To Be Argued By:
Alan D. Sugarman

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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

against

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair of said Board, CHRISTOPHER COLLINS, Vice Chair of said Board and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents-Respondents.

BRIEF FOR PETITIONERS-APPELLANTS NIZAM PETER KETTANEH AND HOWARD LEPOW

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PRELIMINARY STATEMENT[1]

This is an appeal from the July 10, 2009 order and decision of the Supreme Court, New York County[2] dismissing an Article 78 proceeding challenging an August 26, 2008 decision[3] of the New York City Board of Standards and Appeals (BSA) granting variances to the respondent Congregation Shearith Israel.

Petitioner-Appellant Kettaneh is the owner of a brownstone located opposite and Petitioner-Appellant Lepow is the owner of a cooperative apartment located adjacent to the Congregation's site at Central Park West and West 70th Street in Manhattan. Petitioners challenged seven variances granted by the BSA to the Congregation for a 113.7[4]-foot high mixed-use community house and luxury condominium building. Although not apparent from the BSA Decision itself, the upper floor condominium variances account for over 90% of the variance floor area.[5]

The development site is in Manhattan, adjacent to the Congregation's historic landmarked Synagogue and Parsonage at the corner of Central Park West

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[1] Petitioners' 4450-page Appendix on Appeal is cited as [A-1 to A-4450]. The BSA below filed a 5795 page administrative record [A-249], supplemented by additional documents. [A-360]. Petitioners filed 4200 pages of exhibits with their Article 78 Petition. [A-157].

[2] *Kettaneh v. Board of Standards and Appeals*, 2009 NY Slip Op 31548(U) (Sup. Ct. NY Co, July 10, 2009) (Lobis Decision). [A-13].

[3] *See* the 230-paragraph Resolution of the BSA, August 26, 2008 (Decision.) [A-52]. By stipulation, the parties cite to paragraph numbers applied to the Decision. [A-270].

[4] The BSA misrepresented the height as 105 feet. *See* note 21.

[5] The BSA misleads by implying that 50% of the variances are related to religious programmatic needs. BSA Decision, ¶ 33. [A-54]. *See also* [A-476-81] explaining the 90% figure.

and West 70th Street.[6] The site is within a landmark district and three-fourths of the site is subject to West Side "contextual zoning," the zoning applicable to these residential neighborhoods with narrow side streets. Contextual zoning limits maximum building height to 75 feet and requires upper-floor setbacks on a building's street side, so as to protect the light and air on the street and the character of the community.

The record shows that a conforming building would easily provide a reasonable return on investment to the Congregation, even excluding the $12.3 million of profit the Congregation would earn as to the site value.

For the purposes of judicial economy and although cause does exist, this appeal does not challenge the lower floor community house variances; nor does this appeal assert that the BSA should have use a leveraged/return on equity approach.[7] Nor do Petitioners argue on this appeal the failure of the Congregation to exhaust administrative remedies with the City Planning Commission (CPS) under ZR § 74–711 special permit – rather, Petitioners' appeal is confined to the

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[6] *See* [A-182–4] providing three-dimensional color graphics of the site and proposed project.

[7] The Court below was incorrect in stating that the "petitioners' biggest complaint was that the Congregation's expert did not utilize the return on equity analysis" in determining the Project's rate of return." Lobis Decision at page 22. [A-35]. Petitioners' biggest complaint was the fallacious return on investment analysis and indeed Petitioners devoted a large part of their filings to that issue. [A-769 at line 21].

lack of jurisdiction by the BSA to provide relief from landmarking, as provided to CPC in ZR § 74–711.[8]

ISSUES PRESENTED

1. **Reasonable Return Acceptable to Congregation**

Whether the BSA may grant variances for a non-conforming building when the rate of return for a conforming building is nearly twice the rate acknowledged by the Congregation as satisfactory.

Not addressed by the court below.

2. **Reasonable Return of Entire Site[9]**

Whether in a mixed-use project, the Congregation must show as a basis for the BSA's (b) finding[10] that it is unable to earn a reasonable return on investment from an all-income producing conforming building (Scheme C) using the entire development site.[11]

Not addressed by the court below.

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[8] The concept of "exhaustion of remedies" would imply that the BSA has jurisdiction to grant landmarking hardship relief, but that first an owner must apply to the CPC. Petitioners' contend that the BSA has no power to consider landmarking as a physical condition in any event, hence the concept does not apply.

[9] "Reasonable return analysis" and "feasibility report/study/analysis" are used interchangeably.

[10] References to the (b) finding etc. are to the findings required under ZR § 72-21. *See* page 12 below.

[11] "As-of-right building" and "conforming building" are used interchangeably.

3. Partial Reasonable Return Feasibility Study

Whether the BSA may calculate its reasonable return finding for a mixed use project (Scheme A) using a site value representing seven floors, rather than two, when only two floors are being developed for condominiums.

Not addressed by the court below.[12]

4. Use of Value of Undeveloped Adjacent Landmarked Site

Whether the BSA may calculate its reasonable return finding for a mixed use project (Scheme A) using a site value representing the value of undeveloped space in an adjacent building alleged to be undevelopable because of landmarking.

Not addressed by the court below.

5. Use of Landmarking as Hardship

Whether the BSA in granting variances is authorized by statute to take into account hardships relating to landmarking, a power assigned to the New York City Planning Commission.

Not addressed by the court below.

6. Use of Original Acquisition Cost In Reasonable Return Analysis

Whether a reasonable return analysis must consider the actual acquisition cost of the property, so that the $12.3 million profit earned by the Congregation as to the site would be included as part of the return on investment.

[12] The court below, without discussion, held that this approach was not arbitrary or capricious. Lobis Decision at 23, last two lines [A-36] but not whether the law permitted such an approach.

Not addressed by the court below.

7. Absence of Physical Conditions Creating Hardships

Whether the BSA may grant variances for condominiums in the absence of unique physical conditions as distinguished from unique conditions.

Not addressed by the court below.

8. Zoning Regulations as a Physical Condition

Whether the requirement of a unique physical condition has any meaning if zoning regulations themselves can be considered physical conditions.

Not addressed by the court below.

9. BSA Following Own Written Instructions

Whether the BSA may not apply, without explanation, its own written and instructions for the preparation of reasonable return analyses.

Not addressed by the court below.

10. Reasonable Return Analysis Based Upon Spoliated Documents

Whether the BSA may knowingly base its reasonable return findings upon intentionally spoliated construction cost estimates that are missing key pages of relevant and material costs.

Not addressed by the court below.

11. Ignoring Blocked Lot Line Windows When Granting Variances

Whether the BSA, in allowing a non-conforming building to brick up windows in the side-front of an adjacent building, was not required as a basis for

its (e) finding to investigate whether a lesser variance with setbacks not blocking the windows would still provide a reasonable return to the Congregation and to otherwise balance the equities as a basis for it (c) finding.

Not addressed by the court below.

12.Improper *Ex Parte* Meeting Held by BSA Chair and Vice-Chair

Whether under the circumstances it was proper for the Chair and Vice-Chair to have held the *ex parte* meeting with the Congregation's consultants and lawyers and then refuse to disclose what had taken place, and whether the Respondent Chair and Vice-Chair may participate in any remand.

Not addressed by the court below.

13.Satisfaction of SEQR and CEQR is Not Compliance with Finding (c)

Whether satisfaction of the requirements of SEQR and CEQR dispenses with the obligation of the BSA to consider all factors in ZR § 72–21(c) in ascertaining the impact of shadows on narrow streets created by a non-conforming building.

Not addressed by the court below.

14.Ignoring Condition Known to Require Variances

May the BSA in approving a project ignore conditions that it knows require variances under the Zoning Resolution, such as the 40-foot minimum separation between buildings.

Not addressed by the court below.

STANDARD OF REVIEW

There must be a rational basis for the decision of a zoning board supported by evidence in the record. *Vomero v City of New York*[13] and; *Matter of Pecoraro v Board of Appeals of Town of Hempstead.*[14] For the BSA, there is a further explicit statutory requirement not found in other New York State zoning laws: BSA variance decisions are to be supported by "substantial evidence." ZR § 72–21. [15]

Generalized conclusory and unsubstantiated assertions are not evidence. The many BSA findings that a fact was asserted do not substitute for the requisite BSA finding as to the facts themselves.

STATEMENT OF FACTS

The BSA devoted large parts of its Decision to the community house variances and issues irrelevant to the condominium variances, yet 90% of the extra floor area permitted by the variances granted to the Congregation is for the luxury condominiums.[16] The community house variances are not challenged in this appeal. The key issue raised in this appeal is the fallacious and improper site value used by the Congregation in its feasibility studies.

A. The Development Site

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[13] *Vomero v City of New York*, 13 NY3d 840 (2009).
[14] *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 (2004).
[15] "[E]ach finding shall be supported by substantial evidence." ZR § 72-21. [A-789]. Zoning laws in other New York jurisdictions do not require "substantial" evidence.
[16] *See* [A-476-81] showing the variance spaces on each floor and the computations.

The development site consists of three brownstone lots on West 70th Street adjoining the Congregation's Synagogue on Central Park West. Adjoining the Synagogue on Central Park West is the Parsonage, a five-story townhouse that is being rented currently as a luxury single-family residence.[17] Having originally owned the lots, the Congregation sold and then in 1949 and 1964 repurchased the lots. One brownstone was demolished by the Congregation, yielding a vacant lot. The other two brownstones were reconfigured to create a community house. The community house currently is used by both the Congregation and a tenant private school (unaffiliated with the Congregation), which pays as much as $500,000 per year in rent to the Congregation.[18]

The existing community house building is to be demolished for $100,000.[19] After demolition, the site is essentially a simple 64- by 100-foot rectangular lot — in a prime Manhattan residential neighborhood.

The site lies in two zoning districts along West 70th Street. Adjacent to the Synagogue on the east, a 17 feet portion of the 64-foot wide site (or 26.6%) is in the R10A zoning district, having a 185-foot height limit.[20] On the west, a 47 feet portion (or 73.4 %) is in the R8B contextual zoning district, having a 75-foot height limit. Immediately to the right (west) is a cooperative apartment building, 18 West 70th Street, with lot-line windows overlooking the site.

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[17] [A-3059]. Lobis Decision at 13. [A-26].
[18] [A-3561]. In a new building, rent would increase to $1,281,000. [A-2108].
[19] *See* note 114 below.
[20] *See* As-of-Right Zoning Calculations. [A-1208]. *See also* BSA Decision at ¶ 87. [A-56].

The development site is 100 feet deep.

B. The Proposed Development

The Congregation proposed a 113.70-foot[21] tall mixed-used building, with a subterranean 6400-square foot banquet hall, a modern school facility and five floors of luxury condominiums atop the community space.

A conforming mixed-use building, described by the Congregation as Scheme A, would have six floors and rise to 75 feet; it would include two, not five floors of condominiums. In this building, the ground floor would rise 23 feet. Accordingly approximately 5/7ths of bulk would be used by the community facility, and 2/7th (31%) of bulk would be used by the condominiums.

A conforming building, if devoted to residential and other income producing uses, described by the Congregation as Scheme C, would have seven floors, also rising to 75 feet.[22]

C. The Congregation and Its Landmarked Synagogue

The Congregation is a distinguished institution, with roots dating to 1654. During the American Revolution, the Congregation was influential in providing financial support to the Colonial effort. In 1897 the Congregation completed the current Synagogue, an individual landmark.

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[21] The BSA decision inaccurately states 105 feet. ¶1. [A-52]. The DOB objection #6 states: "Proposed Maximum Building Height does not comply. 113.70' provided instead for 75.00' contrary to Section 23-633." [A-1565]. The BSA inaccurately paraphrased this language in ¶1]. The Approved plans [A-3871] rise 113.70 feet.. .

[22] The actual version of Scheme C provided by the Congregation was asserted to be all-residential, but in fact included community house space. [A-2794].

Today Congregation members remain distinguished and influential and include important judges, lawyers, political figures, real estate developers and philanthropists.

At the LPC hearings, members testifying included Jack Rudin, real estate developer[23] Jack Stanton, respected philanthropist, and;[24] Louis Solomon, former law partner of Corporation Counsel Cardozo.[25]

While commendable, none of this relates to whether the Congregation should be awarded variances.[26]

D. Certificate of Appropriateness from LPC

The Congregation in 1983 proposed a 42-story, 488-foot apartment tower, a proposal later dropped. Subsequent proposals were made and dropped as well.

In 2001, the Congregation proposed a 14-story condominium project, requiring approval by the Landmarks Preservation Commission (LPC.) The Congregation also sought a special permit under ZR § 74–711 for relief from landmarking hardships, requiring the LPC to recommend relief to the City Planning Commission (CPC.) The special permit would have restricted further

[23] Transcript of LPC Hearing, November 26, 2002. [A-926].
[24] Transcript of LPC Hearing, July 1, 2003. [A-993]. Stanton Announces $100 Million Gift to Yeshiva University. [A-2966].
[25] [A-4380] and [A-4389.]
[26] Considerable portions of the Congregation's statements to the BSA were devoted to the history of the Congregation. [A-1174-80].

development over the landmarked structures.[27] The BSA has no role under ZR § 74–711.

E. The § 74–711 Special Permit Request is Dropped

At LPC, the Congregation dropped its § 74–711 request,[28] and reduced the height of the proposed building. The Congregation still needed a Certificate of Appropriateness from LPC. Having dropped its § 74–711special permit application, the BSA accordingly would require variances from the BSA under § 72-21.

Ultimately, LPC approved a Certificate of Appropriateness in March, 2006, with LPC Commissioner Rebecca Gratz , who had been a member of the Congregation, voting in opposition.[29] The Certificate did not address zoning issues.

F. Primary Objective At LPC - Economic Engine Not Program Needs

At the LPC, the Congregation stated that its principal objective was to provide an "economic engine" to the Congregation, *not merely* to satisfy its religious program needs. [30] There was no mention of a need for access and circulation nor reference to the toddler program that would later be a central part of

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[27] Transcript of Community Board 7 (CB7) Proceeding, October 17, 2007, page 135. [A-2006].

> MS. NORMAN: Would it be possible then the synagogue would come back at a later date and suggest that they need to use those air rights to build above the parsonage.
> MR. FRIEDMAN: Anything is possible. … That's what the 74-711 was all about. It just didn't happen.

[28] *See* discussion concerning the Congregation's § 74-711 application at page 63 below.

[29] Transcript of LPC Hearing, March 14, 2006, page 27 [A-1071]. *See also* [A-3078-84].

[30] *See* statements re economic engine. [A-2922–43].

its community house variance claim. [31] At the BSA, the Congregation would need to conjure up "magic words"[32] not just to support the community house variances, but to satisfy the five findings for the condominium variances under ZR § 72-21.

G. The Five Findings Required to Be Made Under ZR § 72-21

The BSA is required to make five findings for each variance granted, under ZR § 72-21 (a) through (e).

(1) Finding (a) - Hardship Resulting from Unique Physical Condition

Finding (a), known as the physical condition finding, requires that there be a hardship created by a unique "physical condition" arising out of strict compliance with the zoning resolution. For non-profit uses, a compelling programmatic need perhaps may substitute for a physical condition.

(2) Finding (b) - A Conforming Building Cannot Earn a Reasonable Financial Return

Finding (b), the reasonable return finding, requires that the owner show there is no reasonable possibility that a conforming (as-of-right) building will bring a reasonable return to the applicant. Under BSA rules, an applicant must prepare

[31] Transcript of LPC Hearing November 15, 2005 [A-1041–42] ("[E]ssentially the second floor, third floor, and fourth floor will be some configuration of some classrooms and office …")
[32] Transcript of March 31, 2009 Hearing Before Justice Lobis, Counsel for Congregation states at lines 22-23: ("You see the magic words.") [A-766].

"feasibility studies."[33] For a non-profit project, this finding need not be addressed.[34]

(3) Finding (c) - Use of Adjacent Property Not Substantially Impaired and Neighborhood Character Not Altered

Finding (c) is the neighborhood impact finding that 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."

(4) Finding (d) - Hardship Not Self-Imposed

Finding (d) is the self-imposed hardship finding that the hardship claimed may not have been self-imposed.

(5) Finding (e) - The Variances Granted Must Be the Minimum Required to Afford Relief

Finding (e) is the so-called minimum condition finding that the variance is the minimum required to afford relief. To the extent that the hardship asserted is the reasonable return hardship of finding (b), economic feasibility studies are needed to show that the approved project would not result in an excessive financial return to the applicant.

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[33] *See* [A-820-220].

[34] The Congregation had asserted the BSA may not consider reasonable return where a non-profit seeks a variance for a mixed-use project. *See* Letter from Congregation's Counsel to BSA June 17, 2008 [A-4026-7]. The Congregation did not file a cross-appeal herein on the BSA's rejection of that argument. BSA Decision at ¶¶ 32-36. [A-54].

H. The Improper November, 2006 *Ex Parte* Meeting of the Congregation with the BSA Chair and Vice-Chair

Prior to filing its application with the BSA, the Congregation in October, 2006 sought and obtained an improper *ex parte* private meeting with the Chair and Vice-Chair of the BSA. The BSA kept the meeting secret from opponents who had already written to the BSA.[35] The same building drawings approved by the LPC and soon-to-be-filed with the BSA were presented at the meeting.[36]

In response to a formal request that the Chair and Vice-Chair recuse themselves,[37] the BSA General Counsel admitted that if such a meeting occurred after an application was filed, it would be improper.[38] The BSA refused to disclose what transpired therein, asserting attorney-client privilege.[39]

I. First DOB Objection Letter Requiring Eight Variances

The Congregation was required to submit its plans to the New York City Department of Buildings (DOB). The DOB would then deny the permits stating its objections, which denial would be appealed to the BSA. The DOB denied the Congregation's application and on or about March 27, 2007 and issued an objection letter listing eight variances required from the BSA.[40]

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[35] Letter from Petitioners' Counsel Re Status of Congregation Variance Application September 1, 2006 [A-1078]. BSA Memorandum Scheduling Ex Parte Meeting, November 8, 2006 [A-1135].
[36] Building Plans dated October 30, 2006, Presented By Congregation to BSA Chair and Vice-Chair At Improper Ex Parte Meeting November 3, 2006 [A-1094–1134] enclosed by letter dated November 3, 2006 [A-1093].
[37] Letter Requesting Recusal April 10, 2007. [A-1338]. *See also* [A-1471].
[38] [A-2339].
[39] [A-1471] and [A-1151].
[40] DOB Objection Sheet March 27, 2007. [A-1169].

The condominium-related objections were: maximum building height (#6), upper-floor setback (#7), base height in the front of the building (#5), initial front setback (#4) and required separation between buildings of 40 feet (#8.)[41]

The community house variances provided an extra ten feet of rear setbacks (#1, #2 and #3.)[42] Although meritorious grounds for challenges exist, in this appeal Petitioners do not challenge the community house variances.[43]

J. Congregation Delayed One Year to File With BSA

On April 1, 2007, a year after the LPC action, the Congregation submitted its variance application to the BSA. Having abandoned its §74-711 application at LPC and CPC, the Congregation needed to create a case for variances cognizable under ZR § 72–21. The application filed by the Congregation was defective procedurally because the DOB action was stale, ultimately forcing the Congregation to refile in September, 2007.

K. Deficiencies in Initial April, 2007 Application to BSA

BSA staff then detailed many deficiencies in a letter of objection.[44]

Among the deficiencies in the initial application:

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[41] The locations of the variances on each floor are shown at Petitioners Ex. M-1 at [A-476]. No variances were required for the 23-foot high first floor.

[42] *See* Proposed Building Street Wall Sections, Section R8B. [A- 1241].

[43] The Congregation concocted programmatic needs to satisfy the BSA requirement. Initially, floors one and two were for "Rabbinical and executive offices." [A-1184] and [A-1607]. Later, the Congregation would show a second floor devoted to classrooms for toddlers. [A-3881]. The claim that the caretaker's apartment must be on the fourth floor was concocted as well, since it could have easily been located on the fifth floor.: "[F]easibility further requires that the caretaker apartment be located at the fourth floor level rather than on a higher residential floor which carry a premium..."[A-4194]

[44] BSA Notice of Objections to Congregation dated June 15, 2007. [A-1491].

(1) All-Income Producing Feasibility Study Not Provided

The Congregation did not provide the required economic feasibility analysis of all of an all-income-producing, conforming "as-of-right" building (the so-called Scheme C.)[45]

(2) Assigned seven floors of site value to just two floors

The Congregation assigned the property value of a seven-floor structure to the two floors of condominiums, vastly inflating site value and vastly reducing return on investment. [46]

(3) Did not describe the bricking-over of lot line windows.

The Congregation failed to disclose that the proposed, non-conforming building would brick up lot line windows in an adjacent building, whereas a conforming building would not. The Congregation had not disclosed this to the LPC.[47]

(4) The 40-foot separation under ZR § 23-711 not shown

The Congregation's drawings did not reflect the DOB's eighth objection. [48] Under ZR § 23-711, the DOB required a 40-foot separation zone on the upper floors between the Synagogue and the residential buildings.[49] Opposition planning

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[45] *Id.*, Objection 37. [A-1496].
[46] *See* extended discussion below.
[47] BSA Objection 22 [A-1494].
[48] BSA Objection 21 [A-1494]. Objection 21 states: "Please note that ZR § 23-711 prescribes a required minimum distance between a residential building and any other building on the same zoning lot."
[49] New York City DOB Objection Sheet, March 27, 2007. [A-1169].

expert Simon Bertrang agreed with the other experts, DOB, and BSA staff.[50] The Congregation did not assert the inapplicability of ZR § 23-711, but just failed to show the separation zone on its drawings.

L. No Variances Required for Access and Circulation

To the BSA, the Congregation asserted that variances were needed to resolve circulation and access issues and were the heart of its application.[51] This was proven to be false, yet the BSA did not ask the Congregation to clarify or correct the record[52] and then referred to the false assertion in its Decision.[53]

Yet, as the BSA knew, the Congregation's architect had admitted that which was obvious from the facts: "Mr. Morrison [opposition architect] correctly points out that both the as-of-right and proposed schemes relieve the now untenable access to the synagogue. Both schemes remedy the circulation through the addition of an ADA compliant elevator…"[54]

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[50] Memorandum from Simon Bertrang. [A-1563].
[51] *See* [A-1175], [A-1180], [A-1181], [A-1184], [A-1190], [A-1194], [A-1200], and [A-1201].
[52] Transcript of BSA Hearing of June 24, 2008, page 15, line 8. [A-4117]. Counsel for Petitioners confronted the BSA Board:

> "Can the applicant explain how a building strictly complying with the Zoning Resolution, does not address the access and accessibility difficulties; a hardship described by the applicant as the heart of its application."

See also [A-4092].
[53] BSA Decision, ¶¶ 41, 48, 61 73. [A-52 to A-65].
[54] February 4, 2008 Letter from Congregation Architect Charles Platt. [A-3097] reproduced at [A-214]. *See also* Morrison letter. [A-2892].

Even after this admission, the Congregation still continued with the false claim.[55]

Because the condominium floors tower above the Sanctuary, there can be no conceivable relationship between the claimed access and circulation problem to the Synagogue and the condominium variances. Therefore, any reference to this false assertion without acknowledging its falsity has no place in responsive papers.

M. The Opposition Was Far More Than Generalized Community Opposition

Zoning boards may not refuse variances based upon "generalized community opposition." Here the opposition groups posed detailed objections in reasoned opposition statements to the BSA.[56] Opponents included major figures in New York City land use – such as Norman Marcus. Opposition real estate financial expert Martin Levine provided seven lengthy reports dissecting Freeman's work. Planners, lawyers, architects and preservationists providing detailed professional objections and criticism of the apparent BSA intent.

The BSA ignored the more substantive criticisms, even criticizing opposition positions in fact not taken by the opponents, yet avoiding detailed positions that the BSA was unwilling or unable to address.

N. Five-Month Delay in Curing Defective Application

[55] *See* [A-4219]; *See also* letter from Congregation's Counsel to BSA June 17, 2008. [A-4025] [A-500]; and Transcript of March 31, 2009 Hearing Before Justice Lobis. [A-752-3].
[56] *See* as examples [A-186], [A-1501][A-1816], [A-2875],[A-2005], [A-3136], [A-3959], [A-3949], A-4090], [A-4254], and [A-4370].

On September 10, 2007 the Congregation filed a new application based upon a new objection notice from DOB, which notice -without explanation - omitted the Eighth Objection requiring the 40-foot separation.[57]

O. Deficiencies Still Not Cured in New September, 2007 Refiling

The Congregation's new application remained deficient. The Congregation claimed to have presented an as-of-right seven-floor, all-residential building, but the analysis was not of an all-residential building and ignored other commercially valuable space. The Congregation continued to apply seven floors of value to two floors of site, understating the Scheme A and Proposed Scheme rates of return.

On October 12, 2007, BSA staff delivered its last letter of objection repeating many of its earlier objections.[58] All BSA staff letters were to cease after the November 27, 2007 BSA hearing.

P. Community Board 7 Rejects the Congregation's Financial and Program Claims

As required by the Zoning Resolution, the September, 2007 application was then submitted to Community Board 7 (CB7). At the CB7 committee hearing, Congregation's counsel boasted that that the project had the "imprimatur" of the

[57] [A-1169]. The DOB provided no explanation for the removal of the Eighth Objection The BSA falsely states in footnote 1 of its Decision that the objection was removed "after the applicant modified the plans." [A-52]. The BSA and Congregation cannot cite to any evidence in the record describing the exact modifications that related to the 40-foot separation.

[58] BSA's Second Notice of Twenty-Two Objections To Applicant Congregation October 12, 2007. [A-1863].

Bloomberg administration.[59] The CB7 under chair Linda Rosenthal and its subcommittee under the chairs of attorney Richard Asche and architect Page Crowley carefully reviewed the Congregation proposal. After two subcommittee hearings[60], a full board hearing[61] and private sessions with the Congregation, CB7 voted in December, 2007 to reject all the variances.[62]

CB7 found that "CSI [the Congregation] does not claim that the zoning lot is irregular in shape."[A-2634]; "height and setback variances are not necessary to permit CSI to meet its programmatic goal." [A-2635], the proposed building would "substantially impair the use of a portion of the adjacent property" [A-2635]; and "it was an abuse of the variance process to permit one landowner to exceed zoning restrictions at the expense of its neighbors." [A-2635]. CB7 heavily criticized as inconceivable the failure of the Congregation to include the value of the basement and subbasement in the analysis of Scheme C. [A-2636]. CB7 questioned whether the Congregation was entitled to a reasonable return on the entire value of its site, and noted that 6% was a reasonable return. [A-2636].

While the Community Board was considering the proposal, the BSA went ahead and held it first hearing.

Q. BSA Chair: Congregation Puts BSA in a "Hard Place."

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[59] Manhattan Community Board 7 Land Use Committee Meeting Transcript, dated October 17, 2007. [A-1878].
[60] [A-2255].
[61] [A-2640].
[62] [A-2634]. The Community Board committee had rejected the condominium variances, but accepted the assertions of the Congregation as to the lower floors. [A-2637].

The first BSA hearing was held November 27, 2007. The Chair of the BSA complained to the Congregation's counsel that the Congregation had put the BSA in a “hard place.”[63]

> So, we're put in this *hard place*. Typically, when you have a situation that goes through Landmarks where you're asking for height and setback waivers and they're not driven by hardship, there's another venue and I know that you just mentioned 74–711. It - - maybe it was foreclosed to you. That's unfortunate, but we're here looking at this case and it's just - - it's been very hard for us to get our hands around this (emphasis supplied).

The BSA commissioners noted at the same place that the BSA could not provide variances based on the economic engine argument.

R. BSA: Site Value Should Only Include Space a Developer Could Use

At the November 27, 2007 hearing, the BSA objected to the Congregation's use of the site value for all seven floors of an as-of-right building being applied to the site value for two floors of condominiums in the as-of-right mixed-use building. Thus, the Chair criticized the use of the entire site value when preparing the two-floor condominium partial feasibility study. The Chair was explicit:

> CHAIR SRINIVASAN
> Freeman needs to explain to us what he's done on his financials. We've seen it. I think we have some concerns which we raised yesterday and either he can go back and look at that or we can state them for the record, but I think some of the issues have to do with how the site is valued and *how a good portion of what is anticipated as the developer paying for that site is not going to be used*

[63] Transcript of November 27, 2008 BSA Hearing, page 23, line 510.. [A-2500]. See entire discussion at [A-2500 -05].

> *by the developer because it's being used by the synagogue*. So, it's almost like you should take that out of the equation and then you have this value on this property without that 20,000 square feet that's being used for the synagogue. (emphasis supplied)[64]

Freeman would never remove from the site value portions that a developer could not use, despite having claimed to do so. This resulted in the understatement of rates of return. Yet the Board *inexplicably* never again publicly pressed Freeman on this issue, despite repeated objections by the opposition.

S. The BSA Holds Further Hearings

After November 27, 2007, the BSA held several more hearings, and the Congregation submitted a flood of additional and mostly confusing filings. The Congregation submitted five different versions of its Statement in Support, fourteen separate submissions by its economic consultant and hundreds of pages of drawings.

The BSA reviewed various versions of the proposed building and agonized as to the appropriate valuation per square foot, while blindly ignoring the inflated number of square feet in the site value computations. Similarly, the BSA never forced the Congregation to submit an analysis of a true all-income producing conforming building.

[64] Transcript of BSA Hearing November 27, 2007, page 27, line 592. [A-2504].

After the November 27, 2007 hearing, the Board seemed intent on providing the requested variances but did not want a record to be created to reflect the lack of a basis for the variances.

T. The Feasibility Studies

For the upper-floor condominiums, under§ 72–21 (b), the Congregation needed to show that the development site, if used for a conforming building, was *not* feasible, *i.e*. would *not* provide a reasonable financial return to the Congregation. To prepare the feasibility studies, the Congregation turned to Jack Freeman, who specialized in such studies. Freeman would focus on inflating costs to depress return on investment.

Each Freeman study of a scheme would have several components: a textual report by Freeman, annexed spreadsheets of computations, real estate valuation studies, and construction cost estimates by McQuilkin Associates, Inc. For each scheme, 17 pages or so of architectural drawings also would be provided separately by the Congregation's architects Platt Byard Dovell White.[65]

Freeman's focused on manipulation of the site valuation. Freeman also manipulated allocations of construction costs and used other more subtle scale-tipping techniques such as charging construction interest as if the full cost of construction was incurred on day one (rather than over the course of construction)

[65] *See* for example, the Scheme A drawings dated March 27, 2010. [A-1207].

and assigning common costs appropriate for a five or seven floors of condominium to just two condominium floors.[66]

U. The BSA Feasibility Study Instructions

For the preparation of financial feasibility studies, the BSA has promulgated specific requirements, Item M of Detailed Instructions for Completing BZ Application.[67] These Instructions are the only BSA regulations or rules relating to feasibility studies.[68]

Paragraph 5 of Item M states:

> 5. Generally, for cooperative or *condominium development proposals,* the following information is required: market value of the property, acquisition costs and date of acquisition; … net profit (net sellout value less total development costs); and percentage return on equity (net profit divided by equity)(emphasis supplied).

Because the Congregation submitted a "condominium development proposal," this paragraph without question applied, but was ignored by Freeman.[69]

(1) Acquisition Cost Not Provided

Freeman did not provide in his report the actual acquisition costs for the site – the amounts paid by the Congregation for the sites. The Instructions distinguish between the "market value" of the property and the "acquisition costs." Freeman

[66] Expert Opinion Martin B. Levine of July 29, 2008. [A-4354].
[67] [A-820].
[68] [A-3703].
[69] Fifth Expert Opinions of Martin B. Levine dated June 10, 2008. [A-3967–71]: "The BSA guidelines for conducting a financial feasibility are fully consistent with the methodology employed by investors, developers and analysts in the market."

conflated the two terms, using the term "acquisition cost" to apply to his estimates of "market value", so that he could claim that he had provided acquisition cost. Nowhere in any submission by Freeman is there a reference to the actual acquisition costs in 1949 and 1965.

The court below stated that the deeds had provided the costs, while not addressing the instructions or related judicial precedent.[70] If the deeds do show actual acquisition costs, then the Congregation may have paid as little as $12,000 for the site.[71] Under Freeman's approach, the Congregation would receive $12.4 million for the site, no part of which was considered by Freeman to be profit or return on investment.

(2) Spoliation – The Missing Construction Cost Allocations

Item M-6 of the BSA's Detailed Instructions requires that construction cost estimates be signed and sealed.[72] The estimates submitted by the Congregation and Freeman not only were not signed nor sealed, but are incomplete documents missing key pages. Freeman submitted the estimates for the Scheme A and

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[70] The court below stated that the deeds filed by the Congregation provided the acquisition cost thus satisfying M-5. Lobis Decision at p. 22. [A-35]. Were the court correct, Respondents would be able to provide the dollar figure for the acquisition cost. Opposition professional Katherine Davis prepared an estimate of the acquisition cost updated to present value and arrived at a current value of approximately $1 million. This analysis did not subtract the value of use and rent collected by the Congregation during the ownership period, which some economists would have subtracted. Ms. Davis computed a return on equity of as much as 5500%. Davis Letter, June 10, 2008 [A-3918]. The Congregation did not rebut Ms. Davis' computations.

[71] Deed for 10 West 70th Street dated May 28, 1965 [A-2761]: consideration shown is $10 plus assumption of $11,750 mortgage. Deed for 8 West 70th Street, August, 30, 1949 [A-1329] and [A-1332]; consideration shown at $1 and other good and valuable consideration. The total consideration shown in the deeds is then $11,762.

[72] [A-822].

Scheme C studies, but deliberately removed 13 of 15 pages in one, and 10 of 12 pages in the other,[73] and then for months refused the demands of opposition groups that they be supplied.

Scheme A and Scheme C include both community space and condominiums,[74] and therefore construction costs must be allocated between the two components. If costs are over-allocated to the condominiums, then the rate of return would be improperly decreased.

Freeman concealed his allocations for construction costs by removing the pages for Scheme A and Scheme C, though Freeman did provide complete reports his various proposed schemes. When challenged by opponents, Freeman falsely asserted that he had submitted the missing pages.[75] When confronted with his failure to complete the record, Freeman's excuse was that the BSA had not asked for the missing pages; yet it was the Congregation's responsibility to create its own as well as the BSA's duty no to make findings on an incomplete record.

That Freeman did not submit those pages is clear: the BSA and the Congregation in their Article 78 answers were unable to identify the reports in the

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[73] The construction estimate for Scheme A [A-2797] is missing pages 3-15; for Scheme C [2804] is missing pages 3-10.

[74] As a supposed all-residential scheme, Scheme C should not have included community space, but it did.

[75] In his Tenth report of June 17, 2008, Freeman falsely claimed "the complete construction cost estimates are attached." [A-4030]; some complete reports were attached, but not the key Scheme A and Scheme C estimates. When opponents objected [A-4119, line 20], Freeman responded falsely on July 8, 2008, at page 4, that he had provided the "full details" on June 17, 2008. [A-4226].

record.[76] This Court may properly infer that Freeman misallocated the construction costs based upon his refusal to provide the complete documents.

Without allocation information, it is not possible for anyone including the BSA to review the feasibility studies for those schemes.[77] As a consequence, there was no basis for the BSA findings based upon the feasibility studies.

(3) Failure to Provide the Return on Equity Analysis Required by BSA Instructions

Petitioners on this appeal *are not asserting,* for judicial economy reasons, that the BSA should have applied a return on equity analysis in reviewing the feasibility studies, because even a proper return on investment analysis shows a reasonable return. The issue on the appeal is the BSA failing to require adherence to its own regulations. The return on equity information should have been provided in accordance with the rules, and would be a factor in the value judgment as to whether the land use regulation improperly impairs the use of value of the property to the Congregation.

In raising this issue, Petitioners are seeking to demonstrate that the BSA acted arbitrarily and capriciously in failing (a) to require the Congregation to comply with the BSA's own regulations and (b) to explain that failure.

V. The Three Significant Feasibility Analyses: Inconsistent Terminology

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[76] *See* Petition ¶189-190. [A-117] and Petitioners' Reply, ¶ 6. [A-416]; ¶18. [A-419], and; ¶¶ 76-82 [A-437-38].

[77] As Mr. Levine states in his report of July 29, 2008: "Review of the construction costs is made extremely difficult as the cost estimates for the very important AOR Schemes A and C are each missing 13 pages." [A-4361].

Freeman would submit to the BSA analyses of many different building schemes.[78] Yet, only three of the schemes are of any significance: Scheme A, Scheme C, and the Proposed Scheme. Confusingly, the Congregation did not refer to them in consistent terms.

(1) The Three Important Feasibility Studies — Scheme A, Scheme C and the Proposed Scheme

- Scheme A - a conforming as-of-right 75-foot mixed use building with two condominium floors.

- Scheme C- a conforming as-of-right 75-foot building devoted to residential and income production. After requests by BSA staff, the first version of Scheme was submitted on September 10, 2007. Although purporting to be an all-income producing building, it was not as described below.

- The Proposed Scheme - the approved 113.7-foot high building with a four-floor community house and five floors of condominiums.

[78] *See* for example, Mr. Freeman's Ninth Submission of May 13, 2008 analyzing three proposed schemes. [A-3824].

(2) The Congregation Created Confusion by Inconsistent Reference to As-of-Right and Proposed Schemes

Freeman and the Congregation's attorneys and the Congregation's architect inconsistently described these three different schemes creating confusion.[79]

Scheme A, Scheme C, and Proposed Scheme are the terms consistently used by the Congregation's architect and are the terms used herein. Freeman in his fourth submission of December 21, 2007 in one place uses the descriptors Scheme A and C,[80] but then did not use the terminology in the spreadsheets in the very same document.[81]

As a consequence of this confusion for which both the BSA and the Congregation are responsible, and the failure of the BSA to attempt specific citation to specific studies, the BSA Decision's references to the feasibility studies are too ambiguous to qualify as proper findings and to allow judicial review.[82] Where the findings are so ambiguous as to preclude review, then the court may reject the findings**.**

W. Summary of Freeman's Manipulation of Site Value Used in the Various Reasonable Return/Feasibility Studies

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[79] Scheme A [A-1617] is referred to variously by Freeman as the "as-of-right scheme" [A-1207], "Revised As of Right Residential Development" [A 1655], and "Revised As of Right Community Facility/Residential Development". [A-1652].

[80] [A-2972] and [A-2974].

[81] [A-2780]. In Freeman's Eleventh submission of July 8, 2008, Freeman provides an analysis spreadsheet without indicating that the first column was a Scheme A analysis, describing instead a "Revised As-of-Right Development." [A-4224] and [A-4230].

[82] The BSA Decision's ambiguous references to the feasibility studies accordingly are too ambiguous to qualify as a basis for proper findings. *See BSA* Decision. ¶¶ 127, 128, 129, and 147. [A-59-61].

Freeman was able to understate the rate of return simply by overstating the site value.[83]

- By manipulating higher site values, the economic return on investment is artificially reduced.
- For the two-floor scheme analysis. Freeman used a fallacious site value reflecting seven floors of residential development, not two.
- The return on investment for the two condominiums in the Scheme A building accordingly was grossly understated.
- For the Proposed Scheme, Freeman used the same inflated site value as used in Scheme A.
- Accordingly, the 10.93% return on investment for the approved Proposed Scheme was grossly understated.

Freeman during the 18-month BSA proceeding would present many different site valuations as he struggled vainly to arrive at a defensible valuation of the site that would result in a reasonable return.[84]

One way to manipulate the market value would be inflate the valuation per square foot. Because of the BSA's familiarity with such overvaluation, the BSA

[83] The BSA rules distinguish between "market value of the property" and "acquisition costs". [A-821]. Freeman conflated the two terms.

[84] *See* [A-487]. Freeman provided the following wildly varying site value estimates:

- $18,944,000, First Freeman Submission, March 28, 2007. [A-1290].
- $17,050,000, Third Freeman Submission October 24, 2007. [A-2105].
- $14,816,000, Fourth Freeman Submission, December 28, 2007. [A-2774].
- $13,384,000, Seventh Freeman Submission, March 11, 2008. [A-3332].
- $12,347,000, Ninth Freeman Submission, May 13, 2008. [A-3818-9].

seemed to focus on the square foot valuation figures used as an input. But, more creatively, Freeman manipulated the site value by manipulating the number of square feet while the BSA focused on valuation per square foot.

X. Inflating the Two-floor Site Value Skews the Return for Both Scheme A and the Proposed Scheme

Inflating the site value for the two floors affects not only the two-condominium Scheme A analysis, but also the five- condominium Proposed Scheme as well. It is not necessarily intuitive that it is proper to use the same site value for both schemes. Yet, the site value component of the "investment" remains the same in the variance-requiring, Proposed Scheme as in the conforming scheme. In other words, the question is how much larger does a non-conforming building need to be to obtain a reasonable return, assuming the site value is the same value used in a conforming building.

Petitioners do not contest Freeman's use of the same value of $12,357,000 for Scheme A and the Proposed Scheme as shown on his concluding final summary of July 8, 2008.[85]

Petitioners do however contest the grossly-understated site value $12,357,000. Notwithstanding the admonitions of the BSA Chair, it is abundantly clear that Freeman used the site value for the seven floors of condominiums, rather than reduce the site value to two floors. The $12,357,000 value is applied by

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[85] [A-4230].

Freeman to only 5316 square feet of buildable space for the two condominiums, or $2300 a square foot,

Petitioners also object to the failure of Freeman in his July, 2008 concluding summary to show a third column, the summary of Scheme C— the supposedly all-residential scheme. For Scheme C, it is clear that the site value to use would be the value of the entire development site, as would be done in a usual feasibility study.

Freeman refused to update Schedule C, not only because it would show a reasonable return on investment, but also because Freeman would have to disclose his site value for the entire development site which, based on Freeman's earlier submissions, would also be the same $12,357,000. In Freeman's prior schedules showing all three schemes, he used the same "acquisition cost" for all three scenarios: $17,060,000 in his October 24, 2007 summary[86] and $14,816,000 in his December 21, 2007 summary.[87]

Had Freeman submitted a revised Scheme C and shown it on a spreadsheet together with Scheme A and the Proposed Scheme, it would be possible to compare the "site value/acquisition costs".

The obvious conclusion is that Freeman deliberately omitted a Scheme C analysis from his July, 2008 final summary and deliberately failed to even update the analysis, hiding what he had done and avoiding revealing (i) that a Scheme C building would have generated a reasonable rate of return and (ii) that he was

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[86] [A-2107].
[87] [A-2780]

continuing to overstate the site value for the two floors and consequently understating the rates of return for Scheme A and the Proposed Scheme.

Y. The Site Value Was Never Reduced in Proportion to the Space Occupied by the Community Facility.

The BSA in its Decision[88] noted that it had "asked the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of-right development." There is no factual basis for this statement in the BSA decision. At the time of the November 27, 2007 hearing, Freeman was using a valuation for the entire building of $17,500,000. Freeman next submitted a two-floor Scheme A analysis on December 21, 2007 but reduced the site cost for the two floors only from $17,500,000 to $13,384,000.[89] A proper proportionate reduction would have yielded a site value for the two floors of approximately $5,000,000, not $13,284,000. Indeed, the Chair of the BSA had guessed that the over-valuation for the $17,500,000 was in the range of $10,000,000.[90]

Z. Change in Valuation Methodology By Assigning Value of Unused Parsonage Development Rights

By May, 2008, it had become evident that Freeman's site value for the Scheme A was indefensible – plainly, it was not possible for Freeman to show a

[88] *See* BSA Decision, ¶ 128-9. [A-60]. Here, the BSA falsely suggests that the site valuation methodology described here is the methodology upon which its (b) finding was based.
[89] *See* exhibit describing various valuations by the Congregation. [A-487].
[90] "10 million worth is really just paying for the synagogue." November 27, 2007 BSA Transcript, page 27, line 702. [A-2504].

computation where he had to compute the value of the two floors of condominiums by multiplying the square feet by a valuation per square foot.

Freeman adopted two new strategies.

First, he would provide no further analysis of the all-residential Scheme C for that would among other things disclose his valuation of the entire development site and would expose the fact that he was still using the same value for just two floors. Further analysis would also show that Scheme C would earn a reasonable return.

Next, Freeman would abandon traditional valuation methodologies and not even bother valuing the two floors at all. Instead, in his Ninth Submission of May 13, 2008, Freeman use a bizarre, novel approach involving valuation of the remaining allowable development over the Congregation's adjoining Parsonage building on Central Park West.

Probably not coincidentally, Freeman arrived at essentially the same valuation as his previous faulty valuation. So Freeman did not so much change the number, but asserted a new rationale to reach the same conclusion. In his March, 2007 analysis he estimated the site value of $13,384,000 – the new number with the new methodology was $12,347,000.

The Congregation's architects prepared for him a diagram showing 19,094.20 square feet of floor space above the parsonage that the Congregation

would not be able to develop (so it claimed) because of landmark regulation.[91] Freeman then adjusted the 19,094 square feet to 19,755 square feet and multiplied that figure by a value per square foot of $625 to arrive at a valuation of $12,347,000.[92]

Next, Freeman took this valuation of the development rights over the parsonage and used *that* as the "acquisition cost" for the two floors of condominiums on the adjoining development site.[93] Freeman applied this value of 19,755 square feet to the 5,316 square feet for the two condominium floors.

(1) Valuing the Two-Floor Condominium Site Based Upon the Unused Parsonage Space Not Disclosed in BSA Decision

The BSA does not disclose that its (b) and (e) findings were based upon, not the value of the two-floors, but Freeman's new approach using the Parsonage's claimed undeveloped air rights value (not the transfer of air rights themselves to allow changes in bulk or height.)[94] Indeed, by referring to its request that Freeman

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[91] *See* Parsonage Air Rights - Transfer Value From Landmark In Support of Reducing Reasonable Return, May 13, 2008. [A-3861]. *See also* Freeman's Ninth Submission. [A-3818].

[92] Freeman states in his Ninth Submission of May 13, 2008. [A-3818-9].

> The available floor area on the Parsonage portion of the site (19,094 sq. ft.) exceeds the area needed (10,321 sq. ft.) to replace the non-complying area on the 70th Street lot. Therefore, in the current consideration, 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. Utilizing the comparable sales value of $625/sq. ft. determined by the comparable sales analysis described above, the acquisition cost is 19,755 sq. X $625/sq. ft., equal to the amount of $12,347,000.

[93] Freeman's tenth submission of June 17, 2008 includes a spreadsheet Schedule A1, showing the reasonable return analysis for the Scheme A two-floor condominium analysis consisting of 5,316 square feet of sellable condominiums. [A-4034].

[94] To be clear, the Congregation is able to construct requires no transfers of air rights to build the proposed building.

eliminate the floor value of the community space (Decision ¶ 128), the BSA misrepresented the basis of its (b) finding. The BSA findings were not based upon the studies referred to Decision ¶ 128-130; to the contrary, the BSA's ultimate conclusory finding at Decision ¶ 148 was based upon the Parsonage valuation, one that was not only irrational, but implicitly was based upon alleged landmarking hardship.

(2) Freeman's Parsonage Valuation Method Results in a Site value of $2300 per Square Foot Not $625 per Square Foot.

Freeman claims to use a site value of $625-$750 per square foot for the two-floor partial analysis of the two floors of condominium space. Yet, instead of valuing 5,316 square feet[95] of the condominium site at $625 a foot, but he valued 19,755 square feet of space above the Parsonage at $625 per foot, or $12,347,000. Notwithstanding, Freeman deceptively denied using $2300 a square foot.[96]

Opposition expert Martin Levine described Freeman's approach as "completely irrational. No rational developer would ever accept that the market value of this space is in that stratosphere. "[97]

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95 *See* Petitioner Exhibits re Value Of The Two Condominium Floors In As-Of-Right Scheme A, [A-489] and Location Of The Two Condominium Floors In As-Of-Right Scheme A Building. [A-488].
96 Freeman claimed on August 12, 2008, that "This is a misstatement of the facts. At no time did [I] state or imply that the value of the site is $2,333 per square foot of building area." Freeman then asserts that the value he used was $625 per square foot. [A-4430]. This is pure sophistry.
97 [A-4356]

Freeman shows a site value of $12,374,000 for the two-floor site and a projected income from "sale of units" of $12,702,000 on the same two floors.[98] As to that, Levine stated:

> This is perfectly illustrated by the absurdity of the financial projections which show that the sale of finished condominium apartments is almost equal to the cost of the land alone.[99]

In conclusion, there is little question that Freeman's site valuations used in the Scheme A and Proposed Scheme feasibility studies were grossly overstated and a product of Freeman's sleight of hand. The results are irrational. The BSA did not disclose in its decision that it was relying upon the Parsonage valuation, suggesting that it had relied upon standard valuation methodologies. Even if Freeman's approach were rational, it would still have been based upon a landmarking hardship as to which the BSA has no jurisdiction.

AA. The Congregation Admits that 6.55% is a Reasonable Return on Investment

In his first feasibility report, Freeman opined, as the Congregation's "economic expert", that a return on investment of 6.55% was acceptable for the project:[100]

> "The Proposed Development provides a 6.55% Annualized Return on Total Investment. …*The returns*

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[98] [A-4230].
[99] Seventh Expert Opinion Letter of Martin Levine July 29, 2008, third full paragraph. [A-4357].
[100] First Freeman Frazier Submission March 28, 2007. [A-1294]. *See* Exhibit, Congregation admission that rate of return of 6.55% is acceptable. [A-484].

> ... *would ... be considered acceptable* (emphasis supplied)."

Freeman's second report of September 6, 2007 states similarly that 6.59% is an acceptable return.[101]

Consistently, Freeman further opined in his Ninth Report that 3.82% and 0.93% were *not* feasible returns.[102]

BB. The BSA's Arbitrary Failure to Justify the Return of 10.93%

The BSA decision provides no discussion at all as to how it concluded that a 10.93% return on investment was appropriate, and indeed its Decision did not disclose the 10.93% return. This figure may be found only in Freeman's feasibility study.[103] The only evidence in the record as to the minimum return required for the Congregation is the statements of Freeman that 6.55% and 6.59% were satisfactory. The BSA does not even explicitly state in its Decision that 10.93% is the minimum return, except implicitly by making its finding (e), which also does not even mention the subject of reasonable return.

The Community Board opined that a 6% return was adequate. [A-2636]. An unleveraged return of 10.93% is incredibly generous, exceeding the too-good-to-be-true 10% returns offered by the Madoff Ponzi scheme.

CC. A Conforming All-Residential Building Yields a Reasonable Return

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[101] [A-1653].

[102] [A-3819–20].

[103] *See* second column of spreadsheet in Eleventh Freeman Submission of July 8, 2008 [A-4230]. The first column is the Scheme A analysis. Freeman deliberately omitted including a recapitulation of the Scheme C analysis in this "final" spreadsheet.

The BSA was required to consider first whether a conforming, all-residential condominium structure would provide a reasonable return. If such a conforming building provides a reasonable return, then a non-profit is not entitled to variances to allow a larger building.

(1) Scheme C As Submitted Was Less Than An All-Residential Building

After a request by the BSA staff, the Congregation in September 2007 submitted an "all-residential" Scheme C analysis, which was updated in December, 2007. Scheme C as presented was not indeed "all-residential." as acknowledged by Freeman's accompanying notes [104] and again in his submission of August 12, 2008 [A-4430].

Nor does the presented scheme C take into account income that could derive from the valuable 6400-square foot sub-basement and the related basement.[105] Levine estimates a minimum of 11,000 square feet of valuable, income-generating real estate was omitted by Freeman.[106]

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[104] "The new development consists of a ground floor residential and synagogue lobby and core, and floors 2-7 would be for sale condominium units."[A-2794].

[105] The site would accommodate not one, but two 6400 floors below the street level with standard 10 foot heights.

[106] Opposition Valuation Expert Levine elaborates on this in his Seventh Expert Opinion Letter of July 29, 2008. [A-4355].

Because, as Freeman admits, the Congregation did not submit a true as-of-right all-residential building analysis, there is no factual basis for the BSA finding that such was submitted.[107]

Freeman's excuse was that the he did not revise the report, either to update the site value or to include an investment return from the first floor and basements, because the BSA had not asked him.

> Subsequent to its receipt of this material into the record, the BSA did not ask for any additional information regarding this matter.[108]

(2) The Return On Investment for Scheme C was Not Recomputed When Freeman Changed the Site Value.

Freeman's first Scheme C analysis of September 6, 2007 used a site value of $18,944,000. [A-1665]. His revised Scheme C analysis of December 21, 2007 used a site value of $14,816,000. [A-2780].

Without revising the analysis of Scheme C, On March 22, 2008, Freeman further revised his site value downward to $13,384,000 [A-3343] and again on May 13, 2008 downward to $12,347,000. [A-3823]. Because a reduction in site value would increase the rate of return and because the rate of return Freeman computed on December 21, 2007 was 3.83%, opponents asked that Scheme C be recomputed. Freeman would not do so.[109]

[107] BSA Decision, ¶ 129. [A-60].
[108] Twelfth Freeman Frazier Submission Re Reasonable Return August 12, 2008. [A-4430].
[109] "We note that the BSA did not request a submission of an analysis of a revised Scheme C." [A-4229].

Where the BSA Decision at ¶ 138 states that Freeman submitted a revised as-of-right estimate based on the revised estimated value of the property for “the” as-of-right building, clearly Freeman had not revised the analysis of the so-called all-residential as-of-right Scheme C.[110] Thus, there is no basis for this finding or the ultimate (b) finding.

DD. The BSA Admits in Its Article 78 Answer that Scheme C Earns a Return of 6.7%.

The BSA acknowledged in ¶ 292 of its Article 78 Answer, [111] that the December, 2007 Scheme A rate of return should have been recomputed. So, the BSA revised Freeman’s computation using the lower site value and arrived at a return on investment of, not 3.6%, but 6.7%. This return on investment exceeds the 6.55% that Freeman had explicitly stated represented a return on investment exceeding that which the Congregation admitted was adequate. Had a true all-residential scheme been analyzed, as discussed above, the return would have far exceeded even 6.7%.

EE. The Condominium Variances are Not the Minimum Variances Required To Provide a Reasonable Return.

[110] BSA Decision ¶ 138. [A-52].

> "WHEREAS, the applicant also submitted a revised analysis of the as-of-right building using the revised estimated value of the property; this analysis showed that the revised as-of-right alternative would result in substantial loss."

[111] Article 78 BSA Answer to Article 78 Petition, ¶ 292. [A-335], *See* Petitioners' Reply to BSA Answer ¶ 43-51 at page 16.. [A-428].

Overstatement of site value in the two-floor scheme grossly overstates site value in the proposed building, grossly understating the rate of return. Clearly, the 10.93% return on investment for the approved building is grossly understated.

There is thus no evidence in the record to support the BSA's finding that the condominium variances are the minimum variances required. In other words, had Freeman utilized a proper site value for the Proposed Scheme analysis thereby increasing the return, the condominium floors could have included front setbacks or courtyards yet the final building would still achieved in excess of a 10.93% return.

As well, creating a courtyard in the front of the building would have avoided the bricking up of the windows in the front of the side of the adjoining building at 18 West 70th Street. This would have reduced the Congregation's return slightly, but the Congregation would have still received a generous return. Yet, the BSA never sought to analyze such a modification.

FF. Evidence of "Physical" Conditions Not In Record.

The BSA was required by ZR § 72-21(a) to find, for the condominium variances that there exists a "physical" condition creating a hardship that can only be resolved with a variance. As to those variances, the BSA and Congregation did not provide evidence of any physical condition creating hardships that cannot be resolved by a conforming building.

(1) The Dimensions for the Development Site are Regular

The development site is a large regularly-shaped lot that can accommodate a basement and subbasement. Community Board 7 noted: "CSI does not claim that the zoning lot is irregular in shape."[112]

(2) Access and Circulation are Not Hardships Related to the Variances

Access and circulation issues do not constitute qualifying physical conditions for three reasons: (1) an as-of-right building resolves the hardships; (2) the BSA made no finding that variances were required to resolve the hardships, and (3) the BSA did not claim that access and circulation relates to the condominium variances.

(3) Obsolescence Not A Hardship Relating to the Condominium Variances

As to the "obsolescence" being a physical condition, a careful reading of the BSA decision shows that the BSA relied upon obsolescence as a physical condition *only for the community house variances*, not for the condominium variances.[113] Even then, the BSA was incorrect in even referring to obsolescence since the community house was being demolished at an insignificant cost.[114]

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[112] [A-2634].

[113] BSA Decision ¶ 41, ¶ 69, ¶ 72, ¶ 75, ¶ 76. [A-54-A-56].

[114] *See* Building Demolition Costs of $103,500 and a Total Construction Cost of $17,842,426. [A-4068].

(4) The Split Zoning Lot is Not A "Physical" Condition

In the case of the split lot, the BSA attempted to rely upon the zoning regulations themselves as if they were physical conditions. Here, in 73.4% of the height is restricted to 75 feet (R8B) and in 26.6% of the lot height is restricted to 185 feet (R10A.)

But other zoning regulations such as the "sliver law" would limit a tall building on the 26.6% portion in R10A. BSA Decision, ¶94. [A-52].

The other zoning regulation prohibiting a tall building on the R10A sliver is the requirement of a 40-foot separation between a residential and non-residential building on the same zoning lot.[115] Even though the DOB oddly removed its objection as to this requirement, there was a consensus that such a separation had to be provided, and no one has been able to offer a reason as to why it does not apply.

The BSA Decision[116] refers to "several Zoning Resolution provisions" that "recognize the constraints created by zoning district boundaries" and refers to ZR § 73-52.[117]

Section 73-52 provides relief only in the case of "use" variances. The BSA applied it to the Congregation's request for a "bulk" variance. Further, Section 73-52 applies where the less restrictive part of the lot is more than 50% of the lot.

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[115] *See* discussion at of 40-foot separation at page 16
[116] BSA Decision, ¶ 98. [A-58].
[117] ZR § 73-52 is reproduced at [A-864].

Here, the less-restrictive part (allowing a taller building) of the development site is only 26% of the development site. The BSA has simply and improperly, in major ways, rewritten ZR § 73-52.

Two separate zoning regulations prohibit a tall building on the R10B portion of the site, not just the sliver regulation applying in this split lot.

The Congregation asserted that these constitute a physical condition. Clearly, they are nothing more than the zoning regulation itself.

(5) Landmarking Hardship is Not a Physical Condition Hardship – or A Hardship Cognizable To Support a BSA Variances

As discussed below, the impact of landmarking laws cannot be considered to be a physical condition or other hardship that may be used by the BSA to support a variance. Not only is it not a physical condition, but the BSA has no authority to consider landmarking as a basis for a variance.

GG. The BSA Deliberately Blinded Itself to the Facts.

After the November 27, 2007 hearing, the BSA made great efforts to avoid any further questions to the Congregation which would elicit responses preventing the BSA from granting the variances.[118] Had the Congregation actually provided a proper analysis of an all-residential conforming building, or had the Congregation

[118] The BSA exhibits the same type of deliberate blindness by a zoning board as criticized in *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007).

> "In sum, the record convincingly demonstrates that the zoning decision in this case was characterized not simply by the occasional errors that can attend the task of government but by an *arbitrary blindness to the facts*. As the district court correctly concluded, such a zoning ruling fails to comply with New York law." (emphasis supplied)

truly revised its base site value/acquisition cost to a rationally-derived value of the two floors, the condominium variances would have been impossible to grant. The BSA Commissioners simply sat embarrassed, mum in their chairs, rather than ask the obvious.

Counsel for Petitioners confronted the BSA Chair at the last public hearing held June 24, 2008, identifying some questions the BSA refused to ask.[119] The BSA's response was to arbitrarily proceed *without* requiring that the Congregation provide the missing information and complete the incomplete analysis.

HH. By All Appearance, A Tacit Understanding Was Established After the November 27, 2007 Hearing: The BSA Would Not Ask and the Congregation Would Not Tell.

By all appearances, the Congregation and the BSA reached a tacit, collusive understanding that, unless specifically requested by the BSA, the Congregation would not volunteer an updated or correct analysis of an all-income-producing building. On the other hand, the BSA would blind itself and not ask the Congregation to do so. As Freeman states in his final submission of August 12, 2008:[120]

> As noted on page 7 of the July 8, 2008 Response, the BSA did not request a submission of an analysis of a revised Scheme C. Subsequent to its receipt of this material into the record, *the BSA did not ask for any additional information* regarding this matter (emphasis supplied).

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[119] Transcript of BSA hearing of June 24, 2008. [A-5115]. *See also* Post-Hearing Statement in Opposition. [A-4377].

[120] Freeman's Twelfth Submission, August 12, 2008. [A-4429-30].

Given that the BSA knew a reviewing court might well defer to the BSA, an ask-no-questions approach would help insulate the BSA from judicial review because contradicting facts presented by the Congregation would not appear in the record.

The Congregation had full opportunity and obligation to prove its own case, whether asked to by the BSA or not, and took the risk of an incomplete record.

II. A Conforming Building Would Block No Windows in the Adjoining Cooperative Apartment Building.

Immediately to the west of development site is a nine-story cooperative apartment building at 18 West 70th Street. The upper windows in the east wall of 18 West look out over the Synagogue and the development site, toward Central Park. In this east wall, there are seven windows that the condominium variance cause to be blocked by the initially-proposed building: four in the front (north) — and three in the rear (south), but would not be blocked by a conforming building.[121] The BSA decision erroneously and materially confused north and south when referring to the courtyard. [122]

In a variance proceeding, the impact of the variances on adjoining property owners is to be considered and balanced by the BSA under ZR §72–21(c). Here, the BSA blinded itself to the adverse impact of the proposed building upon the

[121] Included is an apartment owned by Petitioner Lepow.

[122] The BSA decision was incorrect in describing the courtyard in the "*north rear*." The courtyard was required by the BSA in the rear of 18 West, which is the *south* side of the building. The windows bricked over and ignored by BSA are on the north side of the building — in the front. The BSA Decision makes this error twice, at ¶ 29 [A-53] and at ¶ 209 [A-64].

owners of the apartment whose windows (on the front-north) would be blocked by the proposed building as approved. Though repeatedly confronted with the fact that the proposed building as approved would result in four windows being bricked up, the BSA consistently ignored these windows, writing a decision that artfully tried to conceal this fact.

The Congregation will argue that the owners of the condominiums in 18 West 70th have no legal right to their views of Central Park or their light and air, and that there are no light and air easements. The latter statement is true, but totally irrelevant. The Congregation is being provided with variances for which it has no legal rights either, and these variances are being provided solely to provide income for the benefit of the Congregation and, indirectly, of its membership.

The Congregation, in its final Statement in Support, states:[123]

> CSI has endeavored to minimize any potential impact on the adjacent westerly building by providing terraces on floors 6-8 the produce a fully compliant outer court.

This is only partly true, because the terraces, added after the initial application, only protect the rear-south lot windows of 18 West 70th Street, not the front-north lot windows.

For its part, the BSA in its decision states:[124]

> [¶ 132] WHEREAS, the Board also requested the applicant to evaluate the feasibility of providing a

[123] Congregation's Fifth and Last Version of Statement in Support, July 8, 2008, p. 43. [A-4209].

[124] BSA Decision, ¶ 132. [A-52].

> complying court to the rear above the fifth floor of the original proposed building; and
>
> * * *
>
> [¶ 192]WHEREAS, nonetheless, the Board directed the applicant to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows than originally proposed; and
>
> [¶193] WHEREAS, the applicant submitted revised plans in response showing a compliant outer court;

The BSA does not explain why it did not require the Congregation to provide a feasibility study as to providing courtyards or setbacks as to the front-north of the adjoining building. The BSA Decision just ignores this inconvenient fact.

No doubt, a courtyard on the north may have slightly reduced the rate of return from 10.93%,[125] but the Congregation had already agreed that a rate of return of 6.6% was acceptable. Thus, there is no evidence at all that the variance provided was the minimum variance required under ZR §72–21(e) and clearly the proposed building has a negative impact on the surrounding buildings.

JJ. Impact on Sunlight and Shadows Under ZR § 72-21(c)

The BSA Decision at ¶¶ 195-201 limited its review to shadows cast in open spaces as specified in the CEQR, and so limited its ultimate finding to open spaces,

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[125] As discussed elsewhere, the 10.93% return would be substantially higher if the site value had been reduced to the value of two floors, not seven floors.

with no finding as to shadows on streets or the buildings opposite the development site.

The mid-block zoning regulation (minimizing shadows in the surrounding neighborhood by limiting height and requiring set-backs) is a statutory provision separate and apart from the CEQR. The BSA did not gather the evidence and make the findings required for the (c) finding. The BSA seemed to believe that it only need review legally protected rights, absolving itself of the review and balancing required by ZR §72-21(c).

In the Congregation's initial application, shadows were ignored. After objections by opponents, the BSA asked the Congregation for a shadow study, but only for the public space in Central Park. The BSA was under the misapprehension that under ZR §72-21(c) only studies required by CEQR need be performed.

After opponents provided three-dimensional street-level drawings illustrating the impact on the narrow streets and opposing buildings, the BSA reluctantly asked for further studies of West 70th Street, which the proposed building would adversely affect. The Congregation retained AKRF, a consulting firm used by developers, which provided only a cursory study submitting hard-to-decipher overhead drawings purporting to show shadows cast on buildings —

drawings which were inconsistent with real-world photographs provided by opponents.[126]

Petitioner Kettaneh's brownstone will be directly impacted as to winter sun, all so as to provide income-generating variances to reduce the need for Congregation members to support their institution.

The failure of the BSA and AKRF to detail the impact of shadows and sunlight is fatal. AKRF has adamantly refused to provide street-level graphics and photographs similar to those offered by opponents to establish the impact.[127]

Yet, in its Decision, the BSA made no findings as to the impact of shadows on West 70th Street. Rather, the BSA improperly limited its findings to the CEQR findings.

KK. The BSA Decision of August 26, 2008

The BSA approved the variances at a short meeting on August 26, 2008, without voting upon specific findings and without presentation of the proposed decision. There is no record that any particular commissioner even reviewed the decision as written.[128]

ARGUMENT

A. The BSA Findings are Supported Neither by Fact, Law, nor Rationality

[126] *See* Comparison of Photographs of Shadows with Shadow Study. [A-248].
[127] Comparison of Photographs of Shadows With Shadow Study. [A-248]. *See also* Shadow Impacts. [A-3086].
[128] BSA Transcript August 26, 2008. [A-4449].

The Statement of Fact above has detailed the abundant deficiencies of the BSA findings and need not be repeated, for the lack of evidence to support the various findings is clear, as is the irrationality of the findings. No deference is to be given to administrative decisions that are outside the bounds of reason or where the administrative body did not make a good faith attempt to assemble the relevant information, even if there are slivers of evidence. There is ample and indeed conclusive evidence of the BSA's deliberate blindness –such as allowing the Congregation to delete missing pages for the construction report.

No complete analysis of an all-income producing building was conducted, but even the badly flawed analysis of Scheme C that was performed shows that the return exceeded the 6.55% the Congregation stated was acceptable.

Even worse, the BSA based its (b) finding upon facts and factual findings different from those cited in its decision. The (b) finding was based upon Freeman's new site valuation" method" of May, 2008 using the value of undeveloped rights over the Parsonage, not the value of the site. Yet, the BSA never mentions that in its Decision, but rather cites facts and makes quasi-findings indicating that the BSA was relying the standard and initial valuation approach – multiplying the number of square feet in the developable area times the valuation per square foot. But, the BSA ignored this approach once it accepted Freeman's May 13, 2008 new approach.

There is no attempt by the BSA to explain why the same site value used as the basis for the two-floor condominium analysis was also used for the seven floor residential as-of-right building. The BSA did not explain why it accepted a site value for the two-floor condominium site that with a value of $2300 per square foot, which is a value that exceeded the sale price of the fully completed condominiums. The BSA did not explain why it did not require Freeman to update the site value in the supposed all-residential Scheme C building analysis, nor require Freeman to provide an analysis of a legitimately all-residential structure.

A very recent case, *Pantelidis,*[129] from New York County Supreme Court and affirmed by the Court of Appeals, involved not only a reversal by the Supreme Court of the decision of the BSA, but a Supreme Court hearing to determine facts, rather than the remand to the BSA. The Appellate Division made clear that not every issue before the BSA required deference to the claimed expertise of the BSA.

Judicial deference to administrative authority and expertise is an important principle. However, reviewing the evidentiary deficiencies of the BSA findings in this case does not require resolution of highly complex technical issues. Although the Congregation has attempted to make a simple subject complex, this does not foreclose review by the court. The manipulation of the site value is apparent with the application of common sense and simple arithmetic. Neither do the issues here

[129] *Pantelidis v. New York City Bd. of Stds. & Appeals,* 43 A.D.3d 314 at 317 (1st Dep't 2007), aff'd 10 N.Y.3d 846 (2008), aff'g 10 Misc. 3d 1077A (Sup. Ct. N.Y. Co.).

involve facts so complex and technical that the Court must defer to the BSA in every respect, especially where common sense dictates to the contrary.

B. The BSA Must Consider Whether the Entire Property Would Generate a Reasonable Financial Return.

The reasonable return analysis must consider the entire property. The §72-21(b) finding may not use only a slice of the property where only two floors of a seven-floor as-of-right structure are analyzed. And, if the BSA is to accept such an approach, the site value must reflect the actual real estate rights that are under development, not the entire site and certainly not the undeveloped rights over an adjoining building.

Neither the court below nor the BSA addressed this issue although it was explicitly raised by Petitioners.[130] The following precedents require consideration of a reasonable return analysis for the entire project (Scheme C), not just the partial two-floor Scheme A: *Penn Cent. Transp. Co. v. New York City;*[131] *Northern Westchester Professional Park Associates v. Bedford;*[132] *Koff v. Flower Hill*[133]

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[130] The court below stated: "It cannot be found to be arbitrary and capricious to use a return on profit model for that portion of the Project that consists solely of residential condominiums." Lobis Decision at 23. [A-36]. The issue is whether the BSA action was authorized by law or supported by evidence, or rational, not just whether it was arbitrary and capricious. The court below ignored completely the improper use of seven floors of value for two floors of development or alternatively the value of the undeveloped space over the Parsonage. It is also not clear what the court meant by "return on profit", a phrase not ordinarily, if at all, used in this context.

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

[132] *Northern Westchester Professional Park Associates v. Bedford*, 60 N.Y.2d 492, 503–504 (N.Y. 1983).

[133] *Koff v. Flower Hill,* 28 N.Y.2d 694 (1971).

Concerned Residents v. Zoning Bd. of Appeals;[134] *Spears v. Berle;*[135] *Citizens for Ghent, Inc. v. Zoning Board of Appeals of Town of Ghent*[136] and *Concerned Residents of New Lebanon v. Zoning Board of Appeals of Town of New Lebanon.*[137]

The concept that variances from zoning regulations may be granted where the property owner cannot use his property or earn a reasonable return is grounded in longstanding land regulation law. ZR § 72-21(b) merely codifies these longstanding principles applied in United States jurisprudence and reflects the due process clause as to the taking of property without cause or due process.

The Congregation may either elect to meet its programmatic needs or to earn a reasonable return from its property. Nothing in law or due process suggests the Congregation is entitled to do both simultaneously. If using the entire development site for income production would yield a reasonable return to the Congregation, then the condominium variances should not have been granted.

C. The BSA's § 72–21 (b) Finding that an All-Residential As-of-Right Project Would Not Earn a Reasonable Return Is Not Supported by the Evidence

As fully discussed above, even the incomplete and flawed Scheme C analysis of an as-of-right income-producing, all-residential building would provide

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[134] *Concerned Residents v. Zoning Bd. of Appeals*, 222 A.D.2d 773, 774–775 (3rd Dep't 1995).
[135] *Spears v. Berle*, 48 N.Y.2d 254, 263 (N.Y. 1979).
[136] *Citizens for Ghent. Inc. v. Zoning Board of Appeals of Town of Ghent*, 175 A.D.2d 528, 572 N.Y.S.2d 957 (3rd Dep't 1991).
[137] *Concerned Residents of New Lebanon v. Zoning Board of Appeals of Town of New Lebanon*, 222 A.D.2d 773, 634 N.Y.S.2d 825 (3rd Dep't 1995).

a reasonable financial return to the Congregation. The BSA admitted as much in its Article 78 answer. Further, it is abundantly clear that (a) the Scheme C analysis did not value all of the income producing space available; and, (b), if it had done so, then the return on Scheme C would have been even greater.

The BSA (b) finding assumes that an analysis of an all-income producing building was indeed prepared by Freeman. As convincingly shown in the fact statement above, Freeman did not do this and admits to not having done this. Thus, without this factual underpinning, the BSA's (b) finding for the condominiums is not supported by evidence.

D. In the Absence of a Rational Site Value for the Two Floor Condominium Site, the BSA Findings as to Scheme A and the Proposed Scheme Must Be Rejected.

As described above, it was irrational for the BSA to base any variance decision upon a reasonable return analysis that in reality assigned a site value of $2300 per square foot, while the Congregation and Freeman falsely claimed that Freeman was using a valuation of only $625 to $750 per square foot. It is further apparent that Freeman never reduced the site value to only the two floors under question, but continued to use the site value for the entire building.

Thus, the partial two-floor Scheme A analysis should be completely rejected on the basis of this single yet highly significant distortion in the computation of site value. Similarly, the Proposed Scheme analysis, which uses the same faulty site value, can be no basis for the (e) finding.

The two-floor condominium analysis is flawed in other ways as well, including the reliance upon a construction cost analysis that omitted key pages, which Freeman refuses to produce. In normal courtroom litigation, Mr. Freeman's omission of pages would be characterized as spoliation.[138] The construction estimate documents in their entirety should be rejected and the feasibility studies based thereon should be rejected. That means the BSA had no evidentiary basis for its reasonable return finding.

Because, the BSA was not genuinely engaged in "reasoned decision making", its findings should be rejected.[139] The BSA decision was reached in an arbitrary and capricious manner.[140]

E. The Acquisition Cost for the Property Is to Be Considered in Ascertaining Whether a Reasonable Return May Be Obtained.

By ignoring the amount paid by the Congregation for the three brownstone development sites in 1954 and 1965, the BSA ignored the profit that would be earned the Congregation by the "receipt" of the $12.4 million for the site "acquisition cost." Under the Freeman methodology, this profit of $12.4 million to the Congregation was ignored entirely, and not even mentioned in the BSA

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[138] Spoliation: intentional or negligent withholding, hiding, alteration or destruction of evidence relevant to a legal proceeding. The fact finder may conclude that the evidence would have been unfavorable to the spoliator. *Ortega v. City Of New York*,.9 N.Y.3d 69 (2007); Black's Law Dictionary, 1437 (8th ed. 2004).

[139] *Gulf States Utilities Co. v. Federal Power Commission*, 518 F.2d 450, 458–59 (D.C. Cir. 1975).

[140] *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 290 (1974).

decision. Yet, this cash receipt is not shown by Freeman as profit and is in fact concealed by failing to mention the acquisition cost in 1954 and 1965.

Applicable case law requires the acquisition cost be considered by the zoning board.[141] Furthermore, Item M-4 of BSA's Detailed Instructions specifically required of the Congregation the acquisition cost and acquisition date.[142] The BSA cannot depart from its formal written instructions merely because they may not have been adopted as regulations.[143] The BSA and Freeman completely ignored the actual acquisition cost, and the BSA neglected to discuss this fact in its decision.

During the time the Congregation owned the property, it received value in the form of use and rent, including for some years the over-$500,000-per year rent received from the Beit Rabban school. Thus, a return on investment for the Congregation would include factoring in the original acquisition cost, the value of the use, the rent received and the amount received as the market value on the hypothetical sale to the hypothetical developer.

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[141] *Douglaston Civic Assn. v. Galvin*, 36 N.Y.2d 1, 9 (N.Y. 1974), *Curtiss-Wright Corp. v. East Hampton*, 82 A.D.2d 551, 553–554 (N.Y. App. Div. 2d Dep’t 1981)
Northern Westchester Professional Park Associates v. Bedford, 92 A.D.2d 267, 272 (N.Y. App. Div. 2d Dep’t 1983). *Sakrel, Ltd. v. Roth*, 176 A.D.2d 732, 737 (N.Y. App. Div. 2d Dep’t 1991) (“the failure of the petitioner to divulge its purchase price is fatal”); *Varley v. Zoning Bd. of Appeals*, 131 A.D.2d 905, 906 (N.Y. App. Div. 3d Dep’t 1987).

[142] "Generally, for cooperative or condominium development proposals, the following information is required: market value of the property, *acquisition costs and date of acquisition*. (emphasis supplied)" [A-821].

[143] *Allied Manor Road LLC v. Grub*, 2005 N.Y. Misc. LEXIS 3440; 233 N.Y.L.J. 75 (Civil Ct., Richmond Co. 2005); *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 41 (1st Cir. 1989) (Breyer, J.).

F. Since There Are No Unique Physical Conditions Creating a Hardship, the BSA's § 72–21 (a) Condominium Finding Must Be Voided.

The Court of Appeals in the recent *Vomero* case has made clear that the express words of ZR § 72–21 (a) are to be followed by the BSA, and that the BSA cannot create its own statute. Although, in *Vomero*, the Court of Appeals case focused on uniqueness, the Appellate Division dissent discussed both the uniqueness and physical condition requirement. Following the *Douglaston cases,*[144] courts interpreting § 72–21(a) have been careful to require an actual physical condition. Even in *SoHo Alliance*,[145] the court was careful to describe actual physical conditions, rather than non-physical conditions such as landmarking hardships and zoning regulations.

The Respondents below cited cases involving the interpretation of ZR § 72–21 (a) as applied to religious, educational and other non-profits, such as *Guggenheim.*[146] Yet those cases, whether decided correctly or not, are inapplicable when considering the application of ZR § 72–21 (a) to for-profit variances. *Guggenheim* does not modify the requirement for a *"physical"* condition when a condominium variance is at issue.

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[144] *Douglaston Civic Assoc. v. Galvin*, 36 N.Y.2d 1 (1974) and *Douglaston Civic Association v. Klein*, 51 N.Y.2d 963 (1980).

[145] *SoHo Alliance v. New York City Bd. of Stds. & Appeals,* 95 N.Y.2d 437, 441 (N.Y. 2000).

[146] *Guggenheim Neighbors v. Bd. of Estimate*, June 10, 1988, N.Y. Sup. Ct., Index No. 29290/87.

It is clear that a physical condition is required to satisfy the (a) finding for the residential variances. Other "conditions" such as landmarking or programmatic needs are not applicable for this purpose.

Nor can a zoning law itself be the physical condition. Were the impact of zoning a physical condition, then in all variance cases a finding could always be made as to the existence of a physical condition. Thus, a split lot is not a physical condition.

(1) New York Cases Applying State Law Are Not Relevant to the (a) Finding, Since New York Law Has No Requirement of a Physical Condition.

New York City's variance law requires that there be a "physical" condition in order to make the (a) finding. No such requirement is provided by State law applicable outside of New York City.[147] Thus, cases like *Commco*,[148] *Dwyer*,[149] and *Fuhst*[150] are wholly inapplicable. New York City zoning cases mistakenly relying upon these and similar cases to avoid the physical condition requirement are questionable precedent.

[147] Town Law Section 267-b-2-(b) [A-855].
[148] *Commco, Inc. v. Amelkin*, 109 A.D.2d 794 (2d Dep't 1985) (Town of Huntington).
[149] *Dwyer v. Polsinello,* 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (Rennsalaer County)
[150] *Fuhst v. Foley*, 45 N.Y.2d 441, 444 (1978) (Town of Greenburgh).

(2) There is no Obsolescence That Constitutes a Cognizable Physical Condition For the Condominium variances, or Indeed for any Variances.

Although the BSA referred to obsolescence in the context of the community house variances, it did not do so as to the condominium variances. [151] Nonetheless, the Congregation has cited obsolescence as a hardship to support the condominium variances.

Even so, the obsolescence asserted here cannot be physical conditions creating hardships not resolved in a conforming building, because a conforming building resolves the issues with no unusual demolition costs. In certain situations, particularly use variances, if a building is determined to be obsolete and too impractical to demolish or alter, then a physical condition has been found to exist, such as in *Homes for the Homeless.*[152] Here, though the existing community house is asserted to be obsolete, it can be easily demolished at low cost. Thus, cases like *97 Columbia Heights* are not apposite. The BSA's brief filed in *Homes for the Homeless* makes clear that obsolescence in a building to be demolished is not a cognizable physical condition.[153] Obsolescence therefore cannot be a "physical" condition in this situation.

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[151] *See* discussion at note 114 above

[152] *Homes for Homeless, Inc. v. Bd. of Standards and Appeals*, 24 A.D.3d 340 (1st Dep't 2005), rev'd, 7 N.Y.3d 822 (2006).

[153] Memorandum of Law dated April 30, 2004 filed in the Supreme Court by BSA in *Homes for the Homeless.* [A-1010].

As noted, the BSA did not use "obsolescence" as a basis for the (a) finding for the condominiums. Respondents will cleverly cite to cases that use obsolescence as a physical condition and then claim the community house is obsolete and then muddle the issue and somehow claim that obsolescence was a physical condition for the condominiums (a) finding. Even so, under the case law, an easy-to-demolish obsolete building does not rise to the level of a hardship-causing condition.

G. The BSA Has No Power or Jurisdiction to Use Landmarking as a Factor in Providing a Variance.

The BSA used the existence of landmarking requirements on the development site and adjoining buildings on the Congregation's site in two ways (1) to support its physical condition findings for the condominium variances (as discussed above), and (2) to value the 5,316 square feet of the two condominium site by assigning as the site to be valued 19,755 square feet of undeveloped (because of landmarking) space above the adjoining Parsonage [154]

Freeman's theory apparently was that the landmarking laws limited development over the parsonage, and thus the value of the area not developable should be transferred to the two floors of condominiums. Then, the Congregation reserved the right to build over the Parsonage.[155] The fly in the ointment for the

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[154] *See* discussion re Parsonage Development Rights at 33 above.

[155] *See* note 27 above. The court below noted that "There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage." Lobis Decision at page 32. [A-45]. Yet the court below did not address the issue of whether the BSA had any

Congregation and the BSA is that nothing in the statute authorizes the BSA to use landmarking hardships in granting a variance –nothing at all.

There is no question at all that Freeman in May, 2008 suddenly abandoned the normal way to value the site, and came up with this contrivance – and that the BSA failed to note such in its Decision.

BSA has no power or jurisdiction to issue variances based upon landmarking as a hardship, whether using landmarking as a hardship or illegally "transferring" land value from a landmarked site. Clearly, only the City Planning Commission has these powers.

(1) The Congregation Withdrew Its Application to the LPC and City Planning Commission for Relief from Landmarking Hardships Under § 74-711.

The Congregation had initially applied to the LPC for relief from landmarking hardships under ZR §74–711, which would have required City Planning Commission action. But the Congregation withdrew its application when it became apparent that such relief would not be supported by the LPC or perhaps even by the City Planning Commission.[156]

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jurisdiction at all as to relief from landmarking hardships. Nor did the court discuss how the BSA had used the site value above the landmark encumbered Parsonage to value the two-floor condominium site.

[156] The Congregation falsely suggested that LPC *denied* the § 74-711 application to the LPC. Letter from Congregation's Counsel to BSA June 17, 2008 [A-4025] ("[The Congregation's] request for Landmarks cooperation on a ZRCNY Sec. 74-711 special permit was denied,") To the contrary, Shelly Friedman (counsel for the Congregation) advised the LPC at a hearing that the Congregation was withdrawing its § 74-711 application. Transcript of LPC Hearing, November 15, 2005. [A-1027–28]. ("We have withdrawn that aspect of the litigation," p.9, l. 19-20*).* *See also* Applicant's Fifth Statement in Support of July 8, 2008. [A-4182].

If the LPC itself had recommended a special permit, the LCP would make a recommendation to the City Planning Commission. The City Planning Commission, if it agreed to relief, would then impose restrictions on the Congregation site; for example, restricting future development on the Synagogue and Parsonage sites. The BSA not only exercised powers it did not have, but it then provided relief to the Congregation without imposing any conditions whatsoever as contemplated by the zoning resolutions contemplated when the City Planning Commission provides relief.

(2) Zoning Resolution Provisions Authorizing Landmark Hardship Relief Provide No Role to the BSA.

The Zoning Resolution includes many provisions in addition to §74-711 which allocate landmark hardship relief powers to the City Planning Commission.[157] The BSA is mentioned in none of these provisions, nor in any other provisions of the Zoning Resolution. The BSA clearly exceeded its powers.

H. Bricking Over of Windows In the Front of the Adjoining Building ZR §72–21(c) and ZR §72–21(e).

Simply, the BSA arbitrarily and capriciously ignored the blocking of the windows of Petitioner Lepow and others in the adjoining 18 West 70th Street

[157] Other provisions of the Zoning Resolution concerning relief from landmark hardships, which assign power and jurisdiction to the City Planning Commission, with no role for the BSA, include:

ZR §42–142; ZR §74–711; ZR §74–712; ZR §74–721; ZR §74–79; ZR §74–791; ZR §74–792; ZR §74–793; ZR §81–254; ZR §81–266; ZR §81–277; ZR §81–63; ZR §81–631; ZR §81–633; ZR §81–634; ZR §81–635; ZR §81–741; and ZR §99–08.

building and tried to obscure this fact in its Decision. Without question, the bricking over of these windows falls within the purview of ZR §72–21(c).

Community Board 7 found with reference to the bricking-over of windows: "it was an abuse of the variance process to permit one landowner to exceed zoning restrictions at the expense of its neighbors." [A-2635].

Clearly, a conforming building would not block these windows, which have views of Central Park. Clearly, the value of the apartments has diminished, while at the same time the condominium variances accrued to the substantial benefit of the Congregation membership. The BSA Decision was silent as to the blocked windows because the BSA had no explanation for its arbitrary and capricious failure to balance the equities as to these windows.

The BSA, having required the Congregation to analyze the financial feasibility of courtyards in the rear of the building, arbitrarily failed to require the Congregation as part of the (e) finding to submit feasibility studies of courtyards or setbacks in the front of the building so that windows would not be bricked over. The BSA also failed to analyze whether setbacks in the front of the building would unreasonably reduce the 10.93% return on investment to the Congregation.

I. By Applying Only the CEQR As To Shadows, the BSA Failed to Make the Findings Required by ZR §72–21(c).

The BSA in its finding as to shadows under ZR §72–21(c), stated:

> WHEREAS, CEQR regulations provide that an adverse shadow impact is considered to occur when the shadow from a proposed project falls upon a publicly accessible

> open space, a historic landscape, or other historic resource…[158]

It is incumbent upon the BSA to respect the purposes of the zoning regulations as discussed above and as well make the findings required by ZR §72–21(c), not just CEQR.[159] The mid-block contextual zoning regulations establish height and setback requirements to allow light and air into the narrow streets. Satisfaction of CEQR and SEQR requirements by themselves does not mean that ZR §72–21(c) has been satisfied or that the purposes of the particular zoning regulation have been respected.

The condominium variances not only increase building height but eliminate upper floor setbacks, together having a dramatic effect on shadows on a narrow street. Because the Synagogue height and setbacks essentially conform to contextual zoning, the adverse impact of the condominium variances is all the more dramatic.

The BSA's excuse that CEQR[160] and SEQR[161] do not require meaningful studies of streetscape shadows is wholly irrelevant to the obligation of the BSA to meet the requirements of the (c) finding and to follow the purposes of the zoning statute. ZR § 72–21 (c) is a statute separate and apart from CEQR, and CEQR is not a limitation on ZR § 72–21 (c). A superficial "study" by the Congregation's

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[158] BSA Decision, ¶195. [A-63].
[159] *See* discussion at page 49 above.
[160] City Environmental Quality Review.
[161] New York State Environmental Quality Review Act.

consultant does not discharge the BSA from its obligations. The BSA cannot meet its obligations by simply accepting the "magic words" incorporated in a report from a consultant hired by an applicant for the purpose of uttering those very "magic words."

By confining its findings to the CEQR finding, the BSA failed to make the findings required by ZR § 72–21 (c).

J. The BSA Created for Itself the Power to Consider Landmarking When Granting a Variance.

The BSA is not entitled to engage in self-serving and idiosyncratic interpretations of its own governing statutes. In *GRA*,[162] through the Supreme Court and the Appellate Division, the BSA argued that it had certain powers. Then, when faced with the appeal to the Court of Appeals, the BSA abruptly admitted error.

The BSA should now admit error in this case. The BSA acted highly improperly in using landmarking as a factor when the BSA had no jurisdiction whatsoever.[163] Worse yet is the unbridled discretion the BSA has given itself in handing out variances. The BSA's loose statutory construction is what was firmly rejected by the First Department and the Court of Appeals, thwarting efforts of

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[162] *GRA v. LLC,* 12 N.Y.3d 863 (2009) ("On appeal to this Court, however, the BSA concedes that it and the lower courts were in error…").

[163] *In the Matter of 330 West 86th Street* (New York City Board of Standards and Appeals, 290-09-A, July 13, 2010.):.

New York City agencies to skirt real estate laws.[164] These courts rejected the interpretations of statutes by real estate administrative agencies that were unconstitutionally vague and not in accord with the plain words of the applicable statutes.

Without the use of the value of undeveloped space above the landmark-burdened parsonage, there is no evidentiary support for the reasonable return finding for Scheme A and the minimum variance finding for the Proposed Scheme.

CONCLUSION

The Congregation had ample opportunity and resources during the 18-month BSA proceeding to establish a basis for the findings that the conforming as-of-right buildings would be unable to provide a reasonable return. The record is clear that only by using irrational manipulations of the site value and factors not authorized by statute, was the Congregation able to claim an inability to earn a reasonable return on investment. The record is also clear that even the faulty analysis of an all-residential Scheme C yields a return on investment acceptable to the Congregation.

The BSA did exactly what it claimed it would and could not do: provide variances to religious non-profit seeking variances for the purpose of allowing

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[164] *Roberts v Tishman Speyer Props., L.P.,* 13 N.Y.3d 270 (2009) (disregarding administrative agency's interpretation of statute which is improper and conflicts with the plain language of the statute).

income production. BSA Decision, ¶¶ 34, 35, and 125 [A-52]. So, as not to create precedent that the BSA would regret, the BSA concealed what it was doing.

The BSA granted variances to the Congregation of the very type it has adamantly refused to provide to Yeshivas in Brooklyn.[165]

Because of the confusing state of the record, the court below may have been unable to unscramble the confusion sown by the Congregation and the BSA. Further, the court below did not apply the substantial evidence requirement of the statute. Yet, the court below did note that the result might be different if that court were empowered to conduct a de novo review.[166]

What is sought here is not a *de novo* review, but an application of the standard of sufficient if not substantial evidence, a review of the legal powers asserted by the BSA in support of its findings, the application of the legal standards as to feasibility studies, and the rejection of irrational findings.

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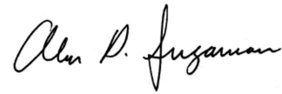
[165] BSA Decisions in *245 Hooper Street,*72–05-BZ, NYC-BSA, May 2, 2006 [A-3065] and *Yeshiva Imrei Chaim Viznitz*, 290–05-BZ, NYC-BSA, January 9, 2007 [A-3069]. The BSA Decision at ¶ 213 and ¶ 214 improperly defers to the Congregation as to the condominium variances.

[166] Lobis decision at page 32 [A-45].

The decision below should be reversed and the BSA instructed to void all the variances, save for the variances for the community house on the first four floors.

Dated: September 7. 2010
New York, New York

Respectfully submitted,



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Order and Judgment Appealed From: Decision, Justice Joan B. Lobis, July 10, 2009, entered July 24, 2009, 2009 NY Slip Op 31548(U) (1 of 38)

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis **PART** 6

Index Number : 113227/2008
KETTANEH, NIZAM PETER
vs.
BOARD OF STANDARDS AND APPEALS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. ________
MOTION DATE 3/31/09
MOTION SEQ. NO. ________
MOTION CAL. NO. ________

this motion to/for ________

	PAPERS NUMBERED
Notice of ~~Motion~~ Petition/ Order to Show Cause — Affidavits — Exhibits ...	1-27
Answering Affidavits — Exhibits	28-71; 72
Replying Affidavits	73-103

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FOR THE FOLLOWING REASON(S):

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/10/09 [signature] J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

--X

NIZAM PETER KETTANEH and HOWARD LEPOW,

Petitioners,

Index No. 113227/08

-against-

Decision, Order and Judgment

BOARD OF STANDARDS AND APPEALS OF THE CITY OF NEW YORK, MEENAKSHI SRINIVASAN, Chair, CHRISTOPHER COLLINS, Vice-Chair, and CONGREGATION SHEARITH ISRAEL a/k/a THE TRUSTEES OF CONGREGATION SHEARITH ISRAEL IN THE CITY OF NEW YORK,

Respondents.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

--X

JOAN B. LOBIS, J.S.C.:

Nizam Peter Kettaneh and Howard Lepow bring this petition, pursuant to Article 78 of the C.P.L.R., seeking to annul and reverse the August 26, 2008 determination of the Board of Standards and Appeals of the City of New York and its chair and vice-chair, Meenakshi Srinivasan and Christopher Collins, respectively (collectively referred to as the "BSA" or the "Board"). The determination is set forth in Resolution 74-07-BZ (the "BSA Resolution"). The BSA Resolution approved the application of respondent Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel (the "Congregation"), a not-for-profit religious institution, for a variance for the property located at 8-10 West 70th Street in Manhattan (the "Property"), which is adjacent to the Congregation's sanctuary, located at 6 West 70th Street. The Congregation seeks to build a structure containing four floors of community space and five floors of luxury condominiums (the "proposed building" or the "Project"). The Board found that the Congregation had satisfied the criteria set forth in New York City Zoning Resolution § 72-21 for a variance. Respondents BSA and the Congregation oppose the petition.

The Property is located within the Upper West Side/Central Park West Historic District and is in a residential zoning district. Petitioner Kettaneh owns and resides in a townhouse located at 15 West 70th Street, which is opposite the Congregation's sanctuary. Petitioner Lepow resides at 6 East 79th Street. Mr. Lepow owns ten (10) cooperative apartments in a building located at 18 West 70th Street (the "West 70th Building"), which is the building adjoining the Property.

The Property is comprised of two tax lots—Block 1122, Lots 36 and 37—with a total lot area of 17,286 square feet. The lots constitute a single zoning lot because the tax lots have been in common ownership since 1984, which is the date of the adoption of the existing zoning district boundaries. The bulk of the site is in the R8B zoning district, known as contextual mid-block zoning, with height and setback limitations. The remainder of the Property is in the R10A zoning district, which has less restrictive zoning requirements. The zoning lot has 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage on Central Park West. Lot 36 consists of the synagogue building, an historic landmark, which was constructed in 1896. Adjacent to the south side of the synagogue, on Central Park West, is a townhouse known as the Parsonage, which was also constructed in 1896. The Parsonage is 75 feet tall and holds 27,760 square feet. Lot 37, which is on West 70th Street, just off Central Park West, is 64 feet by 100 feet. This lot is the combination of three residential house lots, once owned by the Congregation, but sold in 1896 to private owners for the construction of private residences, with the restriction that no structure would exceed the height of the Synagogue building itself. In 1949, two of these lots were conveyed back to the Congregation and in 1954, row houses were constructed on this portion of the Property, creating the Community House. The third lot was conveyed back to the Congregation in 1965. While there were three structures originally, in 1970, the building on the lot acquired in 1965 was

demolished, leaving a vacant lot. Presently, this vacant part of Lot 37 contains a trailer that is used for classrooms. The other part of the lot contains the four-story Community House, which totals 11,079 square feet, and occupies approximately 40% of the tax lot area; the remaining 60% is vacant. The Beit Rabban Day School, a private, nonsectarian Jewish day school that is not affiliated with the Congregation, is the primary user of the Community House, and pays rent to the Congregation.

The Application Process

In order to develop a property that has a non-conforming use or non-complying bulk, the applicant must submit an application to the Department of Buildings ("DOB"). After the DOB issues its denial of the non-conforming or non-complying proposal, the property owner may then apply to the BSA[1] for a variance. The BSA is required to hold hearings and comply with other statutory procedures. Specific findings must be made in the BSA determination to grant or deny a variance. (See below.) Each of the five criteria must be satisfied before a variance may be granted. If the BSA does not grant a variance, the property owner may only develop the property in conformance with the use and bulk regulations for the particular zoning district.

The Zoning Regulations as to the Granting or Denial of a Variance

In determining whether or not to grant a variance, Z.R. § 72-21 requires the BSA to make "each and every one" of five specific findings of fact, as follows: (1) that the subject property

[1] The BSA is empowered to hear, decide and determine whether to grant or deny requests to vary the zoning laws. New York City Charter (the "Charter") §§ 666(5), 668; Z.R. §§ 72-01(b) and 72-20 et seq. The BSA is comprised of five commissioners, who are appointed by the Mayor of the City of New York, each for a term of six years. Pursuant to § 659 of the Charter, at least one member must be a planner with professional qualifications; another member is required to be a licensed professional engineer; and, another member is required to be a registered architect. All three of these professionals must have at least ten years' experience.

has "unique physical conditions" which create "practical difficulties or unnecessary hardship in complying strictly" with the permissible zoning uses and that such practical difficulties are not due to the general conditions of the neighborhood; (2) that the physical conditions of the property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a reasonable return" from the property; (3) that the variance "will not alter the essential character of the neighborhood" or "substantially impair the appropriate use or development of adjacent property" and "will not be detrimental to the public welfare"; (4) that the "practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner"; and, (5) that the variance be "the minimum variance necessary to afford relief." The BSA is further required to set forth in its determination

> each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be supported by substantial evidence of other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board.

<u>The Congregation's Application to the BSA</u>

On or about March 27, 2007, the Manhattan Borough Commissioner of the DOB denied the application, citing eight objections.[2] After the application was revised, the DOB issued a second determination, which eliminated one of the prior objections. The DOB's second determination, issued on or about August 27, 2007, was the basis for the variance application.

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[2] Prior to this application, the Congregation submitted an application to the Landmarks Preservation Commission ("LPC"). As set forth at p. 29, infra, the LPC issued a Certificate of Appropriateness in March 2006.

On April 1, 2007, the Congregation submitted its variance application to the BSA. As a result of its growth in membership from 300 families when the synagogue first opened, to its present membership of 550 families, the Congregation asserted that it needed a new facility to accommodate its religious mission. In addition, the Congregation claimed that it needed to update the 110-year-old building to make it more easily handicapped accessible.

To this end, the plan seeks to demolish the existing Community House occupying tax lot 37, and replace it with a nine-story (including penthouse and cellar) mixed-use community facility/residential building. The use of the Property conforms with the zoning regulations (i.e., as-of-right), so no use waivers were requested; the variance request was with respect to non-complying bulk. The Congregation sought a waiver of certain regulations, since the proposed building does not comply with the zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear setback for the zoning district.[3] The proposed building will have a total floor area of 42,406 square feet, which is comprised of 20,054 square feet of community facility floor area and 22,352 square feet of residential floor area. The base height along West 70th Street is 95 feet, 1 inch, which is just over 35 feet higher than the maximum permitted height of 60 feet; the front setback is 12 feet, which is 3 feet short of the minimum permitted distance of 15 feet; the total height is 105 feet, 10 inches, which is just over 30 feet higher than the maximum permitted height; the rear yard is 20 feet for the second through fourth floors, which is equal to the required minimum; the rear

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[3] "Lot coverage" is that portion of a zoning lot which, when viewed from above, is covered by a building."Rear yard" is that portion of the zoning lot which extends across the full width of the rear lot line and is required to be maintained as an open space. "Base height" is the maximum permitted height of the front wall of a building before any required setback. "Building height" is the total height of the building, measured from the curb level or base plane to the roof. A "setback" is the portion of a building that is set back above the base height before the total height of the building is achieved.

setback is 6 feet, 8 inches, which is more than 3 feet short of the minimum required distance of 10 feet; and, the interior lot coverage is 80%, which is 10% greater than the maximum permitted lot coverage of 70%.

In support of the application, the Congregation submitted a zoning analysis, a statement in support, an economic analysis, drawings, and photographs. The Congregation also submitted an Environmental Assessment Statement. An Economic Analysis Report, dated March 28, 2007 (the "March 2007 Report"), was submitted by the Congregation's consultant, Freeman/Frazier & Associates, Inc. ("Freeman/Frazier"). The March 2007 Report analyzed the feasibility of two alternatives for the development of the site— an as-of-right residential/community facility consisting of a six-story building, with condominium units on the fifth and sixth floors, and a proposed residential/community facility. The latter proposal would require a variance from the BSA, since the proposal called for an eight-story plus penthouse mixed-use building, with condominiums on floors five through eight, plus the penthouse.[4]

On or about June 15, 2007, the BSA issued a Notice of Objections to the variance application, to which Freeman/Frazier responded; the BSA issued a second set of objections on October 12, 2007, comprising twenty-two (22) objections, to which Freeman/Frazier also responded. The crux of the response related to the second prong of the required finding of fact, i.e., the

[4] Freeman/Frazier subsequently made revisions to the March 2007 Report, and submitted letters and/or reports dated September 6, 2007; October 24, 2007; December 21, 2007; January 30, 2008; March 11, 2008; April 1, 2008; May 13, 2008; June 17, 2008; and, July 8, 2008.

reasonable return analysis. Freeman/Frazier also provided a revised as-of-right development, since the prior as-of-right proposal actually violated the rear yard limitations and was not as-of-right. The revised proposal also reduced the floor-to-ceiling heights, which resulted in a seven-story building with a total of six residential units. Freeman/Frazier concluded that an as-of-right building would result in an annualized capital loss in the amount of $23,000, while the revised proposed development would yield an annualized return on total investment of 8.16%.

The Community Board 7 Land Use Committee ("CB7") held hearings on October 17 and November 19, 2007. A number of community residents and elected officials spoke in opposition. The Congregation pointed out that the design had changed slightly after the Congregation appeared before the Landmarks Preservation Commission ("LPC"), with respect to the decrease in size of the proposed building and certain elements of the façade.[5] CB7 expressed concern as to whether all of the residential space in the proposed building was really necessary to finance the Project and the Congregation's programmatic needs. The opposition raised this as a concern, and also questioned the Congregation's use of the Parsonage as rental property rather than as space for its programmatic needs; the excessive garbage that would pile up after events; excessive traffic from the school; and, the shadows that will result from the height of the new building. CB7 questioned the need for five condominiums; whether five condominiums was truly the minimum number necessary for a reasonable return; and, why a Congregation with a large number of wealthy members needed this manner of financing for its programmatic needs.

[5] At the time of the presentation to the LPC, the Congregation sought to construct a fourteen-story building.

The Congregation asserted that it was not required to satisfy the finding of a reasonable rate of return, and that it was optional for the BSA to make that finding. The Congregation stated that the Parsonage was not suitable for community facility use, in that there were too many building code violations for multi-purpose use, so that it is only suitable as a residence. CB7 rejected the variances for the condominiums, but approved the smaller, lower floor variances, essentially approving the horizontal variances but not the vertical variances. On December 4, 2007, the entire Community Board rejected all seven of the variances.

After notice by publication and mailing, the BSA held its first hearing on November 27, 2007. Representatives from the Congregation addressed the reasons for the proposed building, which included the need to accommodate the growth in membership and the need to make the building more handicapped accessible. The BSA asked the Congregation to consider only the value of the residential portion of the site in calculating the reasonable return, and eliminate the community facility from the site value.[6] By letter dated December 21, 2007, Freeman/Frazier submitted its revisions. Five development alternatives were set forth: (1) a revised as-of-right community facility/residential development, which is a revision to the proposal submitted in the March 2007 Report; (2) a lesser variance alternative as-of-right community facility/residential development, which is based on the proposal that was submitted in response to the Board's June 15, 2007 Notice of Objections; (3) a claimed as-of-right structure with tower development, which would consist of a tower with floors five through sixteen comprising thirteen residential units, but would have a smaller zoning floor area than the proposed development; (4) the proposed development, which

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[6] The term "site value" is used interchangeably with the terms "acquisition cost" and "market value" of the Property.

consists of new construction of an eight-story building, plus penthouse; and, (5) an as-of-right residential development. Also, pursuant to the Board's request, the economic feasibility analysis was performed considering only the value of the residential portion of the site. The first three alternatives all resulted in annualized losses. The fourth proposal of the mixed use building with five condominiums provided an annualized return on total investment in the amount of 12.19%, while the fifth proposal provided an annualized return on total investment in the amount of 3.63%. Freeman/Frazier acknowledged its failure to respond to the opposition's concerns, including not valuing income from the school, Parsonage and basement/banquet space.

The public hearing continued on February 12, April 15, and June 24, 2008. Each date, testimony was presented by opponents to the Project and written submissions were prepared by both the Congregation and the opponents to the Project after each hearing. Freeman/Frazier's March 11, 2008 letter and report responds specifically to concerns raised at the February 12, 2008 hearing, and to the report of Martin Levine, of Metropolitan Valuation Services ("MVS"), the expert for the opposition. The BSA asked Freeman/Frazier to review the estimated property value of the residential development portion of the site, using the as-of-right zoning floor area determined by assuming the building lot to be a single split zoning lot, and to consider the financial feasibility of several new alternatives. Freeman/Frazier re-examined comparable sites for land prices, and examined alternatives such as increasing the courtyard space (which would decrease the sellable area on each floor), and reducing the height of the proposed building by one story. The revised proposals would provide an annualized return on total investment of 8.58% and 1.94%, respectively.

MVS submitted a report in which the principal complaint was with respect to the economic feasibility of the Project. MVS questioned Freeman/Frazier's land value of $750 per square foot of buildable area, claiming that this number was arrived at using "cherry picked" data. Rather, MVS argued that a land value of $500 per buildable square foot was a more probable indicator of the Property's market value. MVS also questioned the construction costs. At the April 15 hearing, the Board focused on the price per foot for development, the comparables that were used, and the programmatic needs of the Congregation. The Chair questioned the credibility of the site value, and questioned whether the current proposal before the Board really was the minimum variance required, which is the fifth required finding. The opposition questioned why the BSA was not scrutinizing the Congregation's financial statements to see what available resources it has, other than potential income from the sale of the condominiums. The BSA concluded the hearing by requesting that the Congregation address the issue of shadows and the implication of a larger building on the surrounding buildings. The BSA also requested clarification to demonstrate that the additional ten-foot encroachment is driven by the Congregation's programmatic needs.

Freeman/Frazier's May 13, 2008 response contained a revised proposal consisting of a building with eight floors and a penthouse, with a complying courtyard in the rear in order to continue providing light and air to three lot line windows in the West 70th Building. The courtyard would start at the sixth floor, which would reduce the size of floors six through eight, and the penthouse. A second revised proposal was the same as above, but eliminated the penthouse. A third alternative eliminated the eighth floor, but retained the penthouse, because the LPC believed the architectural character of the penthouse was an important design feature. The three proposals yielded an annualized return on total investment of 10.66%, 3.82%, and 0.93%, respectively. Although the

BSA specifically requested that the Congregation address the impact of shadows and the programmatic needs of the Congregation, these issues were not addressed.

MVS raised additional objections, to which Freeman/Frazier responded by noting that the same objections were set forth previously. A member of the opposition (petitioners' counsel herein) expressed concern about the practice of measuring return on investment, rather than a return based on equity. Freeman/Frazier responded that it is customary in a condominium development project to use return on investment (see pp. 23-24, infra), and also addressed other concerns raised by opponents to the Project.

At the June 24 hearing, a question arose concerning the failure to account for the terraces in the proposed pricing of the condominiums. The BSA also questioned how the efficiency ratio was calculated, the comparables that were used, and whether the comparables calculated square footage solely based on the interior of an apartment or whether the square footage also included common areas. Freeman/Frazier responded to issues raised at the June 24 hearing, MVS' June 23, 2008 report, and a letter from Mr. Sugarman. Freeman/Frazier's July 8 submission updated the prices for the condominium units, since they now had terraces on the fifth and sixth floors; the proposed apartment prices were still lower than in the March 2007 Report, since there is now less sellable square footage per floor than in the original plan. The additional value as a result of the terrace areas increased the annualized return on investment from 10.66% to 10.93%. The revisions to the as-of-right development resulted in an annualized capital loss of $4,569,000. Freeman/Frazier also responded to the question concerning the efficiency ratio, noting that the variations occurred as the sellable areas change, while the common areas remain the same size. The opponents continued

to question the methodology to determine the acquisition costs, and the decision to utilize a return on investment analysis, rather than a return based on equity. Freeman/Frazier responded by noting that the concerns were repetitive, or rejected the comments outright.

In a decision dated August 26, 2008, the BSA adopted unanimously, by a vote of 5-0, the Resolution granting the variance. The BSA Resolution approved the construction of a new building which will contain both community space and five luxury condominium apartments. The relevant portion of the Resolution provides that the BSA

> permit[s], on a site partially within an R8B district and partially within an R10A district within the Upper West Side/Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to Z.R. §§ 24-11, 77-24, 24-36, 23-66, and 23-633; on condition that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received May 13, 2008" - nineteen (19) sheets and "Received July 8, 2008" - one (1) sheet; and on further condition:
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> **THAT** the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80. . .

Other conditions include, inter alia, that the Congregation obtain an updated Certificate of Appropriateness from the LPC prior to any building permit being issued by the DOB; that substantial construction be completed in accordance with Z.R. § 72-23; and, that the DOB ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction. The Resolution was filed on August 29, 2008. This Article 78 proceeding was commenced on September 29, 2008.

As approved, the proposed building includes mechanical space and a multi-function room on the sub-cellar level, with 360-person capacity[7] for a banquet hall for various life cycle events; a cellar level with separate dairy and meat kitchens and childcare space. The first floor consists of the synagogue lobby, small synagogue, rabbi's office, and library and archive space; the second floor contains toddler classrooms; the third floor contains Hebrew School classrooms and the Beit Rabban Day School; and, the fourth floor consists of a caretaker's apartment and adult education classrooms. The residential condominiums are on the fifth through eight and ninth (penthouse) floors. Portions of the ground through fourth floor contain elevators for the synagogue.

Petitioners' Allegations

Petitioners raise numerous objections to the BSA's determination. The primary claim is that there was no need for the zoning variance at all. Petitioners assert that the Congregation stated repeatedly during the course of the proceedings before the BSA that the purpose of the variances was to fund the Congregation's programmatic needs, through income from the condominiums. Petitioners argue that the Congregation failed to demonstrate financial need; indeed, petitioners assert that the historic Congregation can raise the necessary funds from its members. They also object to the BSA's failure to inquire of the Congregation as to the rent being paid by the Beit Rabban Day School; the rent being paid by the residential tenant of the six-bedroom luxury Parsonage residence, which is apparently rented to Lorin Maazel, the Musical Director of Lincoln Center, at a monthly rent of $19,000; and, income from the banquet facilities.

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[7] During the November 19, 2007 CB7 public meeting, a representative of the Congregation stated that the capacity was 440 persons.

Petitioners further allege that a conforming as-of-right mixed-use building could be built, with two floors of luxury condominiums, with setbacks and height limitations of 75 feet, consistent with the brownstones on the block, or, a conforming all-residential building could be built that would allow for seven floors of condominiums, with two sub-basements. The proposed building will adversely affect the light and air in the courtyard that these apartments face. Two of the apartments owned by Mr. Lepow—apartments 7B and 8B—will be "bricked up" by the proposed building as a result of the variances. In a conforming, as-of-right structure, however, his apartments would not be bricked up. Similarly, the other units face a courtyard; in an as-of-right structure, there would be little, if any, adverse impact.

Petitioners allege that on November 8, 2006, before the application was filed, respondents Srinivasan and Collins held what petitioners describe as an "ex parte" meeting with the Congregation's lawyers and consultants at BSA headquarters without notifying the opponents of the project, and refused to provide information concerning what occurred at the meeting.

Finally, petitioners allege that because the Congregation did not exhaust its administrative remedies provided by §74-711, claiming that the Congregation failed to complete the review process before the LPC. Petitioners contend that the BSA should not have entertained the application, since the Congregation is asserting the same landmark hardships and economic need inherent in a § 74-711 application.

Article 78 Standard of Review

"'It is not the function of judicial review in an article 78 proceeding to weigh the facts and merits *de novo* and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis.'" Clancy-Cullen Storage Co., Inc. v. Board of the Elections in City of New York , 98 A.D.2d 635, 636 (1st Dep't 1983) (emphasis in original), quoting Kayfield Const. v. Morris, 15 A.D.2d 373, 378 (1st Dep't 1962). "[A]n agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable." In re Smith v. Donovan, 61 A.D.3d 505 (1st Dep't 2009), citing Seitttelman v. Sabol, 91 N.Y.2d 618, 625 (1998).

Moreover, there is a special deference given to determinations of zoning boards and other bodies. Khan v. Zoning Bd. of Appeals of Village of Irvington, 87 N.Y.2d 344, 351 (1996); Parsons v. Zoning Bd. Of Appeals, 4 A.D.3d 673, 674 (3d Dep't 2004). "Local zoning boards have broad discretion in considering applications for variances and interpretations of local zoning codes, and the scope of judicial review is limited to whether their action was arbitrary, capricious, illegal, or an abuse of discretion." Matter of Marino v. Town of Smithtown, 61 A.D.3d 761 (2d Dep't 2009), citing Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613 (2004); Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 62-63 (1st Dep't 2000). A determination is considered to be rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." Halperin v. City of New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005), lv. dismissed, 6 N.Y.3d 890, lv. denied, 7 N.Y.3d 708 (2006). Furthermore, "[w]hile religious institutions are not exempt from local zoning laws, 'greater flexibility is required in evaluating an application for a religious use than an

application for another use and every effort to accommodate the religious use must be made.'" Halperin, supra, at 773, citations omitted.[8] In challenging any zoning determination as arbitrary, "the burden of establishing such arbitrariness is imposed upon him who asserts it." Robert E. Kurzius, Inc. v. Incorporated Vil. of Upper Brookville, 51 N.Y.2d 338, 344 (1980), cert. denied, 450 U.S. 1042 (1981), quoting Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121 (1951).

The Five Factors

As set forth at pp. 3-4, supra, pursuant to Z.R. § 72-21, the BSA is required to examine five factors before granting a variance. Each of these findings is addressed below.

The First Finding - Unique Physical Conditions

Under § 72-21(a), there must be a finding that the property at issue has "unique physical conditions" which create practical difficulties or unnecessary hardship in complying strictly with the permissible zoning provisions, and that such practical difficulties are not the result of the general conditions of the neighborhood. The unique physical conditions must be "peculiar to and inherent in the particular zoning lot." The Congregation argued that the site's physical conditions created an unnecessary hardship in developing the site in compliance with the zoning regulations

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[8] Of course, where the proposed use is solely or primarily for religious purposes, flexibility and greater deference must be accorded. Here, the variance is sought for a mixed use building. "Affiliation with or supervision by religious organizations does not, *per se*, transform institutions into religious ones. 'It is the proposed use of the land, not the religious nature of the organization, which must control.'" Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710, 711 (2d Dep't 1988), quoting Bright Horizon House v. Zoning Bd. of Appeals of Town of Henrietta, 121 Misc. 2d 703, 709 (Sup. Ct. Monroe Co. 1983). The record reflects that the BSA gave the Congregation deference with respect to the variance request for the community facility, but did not accord the Congregation deference to the extent that it was seeking a variance for the revenue-generating, residential portion of the Project.

with respect to lot coverage and yards. Were the Congregation required to comply with the 30 foot rear yard and lot coverage, it argued, the floor area of the community facility would be reduced by approximately 1,500 square feet, which would severely restrict the Congregation's programmatic needs. The Congregation argued that it needed to expand the lobby ancillary space; expand the toddler program; develop classroom space for the Hebrew school and adult education program; provide a residence for an onsite caretaker; and, provide classrooms for the Beit Rabban Day School.

The BSA separated its analysis of the first finding into two parts: the community facility portion of the Project and the residential portion of the Project. This separation was necessitated by the fact that the Congregation is not accorded the deference as a non-profit for the residential portion of the Project. With respect to the community facility portion of the Project, the BSA rejected the opposition's claim that the Congregation was required to establish a financial need for the project as a whole, since nothing in the zoning law requires a showing of financial need as a prerequisite for the granting of a variance. Rather, all that is required is that the existing zoning regulations impair its ability to meet its programmatic needs The BSA rejected petitioners' contentions that the Congregation should have sought to raise funds from its members instead of seeking the requested variances, stating that the wealth of the property owner is irrelevant to the hardship finding.

The BSA determined that, when considering the physical conditions together with the programmatic needs of the Congregation, denying the variance would constitute an "unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations." The BSA rejected petitioners' contention that the programmatic needs were too

speculative; that both the Beit Rabban Day School and the toddler program were not reasonably associated with the overall religious purpose of the Congregation; and, that the Congregation's programmatic needs could be satisfied within an as-of-right building. In response to the BSA's request, the Congregation submitted a detailed analysis of the programmatic needs on a space- and time-allocated basis, which demonstrated that daily simultaneous use of the majority of the space required waivers of the zoning regulations with respect to floor area. Because of the areas needed for an elevator and stairs, and the height limit of an as-of-right building due to the width of the Parsonage, an as-of-right building would gain little additional floor area. The BSA Resolution cites Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that it is inappropriate for a zoning board to second guess a non-profit organization with respect to the location in which to place its programs.

Turning to the residential portion of the Project, among the unique physical conditions of the site include the fact that the lot is divided by a zoning district boundary, with 73% of the lot in R10A and 27% of the lot in R8B. The total height limitation for R10A is 185 feet, with a maximum base height of 125 feet, while the R8B portion has a total height limit of 75 feet and a maximum base height of 60 feet. Applying the R8B restrictions, less than two full stories of residential floor area would be permitted above the four-story community use facility.

Petitioners argued that the lot was not unique, solely because of the presence of a zoning district boundary within the lot, pointing out that other properties owned by religious institutions and the Museum of Natural History in the areas bounded by Central Park West and Columbus Avenue, and by 59th Street and 110th Street, had the same zoning district boundaries.

The BSA noted that the presence of other lots with the same zoning district boundaries does not defeat the claim of "uniqueness;" rather, the parcel's conditions must be such that they are not generally applicable to other lots in the vicinity.

An applicant's claim of uniqueness necessarily requires a comparison between similarly situated lots in the neighborhood with those of the applicant's lot. Soho Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441 (2000). "Unique physical conditions" may include the idiosyncratic configuration of the lot (Soho Alliance, supra) or unique characteristics of the building itself. UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248, 249 (1st Dep't 2002). A unique consideration here is that a large portion of the lot is occupied by the landmark Synagogue; the BSA noted that the limitations on development on the Synagogue portion of the lot result in that portion being underdeveloped. Because of the landmark status, the Synagogue is permitted to use only 28,274 square feet for an as-of-right development, although it has approximately 116,752 square feet in developable floor area. The unique physical conditions, the BSA concluded, "when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations," which satisfied the requirement of subdivision (a) of the zoning regulations. This finding is sufficient to support the BSA's determination that the Property is unique.

The Second Finding - Inability to Earn a Reasonable Return

Second, the BSA must find that the physical conditions of the Property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a

reasonable return" from the property.[9] Failure to meet the burden of proof that an as-of-right building in conformity with the zoning requirements will not bring a reasonable return requires denial of the variance. Petitioners assert that the BSA failed to properly analyze the reasonable return of a conforming as-of-right building.

The Congregation argued initially that it did not even need to show a reasonable return, since the Congregation is a not-for-profit corporation. Section 72-21(b) sets forth that "this finding shall not be required for the granting of a variance to a non-profit organization." But, the BSA specifically requested that the Congregation submit reasonable return analysis, concluding that the exemption from this requirement did not apply when a non-profit was seeking variances for a total or partial for-profit building. Alternatively, the Congregation argued that even if the Congregation had to satisfy the requirement of the reasonable return analysis, the Congregation demonstrated that a conforming as-of-right structure would not result in a reasonable rate of return.

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[9] The term "reasonable return" is not defined. In its memorandum of law, the Board suggests that "reasonable return" does not mean "any sort of profit whatsoever," but rather a profit margin "substantial enough to actually spurt development." The rate of return for the proposed development, as approved by the BSA, is 10.93%. In SoHo Alliance v. New York City Bd. of Standards and Appeals, 95 N.Y.2d 437, 441, a reasonable rate of return was found to be 9.9%. In Mt. Lyell Enterprises, Inc. v. DeRooy, 159 A.D.2d 1015, 1016 (4th Dep't 1990), an 11.76% rate of return after three years was found to be "not unreasonably low." But, in Ryan v. Miller, 164 A.D.2d 968 (4th Dep't 1990), a use variance was denied when a conforming use would still earn 5.7%, even though other conservative investments were earning 10-11% return at that time. The Appellate Division decision in SoHo Alliance flatly rejected any effort to determine that a specific percentage is reasonable as a matter of law: "[w]e are unaware of any hard and fast rule as to what constitutes a reasonable rate of return. Each case turns on facts that are dependent upon individualized circumstances." Soho Alliance v. New York City Bd. of Standards and Appeals, 264 A.D.2d 59, 69 (1st Dep't), aff'd, 95 N.Y.2d 437, 441 (2000).

Petitioners assert that although the BSA required the analysis to be performed, the BSA never explicitly addressed how the reasonable return analysis should be conducted, since there is no language in the statute as to how to consider a mixed-use profit and non-profit structure. Freeman/Frazier's March 2007 Report concluded that there is no return on investment provided by the as-of-right development. The first proposed development provided a 6.55% annualized return on total investment. Freeman/Frazier notes that this is at the low end of the range that typical investors would consider for an investment opportunity. The Congregation then submitted a study that analyzed an as-of-right community facility/residential building within an R8B envelope; an as-of-right building with a floor area ratio ("FAR") of 4.0;[10] a proposed building requiring a variance; and, a community facility and residential building that is smaller than the third proposal. In November 2007, the BSA asked the Congregation to revise the evaluation, which it did, by including an as-of-right community facility and residential tower using a modified site value. None of these analyses, other than the original proposed structure, resulted in a reasonable return.

The BSA asked the Congregation to submit additional revisions, after it was determined that the proposed tower on the R10A portion of the lot was contrary to Z.R. § 73-692, the "Sliver Law."[11] At the February 12, 2008 and April 15, 2008 hearings, the BSA questioned the Congregation's basis for the valuation of its development rights, and asked for a recalculation of the value of the site, together with a revised plan with a court to the rear of the building, above the fifth floor. Another revised plan was submitted, which assessed the financial feasibility of: the original proposed building, but with a complying court; an eight-story building with a complying court; and,

[10] The FAR permitted for district R8B is 4.0; the FAR for district R10A is 10.0.

[11] The Sliver Law applies to lots under 45 feet and limits the height of a building on such a lot to a height of 60 feet.

a seven-story building with a penthouse and complying court, using revised site values. Once again, only the original proposed building was shown to be financially feasible. The Board asked for further clarifications; in a July 8, 2008 response, Freeman/Frazier recalculated the value of the apartments with the addition of rear outdoor terraces, and revised the sale prices of two units. Again, the revised analysis that was submitted failed to demonstrate a reasonable return.

Petitioners assert that the BSA failed to adhere to its own guidelines because it did not require the Congregation to provide the original acquisition price of the Property. But, the BSA points out that this is not required, since it is contained in the general guidelines. In any event, the Congregation did submit the acquisition costs, which were provided in the deeds to the Property. Petitioners also assert that the Congregation never complied with the request to provide an analysis of an all-residential building, and instead, provided an analysis for a partially residential building, without including basement and sub-basement space. The methodology utilized by the Congregation's expert, petitioners contend, inflated the largest single cost component—the site value—in concluding that the Congregation could not obtain a reasonable return. Petitioners questioned the use of comparable sales prices based on property values from the period of mid-2006 to 2007, rather than more current sales prices, and questioned the methodology of calculating the financial return based on profits, rather than by calculating the projected return on equity. They also questioned the omission of income from the Beit Rabban Day School from the feasibility study. Finally, petitioners' biggest complaint was that the Congregation's expert did not utilize the return on equity analysis in determining the Project's rate of return.

Freeman/Frazier responded that it was more appropriate to use a return on profit model, which evaluated profit or loss on an unleveraged basis, to evaluate the feasability of the Project, rather than to evaluate the Project's return on equity on a leveraged basis. Freeman/Frazier argued that the methodology it used is typically used for condominium or home sale analyses, and is more appropriate for this Project, while the methodology petitioners wanted to use is typically used for income producing residential or commercial rental projects. Petitioners assert, in contrast, that not only do the BSA guidelines ask for an analysis on a leveraged basis, but that many reported decisions show that return on equity is the factor commonly used. Petitioners point out that Freeman/Frazier used the return on equity analysis in the project that was the subject of Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 2006 WL 1547635, 1 (Sup. Ct. Kings Co. 2006), rev'd, 49 A.D.3d 749 (2d Dep't 2008). Petitioners contend that both the BSA and Freeman/Frazier were unable and unwilling to explain why a leveraged return on equity analysis was appropriate in the Red Hook project, but not for the Congregation's Project. What neither side points out is that the Red Hook project consisted of both condominiums and retail space; according to one decision, four of the six floors were condominiums, while the other two floors were retail space.[12] See, Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards and Appeals, 11 Misc. 3d 1081(A), 2006 WL 1023901, 1 (Sup. Ct. Kings Co. 2006). This mixed-use of commercial rental and residential areas explains why Freeman/Frazier employed the return on equity analysis in the Red Hook case, while here, it used a return on profit model. It cannot be found to be arbitrary and capricious to use a return on profit model for that portion of the Project that consists solely of residential condominiums.

[12] The Board incorrectly refers to the Red Hook project as a conversion from a warehouse to luxury rental apartments. Petitioners simply refer to the Red Hook project as a residential building.

The other cases cited by petitioners that employed a return on equity analysis were requests for variances for conversions for commercial use. Kingsley v. Bennett, 185 A.D.2d 814 (2d Dep't 1992) (real estate office in a one- and two-family residential zoning district); Morrone v. Bennett, 164 A.D.2d 887 (2d Dep't 1990) (restaurant/bar with cabaret sought to expand its facility in a commercial district mapped within a residential district); Lo Guidice v. Wallace, 118 A.D.2d 913, 915 (3d Dep't 1986) (request to open an Italian restaurant in an area zoned as two-family residential). In contrast, a return on profit analysis was utilized in Cook v. Haynes, 63 A.D.2d 817 (4th Dep't 1978), which concerned a request by a landowner for a variance to build a residence on a lot that was zoned for both residential and agricultural purposes.

Here, the BSA agreed that the return on profit model, which evaluates profit or loss on an unleveraged basis, is the customary model for evaluating market-rate residential condominium development. Using the return on profit model, Freeman/Frazier concluded that the Congregation could not obtain a reasonable return from a conforming, as-of-right structure. Petitioners contend that Freeman/Frazier's reports used inconsistent terms, provided incomplete and unsigned reports by the estimator of construction coats, and used different values for the total square footage. In the petition, petitioners accuse Freeman/Frazier of "transparently manipulating the numbers," by decreasing the number of square feet in each report as the value per square foot increases, thereby allowing the Project to show a loss. The expert retained by the opposition, Martin Levine, of MVS, pointed out the Congregation's faulty approach, which the Congregation never corrected, based on its contention that the BSA did not ask for any additional information concerning the reasonable return for an all-residential building and the Congregation's failure to include the sub-sub-basement. Mr. Levine questioned Freeman/Frazier's non-compliance with BSA guidelines; construction cost

estimate fallacies; incomplete documents; and, exaggerated soft costs. Petitioners contend that the BSA ignored every issue raised by Mr. Levine, except his criticism of the return on equity, which the BSA considered but rejected.

These are but some of the challenges petitioners raise in their attempt to challenge the subdivision (b) finding. This court has considered all of their objections and finds them to be unavailing. The record reflects that the BSA responded to the concerns raised by petitioners during the underlying proceedings, particularly in that the BSA required numerous revisions to the Freeman/Frazier submissions. Contrary to petitioners' contentions, the BSA Resolution does more than merely "indicate" that there would be no reasonable return; the BSA makes the requisite finding. Based on the foregoing, and the deference that must be accorded the BSA's determination that the proposed building is necessary to enable the Congregation to realize a reasonable return from the Property, this court determines that the finding is not arbitrary and capricious.[13]

The Third Finding — Not Altering the Essential Character of the Neighborhood and Not Impairing the Use of Adjacent Property

Petitioners challenge the BSA finding that the granting of a variance will not alter the essential character of the neighborhood; will not "substantially impair the appropriate use or development of adjacent property;" and, "will not be detrimental to the public welfare." Rather, they argue that (1) the variance results in the bricking up of windows in the West 70th Building and (2) the shadows cast on other buildings on the block will have a negative effect on the public welfare and the environment.

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[13] Given the current economic climate, it is uncertain whether the reasonable return as calculated by Freeman/Frazier remains a viable figure.

The initial proposal would have resulted in the closure of seven windows in six cooperative apartment units in the West 70th Building. The BSA required the Congregation to reduce the size of the condominiums in the rear of the building and create a courtyard to prevent the rear windows in the West 70th Building from being bricked up. But, petitioners assert that the BSA and the Congregation "collaborated" to create a record that would obscure the facts as to the number of windows that would be bricked up. Petitioners argue that it was arbitrary and capricious and an abuse of discretion for the BSA to require courtyards in the rear of the building but not to require a courtyard for the identically situated apartments in the front part of the eastern face of the building. As approved, the proposed building results in windows on the eastern face of the West 70th Building losing light and air, together with views of Central Park, while a conforming, as-of-right building would not block any windows in the West 70th Building.

The BSA points out that a property owner has no protected right to a view, and that lot line windows cannot be used to satisfy light and air requirements. Nevertheless, the BSA required the Congregation to provide a fully compliant outer courtyard to the sixth through eighth floors of the Project, which would retain three more lot line windows than had been proposed originally, notwithstanding the fact that there was no requirement to do so. The fact that four lot line windows in the front of the West 70th Building adjacent to the Project will be blocked is not grounds to reject the Project.

As part of the variance application, an environmental review was conducted in accordance with the State Environmental Quality Review Act, Article 8 of the State Environmental Conservation Law ("SEQRA") and the City Environmental Quality Review, Title 62, Chapter 5 of

the Rules of the City of New York ("CEQR"), which found that the Project would not have a significant adverse impact on the environment. Once the BSA made this finding, there was no need for the BSA to prepare an Environmental Impact Statement, pursuant to 43 RCNY § 6-07(b). Petitioners criticize the BSA's reliance on CEQR regulations, which provide that shadows on streets and sidewalks or on other buildings generally are not considered significant.[14] Petitioners contend that there is a conflict between CEQR, and the mid-block zoning resolution and subdivision (c). Petitioners further assert that there was no proper analysis of the street shadows and no comparison of the difference in shadows between an as-of-right building and the Project.

The BSA notes that while petitioners argued that the proposed height of the Project was incompatible with the neighborhood character, the West 70th Building has approximately the same base height as the proposed Project and no setback. The West 70th Building also has a FAR of 7.23, while the Project has a FAR of 4.36. Other buildings directly to the north and south on Central Park West have a greater height than the proposed building. Finally, since no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street, any incremental shadows would not constitute a significant impact on the surrounding community.

The Fourth Finding — Practical Difficulties or Unnecessary Hardship Have Not Been Created by the Owner

Subdivision (d) requires that the evidence support a finding that the claimed hardship was not created by the owner of the premises or a predecessor in title. The BSA found that the

[14] An adverse shadow impact occurs when the shadow from a proposed project falls upon a publicly accessible open space, an historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation.

hardship was not self-created, but originated from the fact that the Synagogue building is landmarked. The hardship is a further result of the 1984 rezoning of the site, the site's unique physical conditions, and the site's location on a zoning lot that is divided by a district boundary. This finding has ample support in the record, and is not specifically challenged by petitioners.

The Fifth Finding — Variance is the Minimum Variance Necessary to Afford Relief

Petitioners argued that the minimum variance necessary would actually be no variance at all, claiming that the Congregation could have built an as-of-right structure to meet its programmatic needs. After changes were made to the Project's design, the BSA determined that the Congregation had "fully established its programmatic needs for the proposed building and the nexus of the proposed uses within its religious mission." As to the community use portion of the Project, the BSA again cited to the line of cases, including Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, supra, 38 N.Y.2d 283; Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968); and, Jewish Recons. Synagogue of North Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975), for the proposition that a zoning board must accommodate a proposal by religious and educational institutions for projects in furtherance of their mission, unless the proposed project is shown to have "significant and measurable detrimental impacts on surrounding residents." The BSA found that no such showing had been made.

As to the condominium portion of the Project, the BSA found that the modifications to the proposal, which included adding an outer court and reducing the floor plates of the upper floors, thereby reducing the variance for the rear yard setback, when considered in conjunction with the reasonable return analysis, led to the determination that the variance is the minimum required to afford relief. This finding is supported in the record and is not arbitrary and capricious.

Other Arguments Raised By Petitioners

In addition to their contentions that the Congregation's proposed building did not satisfy the need for a variance, and that the Board's findings under §72-21 were arbitrary and capricious, petitioners raise other challenges to the Board's determination, and contend that the process was flawed. All of these allegations are addressed below.

First, petitioners contend that prior to seeking a variance from the BSA, the Congregation was required to submit an application to the LPC for a special permit under Zoning Resolution § 74-711, and that its failure to do so precludes its application to the BSA for a variance. In 2001, the Congregation applied to the LPC for a special permit under Zoning Resolution § 74-711. A hearing was held on November 26, 2002. The Congregation subsequently withdrew the application and requested a Certificate of Appropriateness, which was considered at a public hearing on February 11, 2003. Following comments at that hearing, the proposal was revised, and a hearing was held on July 1, 2003; additional changes were made, and two additional hearings were held on January 17 and March 14, 2006. At the conclusion of the March 14 hearing, the LPC indicated that it was approving the proposed building, and issued a Certificate of Appropriateness, dated March 21, 2006, solely as to whether the structure would be appropriate for a landmark district. As the BSA points out in its papers, there is no legal requirement that a party seek a special permit from the LPC. A party may elect to seek either a special permit or a variance. The only requirement that the Congregation had to fulfill was to apply for a Certificate of Appropriateness, which the Congregation did. Therefore, the Congregation fulfilled the prerequisite before applying to the BSA for a variance.

Another argument raised by petitioners is that it was improper for the BSA to meet with representatives of the Congregation on November 8, 2006, months before the application was even brought before the BSA. Petitioners assert that the Board had already determined to grant the variances before the hearings had even begun. In response to this claim, the BSA asserts that pre-application meetings are a routine part of practice before the Board. Indeed, annexed as Exhibit E to the Board's answer is a document entitled "Procedure for Pre-Application Meetings and Draft Applications." The document sets forth that "[t]he BSA historically has offered some form of pre-application meeting process to potential applicants." Pre-application meetings are strongly encouraged, so that the application process proceeds more smoothly. After petitioners' counsel complained about the pre-application meeting, the BSA offered counsel the opportunity for his own pre-application meeting, but counsel refused.

At the start of the public hearing in this matter, the Chair of the BSA addressed the concerns of the community that an "ex parte" meeting had been held some months before, and the opposition's request that the BSA members who met with representatives from the Congregation should recuse themselves. The Chair of the BSA explained that pre-application meetings are routine, and that the meeting is not barred under section 1046 of the Charter, Administrative Procedure Act ("APA"), since APA does not apply to proceedings before the BSA.[15] See, Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25

[15] Section 1046 pertains to rules for adjudication when an agency is authorized to conduct an adjudication. The term "adjudication" is defined in § 1041 as "a proceeding in which the legal rights, duties or privileges of named parties are required to be determined by an agency on a record and after an opportunity for a hearing." This section applies to hearings before an administrative law judge or hearing officer, not an agency such as the LPC or BSA. Landmark West! v. Tierney, 9 Misc. 3d 1102(A) (Table), 2005 WL 2108005 at * 2 (Sup. Ct. N.Y. Co. 2005), aff'd, 25 A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y. 3d 710 (2006).

A.D.3d 319 (1st Dep't), lv. denied, 6 N.Y.3d 710 (2006); but see, Carroll v. Srinivasan, Index No. 110199/07 (Sup. Ct. N.Y. Co. Jan. 30, 2008) (holding that BSA hearings are subject to § 1046 of the City Charter). Since nothing in the law prohibits the BSA from holding pre-application meetings, petitioners' claim that the meeting was improper is without merit.

Finally, petitioners challenge the manner in which the hearing was conducted and the entire proceeding as arbitrary and capricious. Petitioners challenge the time limits on their presentations at the hearing; the BSA's failure to question some of the opposition's expert witnesses; the refusal to allow the opposition architect to inspect the premises; and, the BSA's refusal to subpoena witnesses. In response to these allegations, the BSA notes that since the applicant has the burden to support its case for each of the five required findings under Z.R. § 72-21, applicants must be given the opportunity to do so. But, the BSA maintains that the opponents were in no way strictly limited to a three minute time limit during the four hearings dates.

First, nothing requires sworn testimony, cross-examination of witnesses, or the subpoenaing of witnesses at a BSA hearing. Under section 663 of the Charter, it is wholly discretionary for the chair or vice-chair to administer oaths or compel the attendance of witnesses. Similarly, § 1-01.1(j) and (k) of the Rules of the City of New York provides that the Chair controls the admission of evidence and order of the speakers, and allows the Chair to limit testimony.

The administrative record that was submitted in this case belies petitioners' contention that they did not have an adequate opportunity to be heard. The transcripts of the BSA hearings reflect that at every hearing date, community members who opposed the project—including

petitioners, petitioners' counsel, elected officials and other members of the community—were permitted to speak.[16] In addition, opponents to the Project, including petitioners' counsel, submitted numerous letters, documents and reports to the BSA in opposition to the Project.

Petitioners' contentions as to the conduct of the hearing are wholly devoid of merit. The public hearing is not a judicial or quasi-judicial proceeding. Opponents to an application have no due process right to cross-examine applicants for a variance. See note 15, supra. For all of these reasons, petitioners' claim that the procedures employed by the BSA were improper is rejected.

Conclusion

If this court were empowered to conduct a *de novo* review of the BSA's determination, and were not limited to the Article 78 standard of review of a reasonable basis for the determination, the result here might well be different. The facts are undisputed that the Congregation receives substantial rental income from the Beit Rabban Day School and the rental of the Parsonage; the Congregation may have additional earnings from renting the banquet space. There is also some concern that the Congregation could, in the future, seek to use its air rights over the Parsonage. It is also undisputed that the windows of some apartments in the building adjacent to the Project will now be blocked, whereas the windows would not be blocked by an as-of-right structure, which could have been built with two floors of condominiums.

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[16]For example, at the November 27, 2007 hearing, representatives from the offices of State Senator Tom Duane and Assembly Member Richard N. Gottfried spoke in opposition to the Project, as did Mark Lebow, Esq. an attorney for another group of opponents to the application; Norman Marcus, a retired attorney who previously served as general counsel to the Planning Commission; Alan Sugarman, Esq., counsel for petitioners herein; and, many other community residents. Indeed, of the 88-page transcript for that day's hearing, 43 pages contain opposition testimony.

Community residents expressed concern that approval of the variances at issue here opens the door for future anticipated applications by other not-for-profits in the Upper West Side historic district. The concern for precedential effect may well have merit. But, "in reviewing administrative determinations, a court may not overturn an agency's decision merely because it would have reached a contrary conclusion." Matter of Sullivan County Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 278 (1972). This court cannot substitute its judgment for that of the BSA. When viewing the record as a whole, and giving the BSA's determination the due deference that it must be afforded, it cannot be said that the BSA's determination that the Congregation's application satisfied each of the five specific findings of fact lacked a rational basis. Matter of Sullivan County Harness Racing Ass'n, supra, at 277-78 (1972) ("if the acts of the administrative agency find support in the record, its determination is conclusive."). The record reflects that the BSA "balanced and weighed the statutory facts, and its findings were based on objective facts appearing in the record." Halperin, supra, 24 A.D.3d 773. Accordingly, the decision must be confirmed. Id.

Based on the foregoing, [illegible] denied, and the petition is dismissed. The decision of the BSA is confirmed in all respects. This constitutes the decision, order and judgment of the court.

Dated: July 10, 2009

JOAN B. LOBIS, J.S.C.

Norman Goodman
Clerk

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation Shearith Israel, filed August 25, 2008 (1 of 14)

74-07-BZ
CEQR #07-BSA-071M
APPLICANT – Friedman & Gotbaum, LLP, by Shelly S. Friedman, Esq., for Congregation Shearith Israel a/k/a Trustees of the Congregation Shearith Israel in the City of N.Y. a/k/a the Spanish and Portuguese Synagogue.
SUBJECT – Application April 2, 2007 – Variance (§72-21) to allow a nine (9) story residential/community facility building; the proposal is contrary to regulations for lot coverage (§24-11), rear yard (§24-36), base height, building height and setback (§23-633) and rear setback (§23-663). R8B and R10A districts.
PREMISES AFFECTED – 6-10 West 70th Street, south side of West 70th Street, west of the corner formed by the intersection of Central Park West and West 70th Street, Block 1122, Lots 36 & 37, Borough of Manhattan.
COMMUNITY BOARD #7M
APPEARANCES –
For Applicant: Lori Cuisinier.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez......................................5
Negative:..0
THE RESOLUTION:
¶1 WHEREAS, the decision of the Manhattan Borough Commissioner, dated August 28, 2007,[1] acting on Department of Buildings Application No. 104250481, reads, in pertinent part:

1. "Proposed lot coverage for the interior portions of R8B & R10A exceeds the maximum allowed. This is contrary to Section 24-11/77-24. Proposed interior portion lot coverage is 0.80;
2. Proposed rear yard in R8B does not comply. 20'.00 provided instead of 30.00' contrary to Section 24-36;
3. Proposed rear yard in R10A interior portion does not comply. 20.—' provided instead of 30.00' contrary to Section 24-36;
4. Proposed initial setback in R8B does not comply. 12.00' provided instead of 15.00' contrary to Section 24-36;
5. Proposed base height in R8B does not comply. . . contrary to Section 23-633;
6. Proposed maximum building height in R8B does not comply. . . contrary to 23-66;
7. Proposed rear setback in an R8B does not comply. 6.67' provided instead of 10.00' contrary to Section 23-633;"[2] and

¶2 WHEREAS, this is an application under ZR § 72-21, to permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility / residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback, and rear yard setback contrary to ZR §§ 24-11, 77-24, 24-36, 23-66, and 23-633; and
¶3 WHEREAS, this application is brought on behalf of Congregation Shearith Israel, a not-for-profit religious institution (the "Synagogue"); and
¶4 WHEREAS, a public hearing was held on this application on November 27, 2007, after due notice by publication in the *City Record*, with continued hearings on February 12, 2008, April 15, 2008 and June 24, 2008, and then to decision on August 26, 2008; and
¶5 WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and
¶6 WHEREAS, Community Board 7, Manhattan, recommends disapproval of this application; and
¶7 WHEREAS, a number of members of the Synagogue testified in support of the application; and
¶8 WHEREAS, a representative of New York State Senator Thomas K. Duane testified at hearing in opposition to the application; and
¶9 WHEREAS, a representative of New York State Assembly Member Richard N. Gottfried testified at hearing in opposition to the application; and
¶10 WHEREAS, a number of area residents testified in opposition to the application; and

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1 The referenced August 28, 2007 decision supersedes a March 27, 2007 decision by the Department of Buildings which included eight objections, one of which was eliminated after the applicant modified the plans.

2 A letter dated January 28, 2008 to Chair Srinivasan from David Rosenberg, an attorney representing local residents, claims that a purported failure by the Department of Buildings ("DOB") Commissioner or the Manhattan Borough Commissioner to sign the above-referenced August 28, 2007 objections, as allegedly required by Section 666 of the New York City Charter (the "Charter"), divests the Board of jurisdiction to hear the instant application. However, the jurisdiction of the Board to hear an application for variances from zoning regulations, such as the instant application, is conferred by Charter Section 668, which does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner.

By Stipulation, the parties stipulated to cite to the BSA decision by the paragraph number, here inserted in the decision included in the BSA Administrative Record.

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CEQR #07-BSA-071M

¶11 WHEREAS, additionally, Landmark West! and a group of neighbors represented by counsel testified at hearing and made submissions into the record in opposition to the application (the "Opposition"); the arguments made by the Opposition related to the required findings for a variance, and are addressed below; and

¶12 WHEREAS, the subject zoning lot on which the Synagogue is located consists of Lots 36 and 37 within Block 1122 (the "site"); and

¶13 WHEREAS, the site has a total lot area of 17,286 square feet, with 172 feet of frontage along the south side of West 70th Street, and 100.5 feet of frontage on Central Park West; and

¶14 WHEREAS, the portion of the site that extends 125 feet west of Central Park West is located in an R10A zoning district; the remainder of the site is located within an R8B district; and

¶15 WHEREAS, the site is also located within the Upper West Side/ Central Park West Historic District; and

¶16 WHEREAS, Tax Lot 36 is occupied by the Synagogue, with a height of 75'-0", and a connected four-story parsonage house located at 99-100 Central Park West, with a total floor area of 27,760 sq. ft.; and

¶17 WHEREAS, Tax Lot 37 is occupied in part by a four-story Synagogue community house with 11,079 sq. ft. of floor area located at 6-10 West 70th Street (comprising approximately 40 percent of the tax lot area); the remainder of Lot 37 is vacant (comprising approximately 60 percent of the tax lot area) (the "Community House"); and

¶18 WHEREAS, the Community House is proposed to be demolished; and

¶19 WHEREAS, the applicant represents that Tax Lot 36 and Tax Lot 37 together constitute a single zoning lot under ZR § 12-10, as they have been in common ownership since 1965 (the "Zoning Lot"); and

¶20 WHEREAS, Tax Lot 37 is divided by a zoning district boundary, pursuant to 1984 zoning map and text amendments to the Zoning Resolution that relocated the former R8/R10 district boundary line to a depth of 47 feet within the lot; and

¶21 WHEREAS, the applicant further represents that the formation of the Zoning Lot predates the relocation of the zoning district boundary, and that development on the site is therefore entitled to utilize the zoning floor area averaging methodology provided for in ZR § 77-211, thereby allowing the zoning floor area to be distributed over the entire Zoning Lot; and

¶22 WHEREAS, the applicant states that as 73 percent of the site is within an R10A zoning district, which permits an FAR of 10.0, and 27 percent of the site is within an R8B zoning district, which permits an FAR of 4.0, the averaging methodology allows for an overall site FAR of 8.36 and a maximum permitted zoning floor area of 144,511 sq. ft.; and

¶23 WHEREAS, the applicant states that the site is currently built to an FAR of 2.25 and a floor area of 38,838 sq. ft.; and

¶24 WHEREAS, the applicant proposes a nine-story and cellar mixed-use building with community facility (Use Group 3) uses on two cellar levels and the lower four stories, and residential (Use Group 2) uses on five stories including a penthouse (the "proposed building"), which will be built on Tax Lot 37; and

¶25 WHEREAS, the applicant states that the community facility uses include: Synagogue lobby and reception space, a toddler program, adult education and Hebrew school classes, a caretaker's unit, and a Jewish day school; the upper five stories are proposed to be occupied by five market-rate residential condominium units; and

¶26 WHEREAS, the proposed building will have a total floor area of 42,406 sq. ft., comprising 20,054 sq. ft. of community facility floor area and 22,352 sq. ft. of residential floor area; and

¶27 WHEREAS, the proposed building will have a base height along West 70th Street of 95'-1" (60 feet is the maximum permitted in an R8B zoning district); with a front setback of 12'-0" (a 15'-0" setback is the minimum required in an R8B zoning district); a total height of 105'-10" (75'-0" is the maximum permitted in an R8B zone), a rear yard of 20'-0" for the second through fourth floors (30"-0" is the minimum required); a rear setback of 6'-8" (10'-0" is required in an R8B zone), and an interior lot coverage of 80 percent (70 percent is the maximum permitted lot coverage); and

¶28 WHEREAS, the Synagogue initially proposed a nine-story building with a total floor area of 42,961 sq. ft., a residential floor area of 22,966 sq. ft., and no court above the fifth floor (the "original proposed building"), and

¶29 WHEREAS, the Synagogue modified the proposal to provide a complying court at the north rear above the fifth floor, thereby reducing the floor plates of the sixth, seventh and eighth floors of the building by approximately 556 sq. ft. and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in the variance of the rear yard setback by 25 percent and a reduction in the residential floor area to 22,352 sq. ft.; and

¶30 WHEREAS, the Synagogue is seeking waivers of zoning regulations for lot coverage and rear yard to develop a community facility that can accommodate its religious mission, and is seeking waivers of zoning regulations pertaining to base height, total height, front setback, and rear setback to accommodate a market rate residential development that can generate a reasonable financial return; and

¶31 WHEREAS, as a religious and educational institution, the Synagogue is entitled to significant

deference under the laws of the State of New York pertaining to proposed changes in zoning and is able to rely upon programmatic needs in support of the subject variance application (see Westchester Reform Temple v. Brown, 22 N.Y.2d 488 (1968)); and

¶32 WHEREAS, under ZR § 72-21(b), a not-for-profit institution is generally exempted from having to establish that the property for which a variance is sought could not otherwise achieve a reasonable financial return; and

¶33 WHEREAS, however, the instant application is for a mixed-use project in which approximately 50 percent of the proposed floor area will be devoted to a revenue-generating residential use which is not connected to the mission and program of the Synagogue; and

¶34 WHEREAS, under New York State law, a not-for-profit organization which seeks land use approvals for a commercial or revenue-generating use is not entitled to the deference that must be accorded to such an organization when it seeks to develop a project that is in furtherance of its mission (see Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) and Roman Cath. Dioc. of Rockville Ctr v. Vill. Of Old Westbury, 170 Misc.2d 314 (1996); and

¶35 WHEREAS, consequently, prior Board decisions regarding applications for projects sponsored by not-for-profit religious or educational institutions which have included commercial or revenue-generating uses have included analysis of the hardship, financial return, and minimum variance findings under ZR § 72-21 (see BSA Cal. No. 315-02-BZ, applicant Touro College; BSA Cal. No. 179-03-BZ, applicant Torah Studies, Inc.; BSA Cal. No. 349-05-BZ, Church of the Resurrection; and BSA Cal. No. 194-03-BZ, applicant B'nos Menachem School); and

¶36 WHEREAS, therefore, as discussed in greater detail below, the Board subjected this application to the standard of review required under ZR § 72-21 for the discrete community facility and residential development uses, respectively, and evaluated whether the proposed residential development met all the findings required by ZR § 72-21, notwithstanding its sponsorship by a religious institution; and

ZR § 72-21 (a) – Unique Physical Conditions Finding

¶37 WHEREAS, under § 72-21 (a) of the Zoning Resolution, the Board must find that there are unique physical conditions inherent to the Zoning Lot which create practical difficulties or unnecessary hardship in strictly complying with the zoning requirements (the "(a) finding"); and

Community Facility Use

¶38 WHEREAS, the zoning district regulations limit lot coverage to 80 percent and require a rear yard of 30'-0"; and

¶39 WHEREAS, the proposed building will have the following program: (1) a multi-function room on the sub-cellar level with a capacity of 360 persons for the hosting of life cycle events and weddings and mechanical space; (2) dairy and meat kitchens, babysitting and storage space on the cellar level; (3) a synagogue lobby, rabbi's office and archive space on the first floor; (4) toddler classrooms on the second floor; (5) classrooms for the Synagogue's Hebrew School and Beit Rabban day school on the third floor; and (6) a caretaker's apartment and classrooms for adult education on the fourth floor; and

¶40 WHEREAS, the first floor will have 5,624 sq. ft. of community facility floor area, the second and third floor will each have 4,826.5 sq. ft. of community facility floor area, and the fourth floor will have 4,777 sq. ft. of community facility floor area, for a total of 20,054 sq. ft. of community facility floor area; and

¶41 WHEREAS, the applicant represents that the variance request is necessitated by the programmatic needs of the Synagogue, and by the physical obsolescence and poorly configured floor plates of the existing Community House which constrain circulation and interfere with its religious programming; and

¶42 WHEREAS, the applicant represents that the programmatic needs and mission of the Synagogue include an expansion of its lobby and ancillary space, an expanded toddler program expected to serve approximately 60 children, classroom space for 35 to 50 afternoon and weekend students in the Synagogue's Hebrew school and a projected 40 to 50 students in the Synagogue's adult education program, a residence for an onsite caretaker to ensure that the Synagogue's extensive collection of antiquities is protected against electrical, plumbing or heating malfunctions, and shared classrooms that will also accommodate the Beit Rabban day school; and

¶43 WHEREAS, the applicant states that the proposed building will also permit the growth of new religious, pastoral and educational programs to accommodate a congregation which has grown from 300 families to 550 families; and

¶44 WHEREAS, to accommodate these programmatic needs, the Synagogue is seeking lot coverage and rear yard waivers to provide four floors of community facility use in the proposed building; and

¶45 WHEREAS, the Board acknowledges that the Synagogue, as a religious institution, is entitled to substantial deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs in support of the subject variance application (see Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986)); and

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¶46 WHEREAS, however, in addition to its programmatic needs, the applicant also represents that the following site conditions create an unnecessary hardship in developing the site in compliance with applicable regulations as to lot coverage and yards: if the required 30'-0" rear yard and lot coverage were provided, the floor area of the community facility would be reduced by approximately 1,500 sq. ft.; and

¶47 WHEREAS, the applicant states that the required floor area cannot be accommodated within the as-of-right lot coverage and yard parameters and allow for efficient floor plates that will accommodate the Synagogue's programmatic needs, thus necessitating the requested waivers of these provisions; and

¶48 WHEREAS, the applicant represents that a complying building would necessitate a reduction in the size of three classrooms per floor, affecting nine proposed classrooms which would consequently be too narrow to accommodate the proposed students; the resultant floor plates would be small and inefficient with a significant portion of both space and floor area allocated toward circulation space, egress, and exits; and

¶49 WHEREAS, the applicant further states that the reduction in classroom floor area would consequently reduce the toddler program by approximately 14 children and reduce the size of the Synagogue's Hebrew School, Adult Education program and other programs and activities; and

¶50 WHEREAS, the applicant represents that the requested yard and lot coverage waivers would enable the Synagogue to develop the site with a building with viable floor plates and adequate space for its needs; and

¶51 WHEREAS, the Opposition has argued that the Synagogue cannot satisfy the (a) finding based solely on its programmatic need and must still demonstrate that the site is burdened by a unique physical hardship in order to qualify for a variance; and

¶52 WHEREAS, notwithstanding that the applicant has asserted that the site is also burdened with a physical hardship that constrains an as-of-right development, discussed below, the Board notes that the Opposition ignores 50 years of unwavering New York jurisprudence holding that zoning boards must accord religious institutions a presumption of moral, spiritual and educational benefit in evaluations of applications for zoning variances (see e.g.; Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508 (1956) (zoning board cannot wholly deny permit to build church in residential district; because such institutions further the morals and welfare of the community, zoning board must instead seek to accommodate their needs); see also Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968); and Islamic Soc. of Westchester v. Foley, 96 A.D. 2d 536 (2d Dep't 1983)), and therefore need not demonstrate that the site is also encumbered by a physical hardship; and

¶53 WHEREAS, in support of its proposition that a religious institution must establish a physical hardship, the Opposition cites to decisions in Yeshiva & Mesivta Toras Chaim v. Rose (137 A.D.2d 710 (2d Dep't 1988)) and Bright Horizon House, Inc. v Zng. Bd. of Appeals of Henrietta (121 Misc.2d 703 (Sup. Ct. 1983)); and

¶54 WHEREAS, both decisions uphold the denial of variance applications based on findings that the contested proposals constituted neither religious uses, nor were they ancillary or accessory uses to a religious institution in which the principal use was as a house of worship, and are therefore irrelevant to the instant case; and

¶55 WHEREAS, the Board finds that the proposed Synagogue lobby space, expanded toddler program, Hebrew school and adult education program, caretaker's apartment, and accommodation of Beit Rabban day school constitute religious uses in furtherance of the Synagogue's program and mission; and

¶56 WHEREAS, the Opposition contends that the Synagogue's programmatic needs are too speculative to serve as the basis for an (a) finding; and

¶57 WHEREAS, in response to a request by the Board to document demand for the proposed programmatic floor area, the applicant submitted a detailed analysis of the program needs of the Synagogue on a space-by-space and time-allocated basis which confirms that the daily simultaneous use of the overwhelming majority of the spaces requires the proposed floor area and layout and associated waivers; and

¶58 WHEREAS, the Opposition argues, nonetheless, that the Synagogue's programmatic needs could be accommodated within an as-of-right building, or within existing buildings on the Synagogue's campus and that the proposed variances for the community facility use are unmerited and should consequently be denied; and

¶59 WHEREAS, specifically, the Opposition has contended that the Synagogue's programmatic needs could be accommodated within the existing parsonage house; and

¶60 WHEREAS, the applicant represents that the narrow width of the parsonage house, at approximately 24'-0", would make it subject to the "sliver" limitations of ZR § 23-692 which limit the height of its development and, after deducting for the share of the footprint that would be dedicated to elevator and stairs, would generate little floor area; and

¶61 WHEREAS, the applicant further represents that development of the parsonage house would not address the circulation deficiencies of the synagogue and would block several dozen windows on the north elevation of 91 Central Park West; and

¶62 WHEREAS, the Board notes that where a

nonprofit organization has established the need to place its program in a particular location, it is not appropriate for a zoning board to second-guess that decision (see Guggenheim Neighbors v. Bd. of Estimate, June 10, 1988, N.Y. Sup. Ct., Index No. 29290/87), see also Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

¶63 WHEREAS, furthermore, a zoning board may not wholly reject a request by a religious institution, but must instead seek to accommodate the planned religious use without causing the institution to incur excessive additional costs (see Islamic Soc. of Westchester v. Foley, 96 A.D.2d 536 (2d Dep't 1983); and

¶64 WHEREAS, religious institutions are entitled to locate on their property facilities for other uses that are reasonably associated with their overall purposes and a day care center/ preschool has been found to constitute such a use (see Uni. Univ. Church v. Shorten, 63 Misc.2d 978, 982 (Sup. Ct. 1970)); and

¶65 WHEREAS, in submissions to the Board, the Opposition argues that the Beit Rabban school does not constitute a programmatic need entitled to deference as a religious use because it is not operated for or by the Synagogue; and

¶66 WHEREAS, however, it is well-established under New York law that religious use is not limited to houses of worship, but is defined as conduct with a 'religious purpose;' the operation of an educational facility on the property of a religious institution is construed to be a religious activity and a valid extension of the religious institution for zoning purposes, even if the school is operated by a separate corporate entity (see Slevin v. Long Isl. Jew. Med. Ctr., 66 Misc.2d 312, 317 (Sup. Ct. 1971); and

¶67 WHEREAS, the applicant further states that the siting of the Beit Rabban school on the premises helps the Synagogue to attract congregants and thereby enlarge its congregation, which the courts have also found to constitute a religious activity (see Community Synagogue v. Bates, 1 N.Y.2d 445, 448 (1958)), in which the Court of Appeals stated, "[t]o limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation"); and

¶68 WHEREAS, the Board notes that the applicant has provided supportive evidence showing that, even without the Beit Rabban school, the floor area as well as the waivers to lot coverage and rear yard would be necessary to accommodate the Synagogue's programmatic needs; and

¶69 WHEREAS, the applicant represents that the variance request is necessitated not only by its programmatic needs, but also by physical conditions on the subject site – namely – the need to retain and preserve the existing landmarked Synagogue and by the obsolescence of the existing Community House; and

¶70 WHEREAS, the applicant states that as-of-right development of the site is constrained by the existence of the landmarked Synagogue building which occupies 63 percent of the Zoning Lot footprint; and

¶71 WHEREAS, the applicant represents that because so much of its property is occupied by a building that cannot be disturbed, a relatively small portion of the site is available for development – largely limited to the westernmost portion of the Zoning Lot; and

¶72 WHEREAS, the applicant further represents that the physical obsolescence and poorly configured floorplates of the existing Community House constrain circulation and interfere with its religious programming and compromise the Synagogue's religious and educational mission, and that these limitations cannot be addressed through interior alterations; and

¶73 WHEREAS, the applicant states that the proposed building will provide new horizontal and vertical circulation systems to provide barrier-free access to its sanctuaries and ancillary facilities; and

¶74 WHEREAS, based upon the above, the Board finds that the aforementioned physical conditions, when considered in conjunction with the programmatic needs of Synagogue, create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations; and

¶75 WHEREAS, the Opposition argues that uniqueness is limited to the physical conditions of the Zoning Lot and that the obsolescence of an existing building or other building constraints therefore cannot fulfill the requirements of the (a) finding, while citing no support for such a proposition; and

¶76 WHEREAS, to the contrary, New York courts have found that unique physical conditions under Section 72-21(a) of the Zoning Resolution can refer to buildings as well as land (see Guggenheim Neighbors v. Board of Estimate, June 10, 1988, N.Y. Sup. Ct. Index No. 29290/87; see also, Homes for the Homeless v. BSA, 7/23/2004, N.Y.L.J. citing UOB Realty (USA) Ltd. v. Chin, 291 A.D.2d 248 (1st Dep't 2002;); and, further, obsolescence of a building is well-established as a basis for a finding of uniqueness (see Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dep't 1985), and Polsinello v. Dwyer, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (condition creating hardship was land improved with a now-obsolete structure)); and

¶77 WHEREAS, in submissions to the Board, the Opposition has also contended that the Synagogue had failed to establish a financial need for the project as a whole; and

¶78 WHEREAS, the Board notes that to be entitled to a variance, a religious or educational institution must establish that existing zoning requirements impair its ability to meet its programmatic needs; neither New

York State law, nor ZR § 72-21, require a showing of financial need as a precondition to the granting of a variance to such an organization; and

¶79 WHEREAS, the applicant proposed the need to generate revenue for its mission as a programmatic need, New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization, notwithstanding an intent to use the revenue to support a school or worship space; and

¶80 WHEREAS, further, in previous decisions, the Board has rejected the notion that revenue generation could satisfy the (a) finding for a variance application by a not-for-profit organization (see BSA Cal. No. 72-05-BZ, denial of use variance permitting operation by a religious institution of a catering facility in a residential district) and, therefore, requested that the applicant forgo such a justification in its submissions; and

¶81 WHEREAS, however, in numerous prior instances the Board has found that unique physical conditions, when considered in the aggregate and in conjunction with the programmatic needs of a not-for-profit organization, can create practical difficulties and unnecessary hardship in developing a site in strict conformity with the current zoning (see, e.g., BSA Cal. No, 145-07-BZ, approving variance of lot coverage requirements to permit development of a medical facility; BSA Cal. No. 209-07-BZ, approving bulk variance to permit enlargement of a school for disabled children; and 215-07-BZ, approving bulk variance to permit enlargement of a YMCA); and

Residential Use

¶82 WHEREAS, the building is proposed for a portion of the Zoning Lot comprised of Lot 37, with a lot area of approximately 6,400 sq. ft. (the "development site"); and

¶83 WHEREAS, proposed residential portion of the building is configured as follows: (1) mechanical space and accessory storage on the cellar level; (2) elevators and a small lobby on the first floor; (2) core building space on the second, third and fourth floors; and (3) a condominium unit on each of the fifth through eighth, and ninth (penthouse) floors, for a total of five units; and

¶84 WHEREAS, the first floor is proposed to have approximately 1,018 sq. ft. of residential floor area, the second through fourth floors will each have 325 sq. ft. of residential floor area, the fifth floor will have 4,512 sq. ft. of residential floor area, the sixth through eighth floors will each have approximately 4,347 sq. ft. of residential floor area and the ninth (penthouse) floor will have approximately 2,756 sq. ft., for a total residential floor area of approximately 22,352 sq. ft.; and

¶85 WHEREAS, the applicant represents that compliance with the zoning requirements for base height, building height, and front and rear setback would allow a residential floor area of approximately 9,638 sq. ft.; and

¶86 WHEREAS, the applicant states that the following unique physical conditions create practical difficulties and unnecessary hardship in developing the subject site in compliance with underlying district regulations: (1) the development site's location on a Zoning Lot that is divided by a zoning district boundary; (2) the existence and dominance of a landmarked synagogue on the footprint of the Zoning Lot; and (3) the limitations on development imposed by the site's contextual zoning district regulations; and

¶87 WHEREAS, as to the development site's location on a zoning lot that is divided by a zoning district boundary, the applicant states that the development site is split between an eastern portion, comprising approximately 73 percent of the Zoning Lot, which is located within an R10A zoning district, and a western portion, comprising approximately 27 percent of the Zoning Lot, which is located in an R8B zoning district; and

¶88 WHEREAS, applicant represents that the division of the development site by a zoning district boundary constrains an as-of-right development by imposing different height limitations on the two respective portions of the lot; and

¶89 WHEREAS, in the R10A portion of the Zoning Lot, a total height of 185'-0" and maximum base height of 125'-0" are permitted; and

¶90 WHEREAS, in the R8B portion of the development site, a building is limited to a total height of 75'-0" and a maximum base height of 60'-0" with a setback of 15'-0"; and

¶91 WHEREAS, the applicant further represents that the requirements of the R8B district also limit the size of floor plates of a residential development; and

¶92 WHEREAS, in the R8B portion of the development site, a setback of 15'-0" is required at the 60 ft. maximum base height, and a 10'-0" rear setback is required; the applicant represents that a complying development would therefore be forced to set back from the street line at the mid-point between the fifth and sixth floors; and

¶93 WHEREAS, in the R10A portion of the development site, a 15'-0" setback is not required below the maximum base height of 125'-0", and a total height of 185'-0" is permitted, which would otherwise permit construction of a 16-story residential tower on the development site; and

¶94 WHEREAS, the applicant is constrained from building to the height that would otherwise be permitted as-of-right on the development site by the "sliver law" provisions of ZR § 23-692, which operate to limit the maximum base height of the building to 60'-0" because

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the frontage of the site within the R10A zoning district is less than 45 feet; and

¶95 WHEREAS, a diagram provided by the applicant indicates that less than two full stories of residential floor area would be permitted above a four-story community facility, if the R8B zoning district front and rear setbacks and height limitations were applied to the development site; and

¶96 WHEREAS, the Board notes that several Zoning Resolution provisions recognize the constraints created by zoning district boundaries where different regulations apply to portions of the same zoning lot; and

¶97 WHEREAS, specifically, the Board notes that the provisions of ZR § 77-00, permitting the transfer of zoning lot floor area over a zoning district boundary for zoning lots created prior to their division by a zoning district boundary, recognize that there is a hardship to a property owner whose property becomes burdened by a district boundary which imposes differing requirements to portions of the same zoning lot; and

¶98 WHEREAS, the Board further notes that that the special permit provisions of ZR § 73-52 allow the extension of a district boundary line after a finding by the Board that relief is required from hardship created by the location of the district boundary line; and

¶99 WHEREAS, the applicant represents, however, that because of the constraints imposed by the contextual zoning requirements and the sliver law, the Synagogue can transfer only a small share of its zoning lot area across the R8B district boundary; and

¶100 WHEREAS, the applicant further represents that the site is unique in being the only underdeveloped site overlapping the R10A/R8B district boundary line within a 20-block area to the north and south of the subject site; and

¶101 WHEREAS, the applicant further represents that 17 other residential zoning lots overlap the R10A/ R8B district boundary line between West 65th Street and West 86th Street, but that none were characterized by a similar amount of surplus development rights; and

¶102 WHEREAS, the applicant states that all the properties within the 22-block study area bisected by the district boundary line are developed to an FAR exceeding 10.0, while the subject Zoning Lot is developed to an FAR of 2.25; and

¶103 WHEREAS, the Opposition argues that the presence of a zoning district boundary within a lot is not a "unique physical condition" under the language of ZR § 72-21 and represents that four other properties are characterized by the same R10A/ R8B zoning district boundary division within the area bounded by Central Park West and Columbus Avenue and 59th Street and 110th Street owned by religious or nonprofit institutions, identified as: (i) First Church of Christ Scientist, located at Central Park West at West 68th Street; (ii) Universalist Church of New York, located at Central Park West at West 76th Street; (iii) New-York Historical Society, located at Central Park West at West 77th Street; and (iv) American Museum of Natural History, located at Central Park West at West 77th Street to West 81st Street; and

¶104 WHEREAS, the Board notes that it has recognized that the location of zoning district boundary, in combination with other factors such as the size and shape of a lot and the presence of buildings on the site, may create an unnecessary hardship in realizing the development potential otherwise permitted by the zoning regulations (see BSA Cal. No. 358-05-BZ, applicant WR Group 434 Port Richmond Avenue, LLC; BSA Cal. No. 388-04-BZ, applicant DRD Development, Inc.; BSA Cal. No. 291-03-BZ, applicant 6202 & 6217 Realty Company; and 208-03-BZ, applicant Shell Road, LLC); and

¶105 WHEREAS, the Board further notes that the incidence of four sites within a 51-block area sharing the same "unique conditions" as the subject site would not, in and of itself, be sufficient to defeat a finding of uniqueness; and

¶106 WHEREAS, under New York law, a finding of uniqueness does not require that a given parcel be the only property so burdened by the condition(s) giving rise to the hardship, only that the condition is not so generally applicable as to dictate that the grant of a variance to all similarly situated properties would effect a material change in the district's zoning (see Douglaston Civ. Assn. v. Klein, 51 N.Y.2d 963, 965 (1980)); and

¶107 WHEREAS, as to the impact of the landmarked Congregation Shearith Israel synagogue building on the ability to develop an as-of-right development on the same zoning lot, the applicant states that the landmarked synagogue occupies nearly 63 percent of the Zoning Lot footprint; and

¶108 WHEREAS, the applicant further states that because so much of the Zoning Lot is occupied by a building that cannot be disturbed, only a relatively small portion of the site is available for development; and

¶109 WHEREAS, the applicant represents that only the area occupied by the parsonage house, located directly to the south of the Synagogue on Tax Lot 36, and the development site are available for development; and

¶110 WHEREAS, the applicant represents that the narrow width of the parsonage house makes its development infeasible; and

¶111 WHEREAS, the applicant states that the area of development site, at approximately 6,400 sq. ft., constitutes only 37 percent of Zoning Lot area of the site; and

¶112 WHEREAS, the Board notes that the site is significantly underdeveloped and that the location of

the landmark Synagogue limits the developable portion of the site to the development site; and

¶113 WHEREAS, as to the limitations on development imposed by the site's location within the R8B contextual zoning district, the applicant represents the district's height limits and setback requirements, and the limitations imposed by ZR § 23-692, result in an inability to use the Synagogue's substantial surplus development rights; and

¶114 WHEREAS, the applicant represents that, as a result of these constraints, the Synagogue would be permitted to use a total of 28,274 sq. ft. for an as-of-right development, although it has approximately 116,752 sq. ft. in developable floor area; and

¶115 WHEREAS, the Synagogue further represents that, after development of the proposed building the Zoning Lot would be built to a floor area of 70,166 sq. ft. and an FAR of 4.36, although development of 144,511 sq. ft. of floor area and an FAR of 8.36 would be permitted as-of-right, and that approximately 74,345 sq. ft. of floor area will remain unused; and

¶116 WHEREAS, the Opposition contends that the inability of the Synagogue to use its development rights is not a hardship under ZR § 72-21 because a religious institution lacks the protected property interest in the monetization of its air rights that a private owner might have, citing Matter of Soc. for Ethical Cult. v. Spatt, 51 N.Y.2d 449 (1980); and

¶117 WHEREAS, the Opposition further contends that the inability of the Synagogue to use its development rights is not a hardship because there is no fixed entitlement to use air rights contrary to the bulk limitations of a zoning district; and

¶118 WHEREAS, the Board notes that Spatt concerns whether the landmark designation of a religious property imposes an unconstitutional taking or an interference with the free exercise of religion, and is inapplicable to a case in which a religious institution merely seeks the same entitlement to develop its property possessed by any other private owner; and

¶119 WHEREAS, furthermore, Spatt does not stand for the proposition that government land use regulation may impose a greater burden on a religious institution than on a private owner; indeed, the court noted that the Ethical Culture Society, like any similarly situated owner, retained the right to generate a reasonable return from its property by the transfer of its excess development rights (see 51 N.Y.2d at 455, FN1); and

¶120 WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of available development rights from a landmark building within the lot on which it is located or to an adjacent lot, and

¶121 WHEREAS, the Board further notes that while a nonprofit organization is entitled to no special deference for a development that is unrelated to its mission, it would be improper to impose a heavier burden on its ability to develop its property than would be imposed on a private owner; and

¶122 WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate and in light of the Synagogue's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a); and

ZR § 72-21 (b) – Financial Return Finding

¶123 WHEREAS, under ZR § 72-21 (b), the Board must establish that the physical conditions of the site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return, and that the grant of a variance is therefore necessary to realize a reasonable return (the "(b) finding"), unless the applicant is a nonprofit organization, in which case the (b) finding is not required for the granting of a variance; and

Community Facility Use

¶124 WHEREAS, the applicant represents that it need not address the (b) finding since it is a not-for-profit religious institution and the community facility use will be in furtherance of its not-for-profit mission; and

Residential Development

¶125 WHEREAS, under New York State law, a not-for-profit organization which seeks land use approvals for a commercial or revenue-generating use is not entitled to the deference that must be accorded to such an organization when it seeks to develop a project that is in furtherance of its mission (see Little Joseph Realty v. Babylon, 41 N.Y.2d 738 (1977); (municipal agency was required to make the variance findings because proposed use would be operated solely by and for the benefit of a private entrepreneur); Foster v. Saylor, 85 A.D.2d 876 (4th Dep't 1981) (variance upheld permitting office and limited industrial use of former school building after district established inability to develop for a conforming use or otherwise realize a financial return on the property as zoned); and Roman Cath. Dioc. of Rockville Ctr v. Vill. Of Old Westbury, 170 Misc.2d 314 (1996) (cemetery to be operated by church was found to constitute a commercial use)); and

¶126 WHEREAS, the residential development was not proposed to meet its programmatic needs, the Board therefore directed the applicant to perform a financial feasibility study evaluating the ability of the Synagogue to realize a reasonable financial return from as-of-right residential development of the site, despite the fact that it is a not-for-profit religious institution; and

¶127 WHEREAS, the applicant initially submitted a feasibility study that analyzed: (1) an as-of-right community facility/residential building within an R8B envelope (the "as-of-right building"); (2) an as-of-right

residential building with 4.0 FAR; (3) the original proposed building; and (4) a lesser variance community facility/residential building; and

¶128 WHEREAS, at hearing, the Board questioned why the analysis included the community facility floor area and asked the applicant to revise the financial analysis to eliminate the value of the floor area attributable to the community facility from the site value and to evaluate an as-of-right development; and

¶129 WHEREAS, in response, the applicant revised the financial analysis to analyze: (1) the as-of-right building; (2) the as-of-right residential building with 4.0 FAR; (3) the original proposed building; (4) the lesser variance community facility/residential building; and (5) an as-of-right community facility/residential tower building, using the modified the site value; and

¶130 WHEREAS, the feasibility study indicated that the as-of-right scenarios and lesser variance community facility/residential building, would not result in a reasonable financial return and that, of the five scenarios only the original proposed building would result in a reasonable return; and

¶131 WHEREAS, it was subsequently determined that a tower configuration in the R10A portion of the Zoning Lot was contrary to ZR § 73-692 (the "sliver law") and therefore that the as-of-right community facility/residential tower building could not represent an as-of-right development; the Board then questioned the basis for the previous valuation of the development rights and requested that the applicant recalculate the site value using only R8 and R8B sales; and

¶132 WHEREAS, the Board also requested the applicant to evaluate the feasibility of providing a complying court to the rear above the fifth floor of the original proposed building; and

¶133 WHEREAS, applicant subsequently analyzed the financial feasibility of: (i) the proposed building (the original proposed building with a complying court); (ii) an eight-story building with a complying court (the "eight-story building"); and (iii) a seven-story building with penthouse and complying court (the "seven-story building"), using the revised site value; the modified analysis concluded that of the three scenarios, only the proposed building was feasible; and

¶134 WHEREAS, at hearing, the Board raised questions as to the how the space attributable to the building's rear terraces had been treated in the financial feasibility analysis; and

¶135 WHEREAS, in a written response, the applicant stated that the rear terraces on the fifth and sixth floors had not originally been considered as accessible open spaces and were therefore not included in the sales price as sellable terrace areas of the appertaining units; the applicant provided an alternative analysis considering the rear terraces as sellable outdoor terrace area and revised the sales prices of the two units accordingly; and

¶136 WHEREAS, at hearing, the Board also asked the applicant to explain the calculation of the ratio of sellable floor area gross square footage (the "efficiency ratio") for each of the following scenarios: the proposed building, the eight-story building, the seven-story building, and the as-of-right building; and

¶137 WHEREAS, in a subsequent submission, the applicant provided a chart identifying the efficiency ratios for each respective scenario, and explained that the architects had calculated the sellable area for each by determining the overall area of the building and then subtracting the exterior walls, the lobby, the elevator core and stairs, hallways, elevator overrun and terraces from each respective scenario; and

¶138 WHEREAS, the applicant also submitted a revised analysis of the as-of-right building using the revised estimated value of the property; this analysis showed that the revised as-of-right alternative would result in substantial loss; and

¶139 WHEREAS, in a submission, the Opposition questioned the use of comparable sales prices based on property values established for the period of mid-2006 to mid-2007, rather than using more recent comparable sales prices, and questioned the adjustments made by the applicant to those sales prices; and

¶140 WHEREAS, in a written response, the applicant pointed out that, to allow for comparison of earlier to later analyses, it is BSA practice to establish sales comparables from the initial feasibility analysis to serve as the baseline, and then to adjust those sales prices in subsequent revisions to reflect intervening changes in the market; the applicant also stated that sales prices indicated for units on higher floors reflected the premium price units generated by such units compared to the average sales price for comparable units on lower floors; and

¶141 WHEREAS, the Opposition also questioned the choice of methodology used by the applicant, which calculated the financial return based on profits, contending that it should have been based instead on the projected return on equity, and further contended that the applicant's treatment of the property acquisition costs distorted the analysis; and

¶142 WHEREAS, in response to the questions raised by the Opposition concerning the methodology used to calculate the rate of return, the applicant states that it used a return on profit model which considered the profit or loss from net sales proceeds less the total project development cost on an unleveraged basis, rather than evaluating the project's return on equity on a leveraged basis; and

¶143 WHEREAS, the applicant further stated that a return on equity methodology is characteristically used for income producing residential or commercial rental projects, whereas the calculation of a rate of return based

on profits is typically used on an unleveraged basis for condominium or home sale analyses and would therefore be more appropriate for a residential project, such as that proposed by the subject application; and

¶144 WHEREAS, the Board notes that a return on profit model which evaluates profit or loss on an unleveraged basis is the customary model used to evaluate the feasibility of market-rate residential condominium developments; and

¶145 /HEREAS, the Opposition also raised concerns as to the omission of the income from the Beit Rabban school from the feasibility study; and

¶146 √HEREAS, in response to concerns raised by the Opposition as to why the feasibility study omitted the income from the Beit Rabban school, a submission by the applicant states that the projected market rent for community facility use was provided to the Board in an earlier submission and that the cost of development far exceeded the potential rental income from the community facility portion of the development; and

¶147 VHEREAS, further, the Board notes that it requested that costs, value and revenue attributable to the community facility be eliminated from the financial feasibility analysis to allow a clearer depiction of the feasibility of the proposed residential development and of lesser variance and as-of-right alternatives; and

¶148 VHEREAS, based upon its review of the applicant's submissions, the Board has determined that because of the subject site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements would provide a reasonable return; and

ZR § 72-21 (c) – Neighborhood Character Finding

¶149 WHEREAS, as pertains to the (c) finding under ZR § 72-21, the Board is required to find that the grant of the variance will not alter the essential neighborhood character, impair the use or development of adjacent property, or be detrimental to the public welfare; and

¶150 WHEREAS, because the variances sought to permit the community facility use differ from the variances sought to permit the proposed residential use, the potential affects on neighborhood character of each respective set of proposed variances are discussed separately below; and

Community Facility Use

¶151 WHEREAS, the applicant represents that the proposed rear yard and lot coverage variances permitting the community facility use will not negatively affect the character of the neighborhood, nor affect adjacent uses; and

¶152 WHEREAS, the applicant states that the proposed waivers would allow the community facility to encroach into the rear yard by ten feet, to a height of approximately 49 feet; and

¶153 WHEREAS, the applicant states that, as a community facility, the Synagogue would be permitted to build to the rear lot line up to a height of 23 feet; and

¶154 WHEREAS, the applicant represents that the affect of the encroachment into the rear yard is partly offset by the depths of the yards of the adjacent buildings to its rear; and

¶155 WHEREAS, the Board conducted an environmental review of the proposed action and found that it would not have significant adverse impacts on the surrounding neighborhood; and

¶156 WHEREAS, the Opposition disputes the findings of the Environmental Assessment Statement ("EAS") and contends that the expanded toddler program, and the life cycle events and weddings held in the multi-purpose room of the lower cellar level of the proposed community facility would produce significant adverse traffic, solid waste, and noise impacts; and

¶157 WHEREAS, the Board notes that the additional traffic and noise created by the expanded toddler program – which is projected to grow from 20 children to 60 children daily – falls below the CEQR threshold for potential environmental impacts; and

¶158 WHEREAS, the Board further notes that the waivers of lot coverage and rear yard requirements are requested to meet the Synagogue's need for additional classroom space and that the sub-cellar multi-purpose room represents an as-of-right use; and

¶159 WHEREAS, the applicant states that the proposed multi-function room would result in an estimated 22 to 30 life cycle events and weddings over and above those currently held; and

¶160 WHEREAS, with respect to traffic, the applicant states that life cycle events would generate no additional traffic impacts because they are held on the Sabbath and, as Congregation Shearith Israel is an Orthodox synagogue, members and guests would not drive or ride to these events in motor vehicles; and

¶161 WHEREAS, the applicant further states that significant traffic impacts are not expected from the increased number of weddings, because they are generally held on weekends during off-peak periods when traffic is typically lighter, or from the expanded toddler program, which is not expected to result in a substantial number of new vehicle trips during the peak hours; and

¶162 WHEREAS, with respect to solid waste, the EAS estimated the solid waste attributable to the entirety of the proposed building, including the occupants of the residential portion and the students in the school, and conservatively assumed full occupancy of the multi-function room (at 360 persons); and

¶163 WHEREAS, the estimates of solid waste generation found that the amount of projected additional waste represented a small amount, relative to the amount of solid waste collected weekly on a given route by the Department of Sanitation, and would not

affect the City's ability to provide trash collection services; and

¶164 WHEREAS, the Synagogue states that trash from multi-purpose room events will be stored within a refrigerated area within the proposed building and, if necessary, will be removed by a private carter on the morning following each event; and

¶165 WHEREAS, at the Board's direction, the applicant submitted revised plans showing the cellar location of the refrigerated trash storage area; and

¶166 WHEREAS, with respect to noise, as the multi-purpose room is proposed for the sub-cellar of the proposed building, even at maximum capacity it is not expected to cause significant noise impacts; and

¶167 WHEREAS, as held in Westchester Reform Temple v. Brown (22 N.Y.2d 488 (1968)), a religious institution's application is entitled to deference unless significant adverse effects upon the health, safety, or welfare of the community are documented (see also Jewish Recons. Syn. of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

¶168 WHEREAS, the Opposition has raised general concerns about disruption to the character of the surrounding neighborhood, but has presented no evidence to the Board supporting the alleged traffic, solid waste and noise impacts of the proposed community facility; and

¶169 WHEREAS, the detrimental effects alleged by the Opposition largely concern the purported impact of events held in the multi-purpose room which, as noted above, is permitted as-of-right; and

Residential Use

¶170 WHEREAS, the applicant represents that the proposed variances to height and setback permitting the residential use will not negatively affect the character of the neighborhood, nor affect adjacent uses; and

¶171 WHEREAS, the applicant states that the proposed base height waiver and front setback waivers of the R8B zoning requirements allow the building to rise to a height of approximately 94'-10" along the West 70th Street street-line, before setting back by 12'-0"; and

¶172 WHEREAS, the applicant further states that the R8B zoning regulations limit the base height to 60 feet, at which point the building must set back by a minimum of 15'-0"; and

¶173 WHEREAS, the applicant states that the proposed waiver of maximum building height will allow a total height of approximately 105'-10", instead of the maximum building height of 75'-0" permitted in an R8B district; and

¶174 WHEREAS, the applicant also seeks a rear setback of 6'-8", instead of the 10'-0" rear setback required in an R8B district; and

¶175 WHEREAS, the applicant represents that the front and rear setbacks are required because the enlargement would rise upward and extend from the existing front and rear walls; and

¶176 WHEREAS, the applicant represents that the proposed base height, wall height and front and rear setbacks are compatible with neighborhood character; and

¶177 WHEREAS, the applicant states that a Certificate of Appropriateness approving the design for the proposed building was issued by the Landmarks Preservation Commission on March 14, 2006; and

¶178 WHEREAS, the Opposition raised issues at hearing concerning the scale of the proposed building and its compatibility to the neighborhood context; and

¶179 WHEREAS, the applicant represents that the proposed bulk and height of the building is consistent with the height and bulk of neighboring buildings, and that the subject site is flanked by a nine-story building at 18 West 70th Street which has a base height of approximately 95 ft. with no setback, and an FAR of 7.23; and

¶180 WHEREAS, the applicant further represents that the building located at 101 Central Park West, directly to its north, has a height of 15 stories and an FAR of 13.92; and that the building located directly to its south, at 91 Central Park West, has a height of 13 stories and an FAR of 13.03; and

¶181 WHEREAS, the Board notes that, at nine stories in height, the building would be comparable in size to the adjacent nine-story building located at 18 West 70th Street, while remaining shorter than the 15-story and 13-story buildings located within 60 feet of the site; and

¶182 WHEREAS, the Opposition also contends that the proposed nine-story building disrupts the mid-block character of West 70th Street and thereby diminishes the visual distinction between the low-rise mid-block area and the higher scale along Central Park West; and

¶183 WHEREAS, the applicant submitted a streetscape of West 70th Street indicating that the street wall of the subject building matches that of the adjacent building at 18 West 70th Street and that no disruption to the midblock character is created by the proposed building; and

¶184 WHEREAS, the Opposition also contends that approval of the proposed height waiver will create a precedent for the construction of more mid-block high-rise buildings; and

¶185 WHEREAS, as discussed above, the Opposition has identified four sites within a 51-block area bounded by Central Park West and Columbus Avenue, and 59th Street and 110th Street that purportedly could seek variances permitting midblock buildings which do not comply with the requirements of the R8B zoning district; and

¶186 WHEREAS, an analysis submitted by the applicant in response found that none of the four sites identified by the Opposition shared the same potential for mid-block development as the subject site; and

¶187 WHEREAS, the Opposition argues that the

proposed building will significantly diminish the accessibility to light and air of its adjacent buildings; and

¶188 WHEREAS, the Opposition contended specifically that the proposed building abuts the easterly wall and court of the building located at 18 West 70th Street, thereby eliminating natural light and views from seven eastern facing apartments which would not be blocked by an as-of-right building; and

¶189 WHEREAS, the Opposition further argues that the proposed building will cut off natural lighting to apartments in the building located at 91 Central Park West and diminish light to apartments in the rear of the building located at 9 West 69th Street, and that the consequentially diminished light and views will reduce the market values of the affected apartments; and

¶190 WHEREAS, in response the applicant noted that lot line windows cannot be used to satisfy light and air requirements and, therefore, rooms which depend solely on lot line windows for light and air were necessarily created illegally and the occupants lack a legally protected right to their maintenance; and

¶191 WHEREAS, the applicant further notes that an owner of real property also has no protected right in a view; and

¶192 WHEREAS, nonetheless, the Board directed the applicant to provide a fully compliant outer court to the sixth through eighth floors of the building, thereby retaining three more lot line windows than originally proposed; and

¶193 WHEREAS, the applicant submitted revised plans in response showing a compliant outer court; and

¶194 WHEREAS, the Opposition asserts that the proposed building would cast shadows on the midblock of West 70th Street; and

¶195 WHEREAS, CEQR regulations provide that an adverse shadow impact is considered to occur when the shadow from a proposed project falls upon a publicly accessible open space, a historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation, and that shadows on streets and sidewalks or on other buildings are not considered significant under CEQR; and

¶196 WHEREAS, a submission by the applicant states that that no publicly accessible open space or historic resources are located in the mid-block area of West 70th Street; thus any incremental shadows in this area would not constitute a significant impact on the surrounding community; and

¶197 WHEREAS, a shadow study submitted by the applicant compared the shadows cast by the existing building to those cast by the proposed new building to identify incremental shadows that would be cast by the new building that are not cast presently; and

¶198 WHEREAS, the EAS analyzed the potential shadow impacts on publicly accessible open space and historic resources and found that no significant impacts would occur; and

¶199 WHEREAS, the applicant evaluated shadows cast over the course of a full year, with particular attention to December 21, when shadows are longest, March 21 and September 21 (vernal and autumnal equinoxes) and June 21, when shadows are shortest, disregarding the shadows cast by existing buildings, and found that the proposed building casts few incremental shadows, and those that are cast are insignificant in size; and

¶200 WHEREAS, specifically, the shadow study of the EAS found that the building would cast a small incremental shadow on Central Park in the late afternoon in the spring and summer that would fall onto a grassy area and path where no benches or other recreational equipment are present; and

¶201 WHEREAS, based upon the above, the Board finds that neither the proposed community facility use, nor the proposed residential use, will alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, or be detrimental to the public welfare; and

ZR § 72-21 (d) - Self Created Hardship Finding

¶202 WHEREAS, as pertains to the (d) finding under ZR § 72-21, the Board is required to find that the practical difficulties or unnecessary hardship burdening the site have not been created by the owner or by a predecessor in title; and

¶203 WHEREAS, the applicant states that the unnecessary hardship encountered by compliance with the zoning regulations is inherent to the site's unique physical conditions: (1) the existence and dominance of a landmarked synagogue on the footprint of the Zoning Lot, (2) the site's location on a zoning lot that is divided by a zoning district boundary; and (3) the limitations on development imposed by the site's contextual zoning district; and

¶204 WHEREAS, the applicant further states that these conditions originate with the landmarking of its Synagogue building and with the 1984 rezoning of the site; and

¶205 WHEREAS, based on the above, the Board therefore finds that the hardship herein was not created by the owner or by a predecessor in title; and

ZR § 72-21 (e) – Minimum Variance Finding

¶206 WHEREAS, as pertains to the (e) finding under ZR § 72-21, the Board is required to find that the variance sought is the minimum necessary to afford relief; and

¶207 WHEREAS, the original proposed building of the Synagogue had no rear court above the fifth floor, and

¶208 WHEREAS, in response to concerns raised by the residents of the adjacent building, the Board directed the applicant to provide a fully compliant outer court to the

sixth through eighth floors of the building, thereby retaining access to light and air of three additional lot line windows; and

¶209 WHEREAS, the applicant modified the proposal to provide a complying court at the north rear above the fifth floor, thereby reducing the floor plates of the sixth, seventh and eighth floors of the building by approximately 556 sq. ft. and reducing the floor plate of the ninth floor penthouse by approximately 58 sq. ft., for an overall reduction in the variance of the rear yard setback of 25 percent; and

¶210 WHEREAS, during the hearing process, the Board also directed the applicant to assess the feasibility of several lesser variance scenarios; and

¶211 WHEREAS, financial analyses submitted by the applicant established that none of these alternatives yielded a reasonable financial return; and

¶212 WHEREAS, however, the Opposition argues that the minimum variance finding is no variance because the building could be developed as a smaller as-of-right mixed-use community facility/ residential building that achieved its programmatic mission, improved the circulation of its worship space and produced some residential units; and

¶213 WHEREAS, the Synagogue has fully established its programmatic need for the proposed building and the nexus of the proposed uses with its religious mission; and

¶214 WHEREAS, the Board notes again that a zoning board must accommodate a proposal by a religious or educational institution for a project in furtherance of its mission, unless the proposed project is shown to have significant and measurable detrimental impacts on surrounding residents (See Westchester Ref. Temple v. Brown, 22 N.Y.2d 488 (1968); Islamic Soc. of Westchester v. Foley, 96 A.D. 2d 536 (2d Dep't 1983); and Jewish Recons. Synagogue of No. Shore v. Roslyn Harbor, 38 N.Y.2d 283 (1975)); and

¶215 WHEREAS, the Opposition has not established such impacts; and

¶216 WHEREAS, the Opposition may have raised other issues that are not specifically addressed herein, the Board has determined that all cognizable issues with respect to the required variance findings or CEQR review are addressed by the record; and

¶217 WHEREAS, the Board finds that the requested lot coverage and rear yard waivers are the minimum necessary to allow the applicant to fulfill its programmatic needs and that the front setback, rear setback, base height and building height waivers are the minimum necessary to allow it to achieve a reasonable financial return; and

¶218 WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made under ZR § 72-21; and

¶219 WHEREAS, the project is classified as a Type I action pursuant to 6NYCRR, Part 617; and

¶220 WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 07BSA071M dated May 13, 2008; and

¶221 WHEREAS, the EAS documents that the project as proposed would not have significant adverse impacts on Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Waterfront Revitalization Program; Infrastructure; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; and Public Health; and

¶222 WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

¶223 *Therefore it is Resolved* that the Board of Standards and Appeals issues a Negative Declaration with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes the required findings under ZR § 72-21, to permit, on a site partially within an R8B district and partially within an R10A district within the Upper West Side/ Central Park West Historic District, the proposed construction of a nine-story and cellar mixed-use community facility/ residential building that does not comply with zoning parameters for lot coverage, rear yard, base height, building height, front setback and rear setback contrary to ZR §§ 24-11, 77-24, 24-36, 23-66, and 23-633; *on condition* that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received May 13, 2008"– nineteen (19) sheets and "Received July 8, 2008"– one (1) sheet; and *on further condition*:

¶224 THAT the parameters of the proposed building shall be as follows: a total floor area of 42,406 sq. ft.; a community facility floor area of 20,054 sq. ft.; a residential floor area of 22,352 sq. ft.; a base height of 95'-1"; with a front setback of 12'-0"; a total height of 105'-10"; a rear yard of 20'-0"; a rear setback of 6'-8"; and an interior lot coverage of 0.80; and

¶225 THAT the applicant shall obtain an updated Certificate of Appropriateness from the Landmarks Preservation Commission prior to any building permit being issued by the Department of Buildings;

¶226 THAT refuse generated by the Synagogue shall be stored in a refrigerated vault within the building, as shown on the BSA-approved plans;

BSA Action Reviewed by Article 78: BSA Resolution 74-07 BZ - Congregation Shearith Israel, filed August 25, 2008 (14 of 14)

74-07-BZ
CEQR #07-BSA-071M

¶227 THAT this approval is limited to the relief granted by the Board, in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

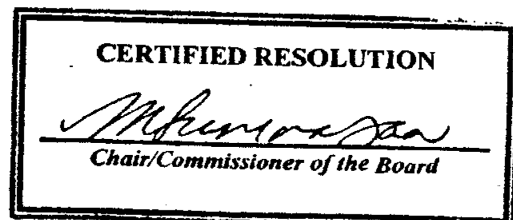
¶228 THAT the approved plans shall be considered approved only for the portions related to the specific relief granted;

¶229 THAT substantial construction be completed in accordance with ZR § 72-23;

¶230 THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, August 26, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, August 26, 2008.
Printed in Bulletin No. 35, Vol. 93.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.



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