to Statement in Opposition dated June 10, 2008.
[27] See Nial letter dated March 23, 2008, p. 5.
[28] The New York Constitution, Article 1, Section 3, "Freedom of worship; religious liberty," states, "The free exercise and enjoyment of religious profession and worship, without discrimination or **preference**, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this state. (Amended by vote of the people November 7 2001)." Cited in Statement in Opposition dated March 25, 2008.

submission, dated July 8, 2008, did Applicant explain why more programmatic space, if truly needed, could not be accommodated in the building's upper floors. Applicant argues that locating the caretaker's apartment "on a higher residential floor which carry a premium due to their oblique Central Park views" would diminish the feasibility of the project.[29] It should also be noted that putting condominiums on top of the community house requires additional elevator and lobby space that eats into the floor area available for programmatic use on floors 1 through 4. Applicant's unjustified desire to use the upper floors as an "economic engine" is also, therefore, driving its request for the Rear Yard variances.

The existence of any nexus between the Rear Yard variances and Applicant's programmatic needs is tenuous at best. Applicant repeatedly argues that the New Building is the only feasible option for developing the site to meet its programmatic needs. Yet, because Applicant has provided no analysis of its ability to accommodate programmatic needs in an as-of-right building, the Board has no basis for accepting this argument except Applicant's word.[30]

Applicant has repeatedly overstated usership of the synagogue and its facilities. For example, Applicant claims that Saturday services in the Main Synagogue attract "up to 500 worshippers."[31] Recent observations counted between 8 (Thursday morning service, observed June 5, 2008) and 47 (first night of Passover service, observed April 19, 2008) attendees. Furthermore, Applicant anticipates a 300% increase in the number of students (from 20 to 60+) enrolled in its Toddler Program—one of the key programs driving its need for more classroom space, according to Applicant—plus expansion of the program from 3 hours per day, twice per week, to 10 hours per day, 5 times per week (an 800% increase). Yet, Applicant provides no reasonable basis for projecting this kind of exponential growth.

It is significant that Applicant did not mention the Toddler Program in any of its written submissions prior to December 28, 2007, much less its ambition to expand the program. According to Applicant, the program now meets in a basement assembly area because existing classroom space is rented to the tenant school, Beit Rabban. This suggests that the Toddler Program, far from being a program central to Applicant's mission, is a minor function of the institution now being inflated to justify the Rear Yard variances when, in fact, Beit Rabban is and will continue to be the primary user of the community facility.[32]

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[29] Friedman & Gotbaum Statement in Support revised July 8, 2008, p. 28

[30] Opposition provided a partial list of space located elsewhere on the zoning lot that could potentially accommodate Applicant's programmatic needs. See Opp. Ex. GG, submitted to the Board on March 25, 2008.

[31] Friedman & Gotbaum Statement in Support revised July 8, 2008, p. 20.

[32] Applicant's program for the new community house has been a moving target since it first applied to the Landmarks Preservation Commission in 2002. For example, Applicant has made inconsistent statements about the small synagogue. See Opp. Ex. B, submitted to the Board on January 28, 2008. In submissions to the Landmarks Preservation Commission, Applicant showed the small synagogue relocated to the New Building. However, at a meeting of Manhattan Community Board 7 on October 17, 2007, Applicant claimed that leaving the small synagogue in its present location was "an issue of faith." Opp. Ex. H, submitted to the Board on January 28, 2008, further describes Applicant's shifting program for the 4th floor. In 2002, the 4th floor was to be used for offices and a conference room. Today, Applicant argues that not only is it necessary to incorporate a caretaker's apartment into the New Building, it must be located on the

Applicant's Environmental Assessment Statement makes it perfectly clear that "Private School Students" will far outnumber other users of the classroom space.[33] The educational programs described by Applicant as integral to its program, including the Toddler Program, Hebrew School and Family Education Program are generally non-simultaneous and can readily share facilities.[34] Educational meeting space is also available in ample supply elsewhere on the zoning lot.[35]

Nothing in the physical condition of the lot presents any practical difficulties or unnecessary hardship warranting either the Height or Rear Yard variances. A nonprofit institution's desire to "monetize" its assets, even for the purpose of funding its programs, is not a basis for granting variances. Applicant's own drawings over the course of the past six years show that there is no single way to construct a building that meets its programmatic and financial goals.[36] The various texts accompanying these drawings, each offering a different description of Applicant's needs, also suggest that Applicant's program is fluid, not fixed.[37] If the program is not driving the design, then it is reasonable to assume that the finances are (see discussion of Finding (b) below).

Applicant has failed to meet Finding (a).

Finding (b): "…because of such physical conditions there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of this Resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such zoning lot; this finding shall not be required for the granting of a variance to a non-profit organization…"

4th floor. These kinds of inconsistencies undercut Applicant's repeated statements that its programmatic needs can only be met by the New Building.

[33] AKRF letter dated May 12, 2008, p. 7f. Moreover, Applicant provides contradictory statements about the degree to which the income-producing tenant school, Beit Rabban, drives its need for space. In its May 13, 2008, submission, Applicant states: "Beit Rabban is unaffiliated with CSI other than as its tenant and membership in CSI is not a prerequisite for admissions." However, on the same page, Applicant states: "While the focus of this Application for expanding its space is on its own pastoral and educational programming, Beit Rabban's own growth is a validation of the need for additional space for educational religious purposes." Friedman & Gotbaum Statement in Support revised July 29, 2008, p. 12. The relationship between Beit Rabban and Applicant's need for additional space is also confused by the note on its Program Usage Chart that "Beit Rabban and CSI will also share classrooms as mutual programs require." Friedman & Gotbaum Statement in Support dated May 13, Exhibit A.

[34] See Craig Morrison letter dated January 28, 2008, ¶ 10, submitted to the Board as an attachment to Statement in Opposition dated January 28, 2008. See also Opp. Ex. BB, submitted to the Board on January 28, 2008, and James A. Greer letter dated July 28, 2008, enclosed herein.

[35] See Craig Morrison letter dated January 28, 2008, ¶ 9-14, and Opp. Ex. GG.

[36] Sugarman affirmation, ¶ 9 and Opp. Ex. E; ¶ 10 and Opp. Ex. H; and Opp. Ex. F & G, all submitted to the Board on January 28, 2008.

[37] Ibid ¶ 8 and Opp. Ex. A, submitted to the Board on January 28, 2008.

Applicant's contention that the as-of-right zoning envelope on its site is "wholly impractical and financially infeasible to develop"[38] is without support.

By prompting Applicant to bifurcate its analysis between the community house and the market-rate condominiums, the Board has created a situation in which the variances associated with Applicant's desire to create an "economic engine" (certainly the Height variances and arguably the Rear Yard variances) must meet the same test as any for-profit development with regard to Finding (b).

The appropriate test is whether there is any possibility that an as-of-right building could achieve a reasonable return.[39] Moreover, the analysis should take into account the possibility of a reasonable return **from the entire site**, not just a select portion of the site. **The threshold issue, then, is whether Applicant's so-called all-residential "Scheme C" would generate a reasonable return.** Secondarily, one might legitimately look at the economic feasibility of two condominium floors (floors 5 and 6) in Applicant's as-of-right alternative "Scheme A". Applicant's conclusion that neither Scheme C nor Scheme A yields a reasonable return is untenable.

Martin B. Levine, MAI, a New York State Licensed commercial real estate appraiser and Chairman of Metropolitan Valuation Services, Inc., has identified numerous fatal flaws in the Freeman Frazier feasibility studies. Their conclusions, on which Applicant's entire Finding (b) argument rests, cannot be relied upon as a basis for granting variances.[40]

Levine demonstrates that both Applicant's as-of-right Schemes A and C are economically feasible and would provide a reasonable return.[41] Therefore, neither the Height nor the Rear Yard variances are warranted.

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[38] Friedman & Gotbaum Statement in Support, revised July 8, 2008, p. 53.

[39] The previously cited Stroock brief argues that: 1) To calculate the reasonable rate of return, the focus "must be on whether *any* conforming use will yield a reasonable return" [emphasis added]. *Soho Alliance v. New York City Board of Standards and Appeals*, 264 A.D.2d 59, 64 (1st Dept. 2000) (*affirmed*, 741 N.E.2d 106). 2) This requires a showing that "there is no reasonable possibility that development of the zoning lot in strict conformity with the Zoning Resolution would bring a reasonable return." *West Village Houses Tenants' Association, et al. v. New York City Board of Standards and Appeals, et al.*, 302 A.D.2d 230, 231 (1st Dept. 2003). 3) The applicable standard is whether a reasonable return can be realized without the variance and not whether a higher rate of return is possible with the grant of a variance. *Bath Beach Health Spa of Park Slope, Inc. v. Bennett*, 176 A.D.2d 874, 875 (2nd Dept. 1991).

[40] In his letter dated March 20, 2008, submitted as attachment to Statement in Opposition dated March 25, 2008, Levine also points out, "The Freeman/Frazier March 11, 2008 report appears to intentionally overestimate the underlying land value in an attempt to prove that as of right development is not economically feasible. Insofar as the value of the underlying land has been clearly demonstrated to be the fulcrum upon which economic feasibility is balanced, basing the land value on **the opinion of a consultant with no appraisal qualifications or licenses, who does not identify themselves as a real estate appraiser, and who has demonstrated a failure to employ proper appraisal methodology and technique**, can only result in an unreliable indication of economic feasibility."

[41] Martin B. Levine, MAI, Metropolitan Valuation Services, letter dated June 10, 2008: "…based on any number of reasonable adjustments to the Freeman/Frazier calculations, development of 'As of Right Scheme C' or an as of right mixed-use building is economically feasible, with no apparent hardship evident." In tables presented at the end of his letter, Levine estimates that Scheme C would yield total net

Inflated Site Value

Since issuing its first Notice of Objection on June 15, 2007, the Board has expressed concern about the credibility of Applicant's site value.[42] Levine demonstrates that, by overstating the site value, Freeman Frazier "have added millions of dollars to the cost of the project."

> They accomplish this in three ways: first by charging the proposed development for buildable square footage whether or not it is actually being delivered as part of the proposed development package; second, by charging the development for buildable area that cannot be utilized (which is far in excess of market norms; and thirdly, by using an inflated unit value for the land.[43]

Levine estimates that Freeman Fraziers errors and exaggerations result in an approximately 20% inflation in site value.[44]

Since the Board rejected the "Sliver Tower" basis for Applicant's inflated site value, Applicant introduced a completely new, but equally specious, methodology involving air rights over the Parsonage on Central Park West. At its April 15, 2008, public hearing, the Board questioned Applicant's use of 19,755 square feet as the as-of-right floor area as the basis for calculating site value.[45] Freeman responded in his May 13, 2008, submission, stating, "…we have assumed that the 19,755 sq. ft. could be achieved by utilizing the as of right buildable floor area from the parsonage portion of the site." Clearly, "19,755" is a crucial number in desperate search of a methodology. In any case, because of the historic district designation and the regulatory purview of the Landmarks Preservation Commission, it is unreasonable to assume that as much as 19,755 square feet of floor area could be built over the Parsonage.

In its May 13, 2008, submission, Applicant confused matters more by introducing two new "hypothetical as-of-right mixed-use" schemes that it misleadingly labels "AOR #1" and "AOR #2". Neither scheme is "as-of-right"; both describe 7-story buildings (one with a penthouse and one without) that would require Height variances.[46]

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proceeds of $15,555,500 to $22,698,320 and a mixed-use building would yield total net proceeds of $4,514,500 to $6,639,420.

[42] See Objection #36 of June 15, 2007, Notice of Objections and Objection 22 of October 12, 2007, Notice. Also, at the April 15, 2008, public hearing, Chair Srinivasan stated, "…I think we're we're questioning whether you can actually build the Sliver building given that there are other zoning rules that may adjust…So, that's, I think, the reason why there is some concern on the Board's part of whether you can actually get Central Park views and so we think a more reasonable analysis is to essentially take that out of the equation. It's a more conservative approach but I think it would be more credible." (4/15/08 transcript, p. 5, lines 102-4, 106-110)

[43] Levine letter dated July 29, 2008, p. 4. Levine's 23-page letter describes Applicant's errors in meticulous detail, as do his previous submissions to the Board.

[44] Levine letter dated July 29, 2008, p. 6.

[45] 4/15/08 transcript, p. 8, line 180, and p. 13, lines 268-271.

[46] Applicant then compounded its misstatement by admitting that one of the "AOR" schemes was not as-of-right but claiming that the other one was. Friedman & Gotbaum letter dated June 17, 2008.

This misrepresentation of the feasibility of alternative schemes is significant because the Board had specifically asked for a side-by-side comparison of the New Building and the "initial as-of-right, which is the mixed community facility and residential within the R-8, the envelope" (a.k.a. Scheme A), what Board Chair Srinivasan referred to as "the threshold issue."[47] Applicant blatantly ignored the Board's directive. Even after finally producing a revised analysis of Scheme A (Freeman/Frazier's June 17, 2008, submission), Applicant continues to ascribe land cost for the entire building to just the two condominium floors, resulting in an apparent, though false, capital loss.

Applicant has never updated its analysis of Scheme C to incorporate any of the revised assumptions that form the basis of its most recent feasibility statements, for example the revised site value.

Unexplained and Erroneous Allocation of Construction Costs

Applicant also withholds relevant pages from construction cost estimates prepared by McQuilken Associates outlining estimates for Schemes A and C.[48] Freeman/Frazier's earlier Scheme C analysis showed unexplained high loss factors (only 17,780 square feet of 28,724 square feet would be sellable)[49], suggesting that this so-called all-residential as-of-right scenario also includes community facility space and thus is not a true "all-residential" as-of-right alternative.[50] In addition, Applicant's drawings show that this scheme is also handicapped, in comparison to the New Building, by not taking advantage of approximately 6,400 square feet of valuable, income-producing space on the subcellar level.[51]

The cost estimates that Applicant did provide, only after Opposition pointed out their glaring omission from Applicant's previously submitted materials, lack transparency.[52] They do not describe the methodology used to allocate costs between "residential" and "school" uses. The estimates for the "residential" and "school" uses appear to be entangled.[53] They also ascribe "residential" costs to the 4th-floor caretaker's apartment,

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[47] At the April 15, 2008, public hearing, Chair Srinivasan stated, "…I think you should really give us a stand-alone document which explains all this information that we've seen up till now and how this project has changed at one place…" (4/15/08 transcript, p. 20, lines 439-441) and "I think you should go back to your initial as-of-right, which is the mixed community facility and residential within R-8, the envelope. That was the threshold issue which you started off with and then you could look at the two alternatives that you provided to us now which is your current proposal and your lesser variance alternative." (4/15/08 transcript, p. 6, lines 117-121)

[48] In a letter dated June 9, 2008 (p. 9), James E. Mulford points out, "No evidence has been submitted that McQuilkin is an architect, engineer, builder, or contractor, and the material is neither signed nor sealed." Levine notes the same in his letters dated June 10, 2008, and July 29, 2008.

[49] Freeman Frazier & Associates letter dated December 21, 2007, p. 11, Schedule A1.

[50] As Levine points out on page 2 of his letter dated July 29, 2008, Freeman Frazier describe in their December 21, 2007, submission that Scheme C "consists of a ground floor residential and synagogue lobby and core…"

[51] Ibid.

[52] Levine letter dated July 29, 2008, p. 8.

[53] See James E. Mulford letter dated June 9, 2008, pp. 9-10. Also, Levine letter dated June 10, 2008, and July 29, 2008.

which Applicant claims is related to its programmatic purposes, thus inflating the residential construction costs by more than $2 million.[54]

Failure to Follow Board's Instructions for Financial Feasibility Studies

In addition, Applicant has failed to analyze the economic potential of the site in accordance with the Board's rules for preparing financial feasibility studies. Applicant provides no reasoned explanation as to why a return on equity analysis, in accordance with the Board's "Detailed Instructions for Completing BZ Application,"[55] is not appropriate for a condominium project. Yet, as Levine points out:

> Quite inexplicably, Freeman/Frazier continues to process their feasibility calculation assuming financing, and charging the development millions of dollars in interest and other borrowing costs. **Disingenuously, they effectively calculate the return on equity, but compare not the equity investment, but rather the total project investment as the percentage return.** This error is egregious; calculated correctly, even Freeman/Frazier's distorted value assumptions prove that development is economically feasible *without any variances.*[56]

Levine further observes:

> The BSA clearly defines net profit as the net sellout value less total development costs and dictates economic feasibility as measured by the percentage return on equity (net profit divided by equity). **Freeman/Frazier appears to have simply ignored this dictate and measure economic feasibility as the net equity profit divided by the total investment instead of the total equity investment.** This is an extraordinary error…[57]

The fundamental flaw in Applicant's methodology is that much of the revenue generated by the "purchase" of the residential portion by a "developer" is absorbed in the cost of constructing the new community house, hiding the true return to Applicant of the overall development project.[58] Levine also describes how Freeman Frazier "continues to process their feasibility calculation assuming financing, charging the development millions of dollars in interest and other borrowing costs."[59] Applicant has already stated that it will act as its own developer, reaping the benefits of the luxury condominium development and the community facility simultaneously.

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[54] Levine letter dated July 29, 2008, p. 9.
[55] Levine finds that none of Applicant's many submissions address acquisition costs and date of acquisition as well as market value, as required by the Board's rules, under Item M, #5. Levine letters dated June 10, 2008, and July 29, 2008. See also Katherine L. Davis letter, dated June 10, 2008.
[56] Levine letter dated June 10, 2008. See also Mulford, pp. 11-14.
[57] Levine letter dated June 10, 2008.
[58] See Mulford, pp. 15-16.
[59] Levine letter dated July 29, 2008, p. 10.

Applicant has attempted to make it impossible to ascertain whether an as-of-right building could yield a reasonable return on this site or indeed whether the New Building is the minimum variance needed to afford relief (see discussion under Finding (e)). But, by doing so, Applicant has also sabotaged its argument that no feasible as-of-right alternative exists. Correct analysis shows that Applicant could develop the site to both meet its programmatic goals and yield a reasonable return, without variances.

The ease with which Applicant is able to blur the lines between program-related and non-program-related space in its analyses also spotlights a basic problem at the core of the bifurcated approach, which treats the institutional and residential components as though they were separate entities. In reality, they are inextricably intertwined. Applicant's desire to build a community house to address its programmatic needs places obvious constraints on the potential profitability of this site, just as Applicant's desire to build profit-generating luxury condominiums limits its flexibility in accommodating its programmatic needs. This point is discussed further under Finding (d).

Given that financial need remains central to Applicant's argument for variances, it is significant that no information about Applicant's financial situation (such as its major donors, endowment, existing and potential income sources on the site including the tenant school, the market-rate residential unit located in the Parsonage, and the 6,400-square-foot multi-function room referred to in previous drawings as a "Banquet Hall"[60]) is provided in any of the submissions.[61]

Applicant has failed to meet Finding (b).

Finding (c) "…the variance, if granted, will not alter the essential character of the neighborhood or district in which the zoning lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare…"

The New Building would undermine the essential character of the surrounding neighborhood, significantly damage the use and value of adjacent properties, and negatively impact neighbors' quality of life. The effect of these variances, if approved, would also be felt beyond West 70th Street since allowing the R8B low-rise contextual zoning to be set aside in this case would provide grounds for overriding it in other cases, resulting in the wholesale *de facto* rezoning of all brownstone midblocks abutting Central Park West.[62] If approved, an out-of-scale, noncompliant building incorporating luxury condominiums on West 70th Street, in the R8B district, would set a clear precedent for the

[60] See Sugarman affirmation ¶ 16 and Opp. Ex. L, submitted to the Board on January 28, 2008.
[61] See Board "Instructions," Item M, #4.
[62] The previously cited Stroock brief points out that: 1) The New York State Court of Appeals has cautioned against piecemeal variances, such as the ones requested by Applicant, which ultimately alter the nature of the neighborhood and may cause "far greater hardships than that which a variance may alleviate." *Village Board of Fayetteville*, 53 N.Y.2d at 259-60; *quoting Matter of Otto v. Steinhilber*, 282 N.Y. 71, 77-8 (1939). 2) Unjustified variances may destroy or diminish the value of nearby properties and adversely affect those who obtained residences in reliance upon the design of zoning ordinance. *Village of Fayetteville*, 53 N.Y.2d at 260.

construction of more intrusive, high-rise buildings throughout the area, eroding the neighborhood's special character and the strong visual distinction between the towers of Central Park West and the brownstone-scale buildings of the midblocks.[63]

The impact does not stop there—nonprofit institutions throughout New York City look to this application as a precedent for allowing profitable development beyond what existing zoning allows. This application, therefore, has the potential to undo decades of planning to protect the character and identity of neighborhoods from out-of-scale development.[64]

The most egregious impacts on community character and adjacent properties result entirely from Applicant's desire to construct luxury condominiums on top of a new community house (the Height variances). The waiving of height and setback regulations would cause at least 4 east-facing windows at 18 West 70th Street to be bricked over, greatly affecting the light and air in these apartments. In Applicant's latest courtyard scheme, three other lot-line windows at 18 West 70th Street would open directly onto a brick wall. The New Building would transform a 3-sided courtyard at 18 West 70th Street into an airshaft, closed on 4 sides up to a height of 113.7 feet, plunging dozens more windows facing the courtyard into deep shadow. An as-of-right building on this site would not brick over any east-facing windows.[65]

Robert Von Ancken, MAI, CRE, and Kathryn J. Cosentino, of Grubb & Ellis Consulting Services Company performed a professional appraisal and concluded that three residential properties adjacent to 6-10 West 70th Street would be adversely impacted: 18 West 70th Street, 91 Central Park West and 9 West 69th Street.[66]

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[63] A map of land uses in the blocks between Central Park West and Columbus Avenue, West 59th to 110th Street, shows that many properties are operated as public facilities and/or institutions. See Statement in Opposition dated November 20, 2007, Exhibit C, and Weisz+Yoes, "Central Park West Skyline: Potential Futures" submitted to the Board on March 25, 2008, pp. 18-23.

[64] In a 2003 statement submitted to the Landmarks Preservation Commission, Professor Elliott D. Sclar wrote: "The contextual zoning and landmark designations that guide this neighborhood's growth and change (and the neighborhood has grown and changed) were thoughtfully designed and democractically adopted policies intended to fairly balance the maintenance of this neighborhood's charms with the real needs for added development. **This project will destroy this careful balance**." See Statement in Opposition dated November 20, 2007, Exhibit H. See also Sclar letter dated February 12, 2008, and Otis Pratt Pearsall letter dated February 12, 2008.

[65] In total, 106 windows would be affected by the noncompliant condominiums, increasing the negative impact of new construction on this site by 80%. See Statement in Opposition dated November 20, 2007, Exhibit I, slide from "Window Census" comparing impact of an as-of-right building versus the New Building on east-facing windows at 18 West 70th Street. In addition, at the November 27, 2007, public hearing, 18 West 70th Street resident Ron Prince submitted into the record a print-out of a PowerPoint presentation including photographs and drawings of the windows that will be affected by the New Building, plus a breakdown of the east-facing windows that would be impacted by the New Building but not by an as-of-right building.

[66] All three buildings are at least 75 years old and have pre-existing non-conforming footprints that fill out their lots to within several feet of the rear lot line. As a result, the New Building's noncompliant footprint would have an even greater impact on adjacent properties than if the existing rear yards were compliant to today's zoning standards. Residents of adjacent buildings are also concerned about the impact that the elimination of the rear yard would have on their emergency fire egress.

> The proposed construction will cause damage to all three adjacent buildings by 1) cutting off the natural lighting in the E and F line apartments with windows on the northerly and westerly elevations on the lower floors at 91 Central Park West, 2) to a lesser extent diminishing natural lighting to the rear apartments at 9 West 69th Street, and 3) eliminate most of the natural light and the easterly views of Central Park from the apartments at 18 West 70th Street that have windows facing east.[67]

The appraisal report concludes that the aggregate loss in value to the apartments at 18 West 70th Street alone would be $2,577,250. Approval of the New Building would, therefore, result in a transfer of wealth from residents of 18 West 70th Street to Applicant, forcing them to contribute involuntarily to Applicant's fundraising strategy.

Applicant's Environmental Assessment Statement downplays the effect that a new, 9-story, 113.7-foot-tall building would have on the light, air and overall character of the West 70th Street brownstone midblock.[68] The Statement does not identify any impacts on windows in adjacent buildings. Furthermore, it fails to provide information necessary to evaluate the impact of increased shadows along West 70th Street. Missing are comparisons of existing, as-of-right and proposed shadow scenarios (required by the Board), as well as information such as a compass rose, GMT and street-level perspectives that would allow the studies to be independently verified. The Statement acknowledges that the new building will cast a shadow similar to 18 West 70th Street (a 1920s building constructed prior to modern zoning laws), but denies that this will create a wall of shadows on West 70th Street.

In fact, the New Building would transform what is now an almost pristine brownstone block by creating a 9-story wall that extends roughly 250 feet into the midblock.[69] The proposed building would tip the balance between the low-rise, 4- and 5-story brownstones that define West 70th Street and the few, taller anomalies the predate the existing zoning, with serious consequences for the neighborhood's essential character and adjacent property values.

Furthermore, Applicant's Statement either ignores or downplays the substantial increase in street congestion, noise and garbage that will be created by the New Building. Applicant contemplates the doubling of the number of students that will be using the proposed New Building and increasing the number of hours of the Toddler Program by a

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[67] Grubb & Ellis report dated March 18, 2008, submitted to the Board as attachment to Statement in Opposition dated March 25, 2008. See also Charles DiSanto, Principal of Walter B. Melvin Architects, letter dated February 7, 2008.

[68] West 70th Street is, for the most part, "A Block Full of Late-19th-Century Row Houses," to quote the title of a February 16, 2003, *New York Times* article by historian Christopher Gray. Gray goes on to describe West 70th Street as "largely unchanged since a couple of apartment buildings sneaked in during the first part of the 20th century." See Statement in Opposition dated November 20, 2007, Exhibit F. Applicant itself sought to preserve this character using an 1896 and later deeds restricting owners of the rowhouse that once occupied 8 West 70th Street from replacing their building with anything taller than the synagogue. See Statement in Opposition dated November 20, 2007, Exhibit G.

[69] Sugarman affirmation ¶ 29 and Opp. Ex. AA, submitted to the Board on January 28, 2008.

factor of 8, thereby adding considerably to the existing traffic congestion on West 70th Street. Applicant also contemplates that an additional ton of garbage will be created at the proposed New Building and talks vaguely about refrigerating the garbage while it is awaiting removal but provides no details as to how this would work.

Applicant has failed to meet Finding (c).

Finding (d) "…the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however where all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship…"

If any hardship exists in this case, it has been created by Applicant's desire to construct new religious and educational facilities **as well as** 5 floors of for-profit luxury condominiums on the same fraction of its total zoning lot. One use places obvious constraints on the availability of space for the other use.

Applicant could construct an as-of-right building to accommodate all of its programmatic needs, including access and circulation and even accounting for tremendous growth in usership.[70] Such an as-of-right building could also accommodate 2 floors or more of for-profit residential development. Alternatively, Applicant could construct an all-residential building yielding a generous return on this site.

The requested Height variances are only triggered because the desired condominiums are stacked **on top of** the desired community house. The requested Rear Yard variances are only triggered because the desired condominiums occupy space that could otherwise be dedicated to community-house functions.

It is not the Board's role to ensure Applicant's ability to pay for a new community house, but rather to assess whether or not zoning impedes the useful development of this site.[71] The site can clearly be developed in a variety of ways that comply with zoning and would produce tangible benefits to Applicant. The fact that Applicant chooses not to pursue any of these options is not a sound basis for variances.

Applicant has failed to meet Finding (d).

Finding (e) "…within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief; and to

[70] There is no basis for concluding that Applicant's membership will increase dramatically. Applicant's historic growth rate has been miniscule. On average membership has increased by less than 2.3 families or less than 1% per year for the past 112 years. See Friedman & Gotbaum Statement in Support revised July 8, 2008, p. 19.

[71] There is no basis for believing that Applicant lacks the resources to pay for a new community house without constructing luxury condominiums on top of it. On the contrary, Opposition has introduced evidence to the contrary, which has not been rebutted by Applicant.

this end, the Board may permit a lesser variance than that applied for."

All of Applicant's needs can be met without any of the requested variances and indeed within the first 4 floors of an as-of-right building.[72] Moreover, there is ample space in the entire zoning lot to accommodate Applicant's programmatic needs without zoning variances.

Applicant is also capable of constructing a mixed-use building (community house with 2 condominium floors on top) or an all-residential building at a reasonable return.

Applicant offers no complete, side-by-side comparison of alternative schemes. Therefore, the Board has no basis for concluding that either the Height variances or the Rear Yard variances are the minimum needed to afford relief.

The Applicant has failed to meet Finding (e).

Conclusion

For all of the foregoing reasons, and because none of the 7 requested variances meet any of the 5 findings required under Section 72-21 of the Zoning Resolution of the City of New York, this application should be denied in full.

[72] See Craig Morrison, AIA, letter dated January 28, 2008, ¶ 7, submitted to the Board as an attachment to Statement in Opposition dated January 28, 2008.