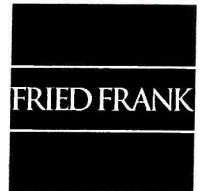


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December 28, 2016

**By Hand**

Margery Perlmutter, R.A., Esq., Chair  
New York City Board of Standards and Appeals  
250 Broadway, 29th Floor  
New York, New York 10007

**Re: Applicant’s Response to Opposition Materials**  
BSA Cal. No. 74-07-BZ  
6-10 West 70th Street  
Manhattan Block 1122, Lots 36 and 37

Dear Chair Perlmutter:

On behalf of the Trustees of the Congregation Shearith Israel in the City of New York (the “Applicant”), this letter responds to the following materials (the “Opposition Materials”) submitted in opposition to the Applicant’s application under Calendar Number 74-07-BZ (the “Application”):

- Letter from Michael S. Hiller, Esq., on behalf of the West Side Neighbors Association, dated December 14, 2016 (the “Hiller Submission”);
- Letter by email from David Rosenberg, Esq., on behalf of Landmark West! et al., dated December 7, 2016 (the “Rosenberg Submission”); and
- Submission by Alan D. Sugarman, Esq., on behalf of Nizam Ketannah et al., dated December 7, 2016 (“Sugarman Submission 1”).

The Opposition Materials were submitted following the Applicant’s submission to the Board on November 16, 2016, of materials responding to questions raised at the public hearing on October 14, 2016.<sup>1</sup>

<sup>1</sup> The opposition parties were permitted to submit responsive materials by December 7, 2016, with a 1-week extension granted to Mr. Hiller. The letter also addresses additional materials submitted electronically by Mr. Sugarman on December 19, 2016, after the expiration of the response period (“Sugarman Submission 2”).

Capitalized terms not otherwise defined below have the meaning ascribed to them in the Applicant's Statement of Facts, dated November 16, 2016.

### **Response to Opposition Materials**

Rather than addressing the Applicant's responses to the Board,<sup>2</sup> the Opposition Materials argue broadly that the Variance that is the basis of the Application should never have been granted, and ask the Board to disregard its long-standing approach to applications for extensions of time and minor amendments to approved plans, an approach that has consistently been upheld by New York courts.

The Opposition Materials, read together, can be summarized as setting forth three main contentions: **(A)** that the proposed modifications of the New Community House reflected in the 2016 Plans are not "minor" due to the itemized number of updates that are listed in the Application; **(B)** that the reasonable return finding approved under the Variance for the residential floors of the building should be reassessed due to current market conditions and the proposed updates to the non-residential floors; and **(C)** that the Applicant's programmatic needs for religious uses approved by the Board in 2008 do not reflect the Applicant's actual needs.

As discussed below, based on information previously submitted in the Statement of Facts, as well as prior Board precedent and case law from New York courts consistently upholding the Board's approach to similar cases, the contentions of the Opposition Materials are without merit.

#### **A. Scope of Proposed Modifications**

The Opposition Materials contend that the design updates to the New Community House proposed under the 2016 Plans are not minor amendments to the BSA-Approved Plans. This contention is based on the itemized number of updates listed in the Application, rather than whether such changes have any bearing on the basis for the Board's approval of the Variance.<sup>3</sup> Specific changes that the Opposition Materials highlight and object to include updates to rooftop mechanical equipment; location of vents above the first floor within the rear yard<sup>4</sup>; and interior changes in the arrangement of spaces, the location of building columns and HVAC equipment, and modifications to core and egress.<sup>5</sup>

The modifications noted in the Opposition Materials, all of which are described in detail in the Statement of Facts, do not change the Applicant's program that formed the basis for the Board's grant of the Variance, nor do they change the nature or extent of the waivers granted by the Board.<sup>6</sup> With respect to the rooftop equipment and bulkhead, there was no height specified

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<sup>2</sup> In particular, the Opposition Materials do not address the Technical Memorandum analyzing potential environmental impacts of the modifications proposed under the Application, or the letter from Longman Lindsey, dated November 11, 2016, discussing compliance of proposed mechanical equipment with the New York City Noise Code, both of which were submitted to the Board on November 16, 2016.

<sup>3</sup> Hiller Submission, pg. 1-2, 16-31; Rosenberg Submission, pg. 4-6, Ex. A.

<sup>4</sup> Hiller Submission, pg. 17, 23 & 31; Rosenberg Submission, pg. 6-7; Sugarman Submission, pg. 19-23.

<sup>5</sup> Hiller Submission, pg. 17-31.

<sup>6</sup> Applicant's Statement, pg. 17-18. Additionally, all exterior changes have been reviewed and approved by the Landmarks Preservation Commission.

on the Approved Plans and the current configuration is within the area of what is considered a rooftop “permitted obstruction” under applicable zoning regulations. With respect to the vents at the rear of the building above the first floor, these elements are at or below 23 feet, the roof level shown on the Approved Plans (and in fact other portions of this roof have been lowered, resulting in a reduced building envelope in this area).<sup>7</sup> The Opposition Materials completely ignore the findings of the Technical Memorandum submitted with the Application, which conclude that there are no discernible effects on air quality or ambient noise levels as a result of these exterior changes.

The proposed minor amendments to the interior layout of the New Community House provide for a more efficient layout and arrangement of spaces to meet the Applicant’s programmatic needs, without material changes to the programs that the Board relied upon in granting the Variance.<sup>8</sup>

Pursuant to Section 1-07.1(a)(1) of the Rules, the Board has the discretion to determine whether an amendment to a variance involves only minor modifications of previously approved plans and therefore may be filed on the Special Order Calendar. In determining whether the scope of proposed modifications are minor or major, the Board has historically looked to whether the waivers and conditions of the underlying variance would be affected in any significant way. *See* Cal. No. 1149-62-BZ (approving an increase in the size of a zoning lot subject to a variance and an amendment to the previously approved site plan as a minor amendment because the “waivers and conditions of the underlying grant [were] not implicated”) and Cal. No. 299-82-BZ (approving a new approved site plan to permit construction of a 195,560 square foot building as a minor modification of a prior variance, because the new building was as-of-right and the site plan modification did not implicate height and setback waivers that were the subject of the variance). This consistent approach has been affirmed in New York State courts. *See Fisher v. New York City Board of Standards and Appeals*, 896 N.Y.S.2d 340 (N.Y. 1st App. Div. 2010) (upholding the Board’s determination regarding the scope of the modification considered under Cal. No. 1149-62-BZ); *Westwater v. New York City Board of Standards and Appeals*, 2013 N.Y. Misc. LEXIS 4707 (N.Y. Sup. Ct. 2013).

Contrary to the Opposition Materials, based on the Board’s well-established precedent, it is the effect of the proposed modifications on the substance of the Variance, not the number of changes, that is the determining factor as to the scope of the modifications.<sup>9</sup> The modifications of the BSA-Approved Plans proposed under the Application do not implicate the Applicant’s program or the waivers granted under the Variance. Accordingly, based on the Board’s well-established precedent and New York case law upholding the Board’s precedent, the proposed plan amendments constitute minor modifications, and the Application is appropriately considered on the Special Order Calendar.

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<sup>7</sup> Applicant’s Statement, pg. 7-9.

<sup>8</sup> Applicant’s Statement, pg. 19-21.

<sup>9</sup> The Hiller Submission cites two prior decisions in which, it is alleged, the Board determined a scope of modifications similar those proposed under the 2016 Plans were major modifications, requiring a new financial analysis. The first case (Cal. No. 62-83-BZ) addressed a proposed conversion of loading docks to private residential parking, a significant program change; the second case (Cal. No. 135-05-BZ) concerned an amendment that would, among other things, increase the size of the approved project by approximately 6,000 square feet. Neither case is analogous to the Application before the Board.

## **B. Applicable Financial Analysis**

The Opposition Materials argue that the financial analysis that the Board relied upon in granting the Variance is invalid, because: (i) residential market conditions have changed<sup>10</sup>; and (ii) the physical modifications proposed under the 2016 Plans would have an effect on the construction costs.<sup>11</sup> These contentions in the Opposition Materials ask the Board to ignore its well-established approach in similar cases involving minor modifications, an approach that has consistently been upheld by New York courts.

As an initial matter, the Board's financial analysis in connection with the Variance concerned only the residential upper floors of the building. Proposed minor updates to the non-residential floors of the New Community House under the 2016 Plans, and any associated construction costs, are not germane to a consideration of the financial analysis of the residential upper floors, for which the program remains unchanged.

As to the residential program, the Opposition Materials assert that the market value of residential condominiums in the building, based on recent appraisals, would be greater than the value calculated in 2008. As the Board's long-standing practice recognizes, market conditions and construction costs vary from time to time and between different appraisals and methodologies. It is the Board's consistent practice not to require new financial analyses in applications for minor modifications and extensions of time of previously issued variances, where such applications do not "seek a new zoning variance or a relaxation of the Zoning Resolution requirements," and are thus "a technical amendment to the originally approved site plan." *See* Cal. No. 299-82-BZ, citing *Fisher*; *see also East 91st Street Neighbors, Inc. v. New York City Board of Standards and Appeals*, 294 A.D.2d 126 (App. Div., 1st Dept. 2002) (deferring to the Board's determination that proposed modifications to a variance were minor).

The Application before the Board concerns the layout of the non-residential floors of the building. The residential floors remain unchanged except for a decrease in floor area by 203.04 square feet.<sup>12</sup> There is no change to the waivers the Board found to be necessary to allow the Applicant to realize a reasonable return on this component of the project. Based on the Board's prior practice, as consistently upheld by New York courts, a new financial analysis is not conducted as part of the Board's review of applications for extensions of time and minor modifications. To depart from the Board's established practice and treat the current Application differently would be arbitrary and capricious, and it would open the door to requiring the many applications to the Board for extensions of time or minor modifications also to provide revised financial analyses.

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<sup>10</sup> Hiller Submission, pg. 2-3 & 31-35; Rosenberg Submission, pg. 2-4; Sugarman Submission, pg. 6-7 & 27-28.

<sup>11</sup> Hiller Submission, pg. 2 & 34-35; Sugarman Submission 2, pg. 3-5.

<sup>12</sup> Applicant's Statement, pg. 7.

### C. Applicant's Programmatic Needs

The Opposition Materials dispute the fact that the Variance was ever necessary to address Applicant's programmatic needs.<sup>13</sup> As evidence of this, the Opposition Materials rely primarily on plans that were submitted to the Department of Buildings in 2015 (the "2015 Plans"), which erroneously labelled certain spaces intended for educational use as "office."<sup>14</sup> These intervening plans, they argue, taken together with the decision not to expand the small synagogue<sup>15</sup> and the absence of a third-party tenant,<sup>16</sup> indicate that the Applicant (i) did not intend to use the lower floors of the New Community House to fulfill its programmatic needs, and (ii) does not currently have a need for mission-critical educational spaces that requires the extension of the Variance.<sup>17</sup>

Contrary to the assertions in the Opposition Materials, the Applicant's programmatic needs remain as relied on by the Board in 2008. These needs, discussed in detail in the Applicant's Statement of Facts and accompanying program calendar and synagogue bulletin, include:

- the expansion of lobby and ancillary space,
- space for an expanded toddler program,
- classroom space for up to 50 Hebrew School students,
- classroom space for 40 to 50 students in adult education programs, and
- a residence for an onsite caretaker to ensure CSI's collection of antiquities is protected against electrical, plumbing or heating malfunctions.<sup>18</sup>

Two changes in the Applicant's use of space highlighted by the Opposition Materials—the decision not to expand the small synagogue and the fact that the Beit Rabban Day School is no longer expected to be a tenant—do not reflect changes in the programmatic needs of the Applicant for purposes of this Application, as the Board did not rely on these elements in granting the Variance.

The 2015 Plans relied upon by the Opposition Materials are not currently before the Board. Rather than reflecting a change in program, as noted in the Statement of Facts these plans reflected sacrifices of needed program space in an effort to find solutions to Building Code issues and HVAC needs.<sup>19</sup> The 2016 Plans that are currently before the Board reflect further design that address the HVAC and Building Code issues (including location of vents on the first floor roof) while still meeting the Applicant's programmatic needs in the manner approved under the Variance.

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<sup>13</sup> New York courts have consistently held that religious institutions may rely on programmatic needs in support of a zoning variance application and that substantial deference is afforded to such institutions regarding their programmatic needs. See *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488 (N.Y. 1968); *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583 (N.Y. 1986).

<sup>14</sup> Hiller Submission, pg. 3-4, 10-15 & 36; Rosenberg Submission, pg. 3 & 5-6; Sugarman Submission, pg. 2, 5-14 & 24-25.

<sup>15</sup> Hiller Submission, pg. 7, 17; Sugarman Submission, pg. 4, 8.

<sup>16</sup> Sugarman Submission, pg. 3-4 & 28-30.

<sup>17</sup> Sugarman Submission, pg. 14-18 & 25.

<sup>18</sup> Pg. 10-14, 19-21 & Exhibit B.

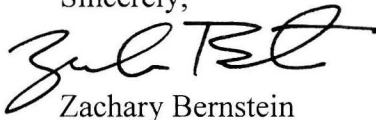
<sup>19</sup> Applicant's Statement, pg. 15-16 & 26).

With respect to the listing of “office” rather than “classroom” use in certain spaces on the 2015 Plans, the Applicant’s architect has indicated to the Board that this was a labeling error for space that was to be used for pedagogical purposes. The Opposition Materials suggest that this reflects some nefarious intention to have offices instead of classroom use, when the Applicant in fact has limited administrative staff that will not be using space in the New Community House. We note as well that the DOB forms filed with the 2015 Plans and cited by the Opposition Materials list both “classroom” and “office” uses as zoning Use Group 4, which includes seminary uses but not business office use. The toilet counts highlighted by the Opposition Materials would accommodate educational uses under the ratios that are required for such use by New York City Building Code.<sup>20</sup>

Under the 2016 Plans, which are the subject of this Application, the Applicant is able fully to meet its programmatic needs, with minor updates to partitioning and space planning in response to Building Code changes and reflecting the final location of mechanical equipment. These minor plan amendments do not implicate the waivers granted by the Board with respect to the Applicant’s proposed program of religious and educational uses within the New Community House. Rather, as described in Applicant’s Statement, with certain *de minimis* changes in the number of toddlers and students that would be accommodated, Applicant’s core program for the New Community House remains as approved under the Variance. Accordingly, contrary to the Opposition Materials, the Applicant’s programmatic needs are not grounds for the Board to revisit its approval of the Variance in considering the current Application.

Please do not hesitate to contact me with any comments or questions in advance of the Board’s public hearing on the Application scheduled for January 10, 2017.

Sincerely,



Zachary Bernstein

Cc:

Penny Ryan, District Manager, Manhattan Community Board 7  
Hon. Gale A. Brewer, Manhattan Borough President  
Hon. Helen Rosenthal, City Council Member, District 6  
Scott Pavan, R.A., Borough Commissioner (Development Hub), New York City Department of Buildings  
Christopher Holmes, BSA Liaison, New York City Department of City Planning  
Edith Hsu-Chen, Director, Manhattan Office, New York City Department of City Planning  
Alan D. Sugarman, Esq., counsel to Nizam Ketanneh et al.  
David Rosenberg, Marcus Rosenberg & Diamond LLP, counsel to Landmark West! et al.  
Michael S. Hiller, Hiller, PC, counsel to the West Side Neighbors Association

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<sup>20</sup> As further evidence of Applicant’s intentions, the Opposition Materials note that an appraiser hired by Applicant to determine the highest and best use of the New Community House appraised the “office” floors as medical office use (see Hiller Submission, pg. 14). However, the inclusion by the appraiser of a use inconsistent with the BSA-approved plans is not reflected in the forms or layout submitted under the 2015 Plans, and it did not reflect Applicant’s intended use of the space.