To Be Argued By:
David Rosenberg

New York County Clerk's Index No. 650354/08

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION
and THOMAS HANSEN,

Petitioners-Appellants,

against

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS,
NEW YORK CITY PLANNING COMMISSION, and
CONGREGATION SHEARITH ISRAEL, also described as
The Trustees of Congregation Shearith Israel,

Respondents-Respondents,

and

HON. ANDREW CUOMO,
as Attorney General of the State of New York,

Respondent.

BRIEF FOR PETITIONERS-APPELLANTS LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION AND THOMAS HANSEN

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Petitioners-Appellants Landmark West! Inc., 91 Central Park West Corporation and Thomas Hansen
488 Madison Avenue, 17th Floor
New York, New York 10022
212-755-7500
dr@realtylaw.org

Of Counsel:
David Rosenberg
Pamela D. Evans

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Petitioners-Appellants,	:	Sup. Ct. N.Y. County Index No. 650354/08
- against -	:	
CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,	:	
Respondents-Respondents,	:	
HON. ANDREW CUOMO, as Attorney General of the State of New York,	:	
Respondent.	:	

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

Petitioners-Appellants Landmark West!, Inc. ("Landmark West!"), 91 Central Park West Corporation and Thomas Hansen (collectively, "Appellants") submit this brief in support of their appeal from the decision, order

and judgment (the "Judgment") [A7 - 14][1] of the Supreme Court, New York County, entered October 6, 2009, which dismissed Appellants' petition (the "Petition") seeking to vacate and declare null and void an August 29, 2008 resolution (the "Resolution") of Respondent-Respondent City of New York Board of Standards and Appeals ("BSA"), the government body of the City of New York (the "City")[2] charged under the General City Law, the New York City Charter (the "Charter") and the New York City Zoning Resolution (the "Zoning Resolution") with the authority to entertain and decide zoning variance applications.

The Resolution [A275 - 288] granted the application (the "Application") of Respondent-Respondent Congregation Shearith Israel ("CSI") for seven variances from height, bulk, setback and other regulations adopted by the City in the Zoning Resolution to protect the neighborhood and its residents.

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[1] Unless otherwise stated, bracket references are to the pages of the Petitioners' Appendix filed on this appeal and all emphasis herein is added.

[2] Respondents BSA and New York City Planning Commission ("CPC" and, with BSA, the "City Respondents") jointly appeared; Respondent Congregation Shearith Israel separately appeared; and Hon. Andrew Cuomo, as Attorney General of the State of New York, did not appear.

Each variance had been rejected by the local Community Board [A248].

Four of the seven variances were required solely to "monetize" air rights [A300] and " accommodate a market rate residential development" – five floors of luxury condominiums (the "Luxury Condominium Development") to be constructed by CSI through and on top of an addition (the "Synagogue Annex") to its landmarked synagogue (the "Synagogue") [A276].

As will be demonstrated:

> Material violations of the General City Law, the Charter, the Zoning Resolution and BSA's own rules and precedent render the Resolution invalid as a matter of law;
>
> BSA lacked jurisdiction over the Application; and
>
> BSA illegally usurped the jurisdiction of the Landmarks Preservation Commission ("LPC") and CPC by effectively granting relief which only those agencies are empowered to grant.

The Resolution was improper; the Judgment confirming it was erroneous; and the matter should be remanded for appropriate relief.

QUESTIONS PRESENTED

Question 1: Did the Supreme Court improperly defer to BSA's determination that it had jurisdiction to consider CSI's Application?

Answer: The statutes controlling BSA's jurisdiction are clear and unequivocal; BSA's legally unsupported "interpretation" should have been rejected.

Question 2: Is BSA's zoning variance jurisdiction limited to appeals from statutorily specified officials of the New York City Department of Buildings ("DOB")?

Answer: CSI's Application to BSA was (1) not an appeal from a denial by a DOB official designated in the Charter; and (2) not based on plans reviewed by DOB. For each reason, BSA lacked jurisdiction.

Question 3: Where the Legislature statutorily authorized two City agencies – CPC and LPC – to provide relief from the burdens imposed by the New York City Landmarks Preservation Law (the "Landmarks Law"), may another agency, not so designated by the Legislature, assume such authority?

Answer: Notwithstanding that the Legislature provided express remedies to CPC and LPC, obviously intending for such remedies to preempt other remedies and to "occupy the field", BSA, in effect, enacted, and then applied, new remedies.

Question 4: Did BSA err in failing to adhere to its own precedents?

Answer: By failing to adhere to its own precedents in deciding similar applications, BSA's actions were arbitrary and capricious as a matter of law.

STATEMENT OF FACTS

Appellants

Appellant Landmark West! is an award winning non-profit community organization which, since 1985, has worked to protect the historic architecture, special character, and development pattern of the Upper West Side and to improve and maintain the community [A128].

The other two Appellants are a corporation which owns a cooperative apartment building and an individual apartment owner, both neighboring property owners directly detrimentally affected by the Resolution [A128, 129].

The Property

CSI owns: an individually landmarked Synagogue at Central Park West and West 70th Street; a parsonage building (the "Parsonage") immediately

to the south; and a four-story school building (the "Community House") and vacant parcel identified as 6-10 West 70th Street, to the west [A276].

All of CSI's property (the "Property") lies within the Upper West Side/Central Park West Historic District, designated by LPC in 1990 [A242].

The Purpose of Zoning Regulations

The fundamental purpose of zoning regulations in New York is to provide "adequate light, air [and] convenience of access" for the City's residents. General City Law § 20.

CSI's Proposed New Building

The BSA Resolution at issue granted CSI seven zoning variances so that it could construct a nine-story building (the "New Building") with the four floor Synagogue Annex and five floor Luxury Condominium Development, containing apartments (the "Luxury Condominiums") which are to be sold to wealthy individuals and not used for CSI's religious, educational or cultural purposes (its "Programmatic Needs") [A276].

CSI's Application did not seek permission for a minor violation of the zoning restrictions, such as permitting a homeowner to construct a garage two feet closer to the boundary line with his neighbor.

CSI's Application sought permission for five material violations of the zoning restrictions:

1. To violate §§ 24-11 and 77-24 by increasing lot coverage from the permitted 70% to 80%, an increase of 10%;

2. To violate § 24-36 by reducing the rear yard depth from the required 30 feet to 20 feet, an additional 33% incursion into the rear yard requirements for light and air to the surrounding buildings;

3. To violate § 24-36 by reducing the required set back from the street from 15 feet to 12 feet, an additional 20% incursion onto the street;

4. To violate §§ 23-66 and 23-633, by increasing the height from the limit of 75 feet to 105 feet, 10 inches, a more than 33% increase over that permitted; and

5. To violate § 23-633, by reducing the rear yard set back from 10 feet to 6.67 feet, an additional 33% incursion into the required rear yard light and air space.

The variances were not necessary to address CSI's Programmatic Needs, all of which could be accommodated in a building which complied with the zoning restrictions. Rather, the variances were sought to generate a cash windfall through the sale of the Luxury Condominiums or, as stated by CSI's attorney, to "monetize" the variances from the Zoning Resolution requirements [A300, 311]. (As stated in the Resolution: "WHEREAS, the Synagogue is seeking waivers of zoning regulations pertaining to base height, total height, front setback, and rear setback to accommodate a market rate residential development . . . ") [A276].

By BSA's own calculations, were the Luxury Condominiums not to be constructed, there would be 2,000 square feet of space available for CSI's Synagogue Annex on the first through fourth floors of the New Building since there would be no need for a separate lobby and additional elevators, stairs and a mechanical room to serve the Luxury Condominiums [A280].

The New Building's overall height will be four stories taller and its base height more than three stories taller than that permitted under the Zoning Resolution, completely blocking several apartment windows and impacting dozens of windows in neighboring buildings [A245, 266].

The Resolution also granted CSI other unwarranted benefits, including the right to violate bulk, setback and other legislatively adopted requirements [A287].

Appellants' Supreme Court Proceeding

If allowed to stand, the Resolution would result in irreversible damage to the character and quality of life of the surrounding area and would improperly lower the bar for zoning variances and permit developers to circumvent the laws and regulations protecting designated landmarked structures and historic areas throughout New York City.

Appellants brought the proceeding to enforce the letter and intent of the governing laws, including the General City Law, the Charter and the New York City Administrative Code. Although originally brought as an action for declaratory and injunctive relief [A15 - 48], the action was converted to a CPLR Article 78 proceeding pursuant to an April 17, 2009 decision and order of the Supreme Court (the "First Decision") [A120 - 125].

Appellants' Petition [A126 - 153] challenged the Resolution on the grounds, among others, that:

BSA lacked jurisdiction due to material deficiencies in the Application process;

BSA illegally usurped the exclusive jurisdiction of LPC and CPC by granting variances based on landmarking restrictions, rather than physical conditions; and

BSA applied the wrong legal standard -- one which BSA, itself, previously rejected -- to find that CSI's proposed plans satisfied the requirements for a variance under the Zoning Resolution.

CSI and the City Respondents served answers and memoranda of law in opposition, to which Petitioners responded [A233 - 236].

The Judgment Dismissing The Petition

The Judgment accepted BSA's claims regarding jurisdiction, denied Appellants' request to annul the Resolution and dismissed their Petition, finding that Appellants had failed to demonstrate that BSA acted illegally in considering and granting CSI's Application and ignored the plain meaning of the governing statutes [A13].

The court concluded that other arguments in Appellants' Petition were encompassed and decided in a related proceeding challenging the same BSA Resolution entitled Kettaneh *v.* Board of Standards and Appeals of the City of New York, *et al*, which the court previously had dismissed (the "Kettaneh Judgment"), based upon its recollection (as recited in the Judgment), that [A9]:

> At the . . . oral argument [on the initial motions to dismiss in this proceeding, at which time there also was a preliminary hearing in the Kettaneh proceeding], the court questioned counsel for [Appellants] as to the differences between the instant proceeding and the Kettaneh proceeding. [Appellants'] counsel articulated two specific claims . . . that were not raised by petitioners in Kettaneh.

Contrary to the court's recollection, Appellants' counsel stated that he was not fully aware of the extent of the issues raised in Kettaneh [A81 - 82], not having been served with the Kettaneh papers [A82].

Ignoring other claims raised by Appellants, not decided in Kettaneh [A13], the court addressed solely the jurisdictional claims raised in Appellants' Petition [A8 - 13].

The *Kettaneh* Proceeding

The Kettaneh Judgment addressed whether a reasonable basis existed for BSA's factual findings, concluding [A272 - 273]:

> 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.
>
> 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. . . [t]his court cannot substitute its judgment for that of the BSA.

That Kettaneh determination is irrelevant since Appellants did not challenge the reasonableness of the Resolution, but whether BSA had any authority to issue it.[3]

[3] An appeal from the Kettaneh Judgment is scheduled to be heard for the February Term of this Court.

ARGUMENT

Point I

The Court Improperly Accorded Deference To BSA's Interpretation As To Its Jurisdiction To Entertain CSI's Application

A. BSA Lacked Jurisdiction Because CSI's Variance Application Was Not An Appeal From A Determination Of Either Of Two Designated City Officials

(i) CSI's Position

Both before BSA and the Supreme Court Appellants argued that BSA lacked jurisdiction to entertain CSI's Application because it was not based upon an appeal from a determination of either of the two City officials specified in Charter § 666 which states:

> The board [BSA] shall have power:
>
> * * *
>
> 6. To hear and decide appeals from and review,
>
> (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five. . . .

Thus, for BSA to entertain jurisdiction, CSI's Application had to be an appeal from a determination of the Commissioner of Buildings or Manhattan Borough Superintendent acting under written delegation of power from the Commissioner.

(ii) The Facts Supporting Appellants' Position

CSI's Application sought review of an October 28, 2005 Notice of Objections issued by DOB (the "First DOB Notice of Objections") [A292], which rejected CSI's plans for the New Building.[4] Almost two years later – while the Application was pending before BSA – DOB issued an August 24, 2007 Notice of Objections (the "Second DOB Notice of Objections") [A507], which BSA, over the objections of Appellants and others, substituted for the First DOB Notice of Objections.

Neither DOB Notice of Objections was issued by the Commissioner of Buildings or the Manhattan Borough Commissioner acting under written delegation, but by Kenneth Fladen, a "provisional Administrative Borough

[4] The First DOB Notice of Objections was dated and issued on October 28, 2005 [A292]; it was presented to DOB for a final denial to permit the Application to BSA on March 27, 2007 [*id.*].

Superintendent" [A132]. Mr. Fladen also signed on the line for "Examiner's Signature" [id.], eliminating the two step review normally required.[5]

(iii) BSA's Determination

In footnote 2 to its Resolution, BSA concluded [A275]:

> [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 [DOB] Commissioner or the Manhattan Borough Commissioner to sign the above-referenced August 28, 2007 objections, as allegedly required by Section 666 of 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.

(iv) The Supreme Court's Determination

In the Judgment, the Supreme Court disposed of Appellant's argument by merely adopting BSA's conclusion [A10 - 12]:

> **Claim that the BSA Lacked Jurisdiction**
>
> Turning to the merits of the petition, petitioners assert that the BSA lacked jurisdiction to entertain [CSI's Application] because the plans were not approved properly, in that the plans were not "passed on" by the DOB in the matter required by the City

[5] At the time both DOB Notices of Objections were issued, Patricia J. Lancaster was the Commissioner of Buildings and Christopher Santulli was the Manhattan Borough Commissioner [A132].

Charter. To invoke the BSA's jurisdiction, petitioners assert, the application must be an appeal from a determination of the DOB Commissioner or Manhattan Borough Superintendent. Petitioners cite to § 666(6)(a) of the City Charter, which, they assert, sets forth the jurisdiction of the BSA. Section 666(6)(a) provides that the BSA has the power:

> [t]o hear and decide appeals from and review, (a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of subdivision (b) of section six hundred forty-five, or a not-for-profit corporation acting on behalf of the department of buildings pursuant to seciton 27-228.6 of the code, ...

But, as the BSA itself pointed out in a footnote to the BSA Resolution, the BSA has jurisdiction pursuant to § 668 of the Charter. The footnote sets forth: . . . [the Judgment quotes Footnote 2 set forth above].

Section 668 sets forth the procedure for variances and special permits. This section is referenced to § 665 of the Charter, which provides that the BSA has the power "[t]o determine and vary the application of the zoning resolution as may be provided in such resolution and pursuant to section six hundred sixty-eight."

An agency's construction of a statute or regulation it administers, "if not unreasonable or irrational, is entitled to deference." Matter of Salvati v. Eimicke, 72 N.Y. 784, 791 (1988), rearg. denied, 73 N.Y.2d 995 (1989). The BSA's interpretation that it has jurisdiction under § 668 is rational and will not be disturbed. Given the interplay in the Charter between the different ways for the BSA to acquire jurisdiction over a matter, it is appropriate to defer to the agency's interpretation. "[W]here the statutory language suffers form some 'fundamental ambiguity' . . . or "the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices' . . . , courts routinely defer to the agency's construction of a statute it administers." New York City Council v. City of New York, 4 A.D.3d 85, 97 (1st Dep't 204) (internal citations omitted). The

> BSA's interpretation that a review under § 668 does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner is entitled to deference and will not be disturbed.

(v) The Supreme Court Improperly Gave Deference To BSA's Determination Of Its Jurisdiction

The Supreme Court cited cases which provide for judicial deference to interpretations of an agency as to its own regulations.

Appellants have no quarrel with the cited cases; they simply are irrelevant to an agency's interpretation of the statutes defining its jurisdiction. Rather, as held by the Court of Appeals in Teachers Ins. & Annuity Ass'n *v.* City of New York, 82 N.Y.2d 35, 41 (1993):

> Where interpretation of statutory terms is involved, two standards of review are applicable. An agency charged with implementing [a law] is presumed to have developed an expertise that requires us to accept its interpretation of that law if not unreasonable. . . . Such deference . . . however, is not required where the question is one of pure legal interpretation. [A statute establishing a] jurisdictional predicate [is] a matter of pure legal interpretation as to which no deference is required.

See also, generally, Levy *v.* Board of Standards and Appeals of the City of New York, 267 N.Y. 347 (1935).

Recently, this Court applied similar reasoning in concluding that a determination of the New York City Civil Service Commission as to whether it had jurisdiction under the Charter was not entitled to deference:

> Critical to the disposition of this appeal is whether CSC's determination dismissing petitioner's appeal for want of jurisdiction is entitled to deference.
>
> * * *
>
> Here, no deference should be accorded CSC's determination. The language used in City Charter § 813(d), above quoted, is plain and involves no special or technical words. Similarly, City Charter § 814(a)(6) employs common words of clear import in vesting DCAS with the power "to revoke or rescind any certification … by reason of the disqualification of the applicant … under the provisions of the civil service law." Here too, interpretation does not depend in the slightest on the knowledge and understanding of the practices unique to CSC or that body's evaluation of factual data (*see* Roberts v Tishman Speyer Props., L.P., 62 AD3d 71, 874 N.Y.S.2d 97 [2009]). Rather, interpretation of these City Charter provisions requires "statutory reading and analysis, dependent only on accurate apprehension of legislative intent …" (*Gruber*, 89 NY2d at 231-32). Therefore, "[we] need not accord any deference to the agency's determination, and [we are] free to ascertain the proper interpretation from the statutory language and legislative intent" (*id.*).

Matter of Raganella *v.* New York City Civ. Serv. Commn., 66 A.D.3d 441, 444 - 446 (1st Dep't 2009).

(vi) The Charter Must Be Interpreted As Written

Charter § 665 merely provides generally for the board "[t]o determine and vary the application of a zoning resolution as may be provided in such resolution and pursuant to section [668]".

Charter § 668, by its plain terms, then sets forth the procedure to be followed by community boards, borough boards and BSA after an application properly is before BSA; it does not, either expressly or by implication, set forth the jurisdictional predicate for BSA review. Rather, it states:

§ 668 Variances and Special Permits

> Community boards and borough boards shall review applications to vary the zoning resolution and applications for special permits within the jurisdiction of the board of standards and appeals under the zoning resolution pursuant to the following procedure . . . .

Section 666(6)(a) of the Charter, in contrast, expressly and specifically sets forth the requirements for BSA's jurisdiction to hear and decide appeals from DOB determinations.

As held by the Court of Appeals in Kurcsics *v.* Merchants Mutual Insurance Company, 49 N.Y.2d 451, 459 (1980):

> Where . . . the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.

Accord, Bikman *v.* New York City Loft Board, 14 N.Y.3d 377 (2010); KSLM-Columbus Apartments, Inc. *v.* New York State Division of Housing and Community Renewal, 5 N.Y.3d 303, 312 (2005); Raritan Development Corp. *v.* Silva, 91 N.Y.2d 98, 102 (1997) (rejecting BSA's interpretation of Zoning Resolution); Rivercross Tenants' Corp. *v.* New York State Division of Housing and Community Renewal, 70A.D.3d 577 (1st Dep't 2010).

BSA's claim that Charter 668 conferred jurisdiction is contrary to the clear wording of the statutory provisions and without precedent.

Most importantly, BSA's authority is derived from and limited by Article 5-A of the General City Law, which states, in § 81-a(4):

> Hearing appeals. Unless other provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination, made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board of bureau of the city.

Charter § 666(a) clearly was adopted in furtherance of this authority and its express restrictions. Nothing in the other provisions cited by BSA or the Supreme Court evidences a contrary intent.

B. BSA Lacked Jurisdiction Because The Plans Which Were The Basis Of The Application Were Not Reviewed By DOB Or The Subject Of The DOB Objections

(i) The Facts Relevant To This Issue

As noted, CSI's Application attached, and sought review of, the First DOB Notice of Objections [A292], which listed eight items, the last of which was:

> PROPOSED SEPARATION BETWEEN BUILDINGS IN R10A DOES NOT COMPLY. 0.00' PROVIDED INSTEAD OF 40.00' CONTRARY TO SECTION 24-67 AND 23-711.

In response to the Application, BSA issued a June 15, 2007 notice [A460 - 466], which required CSI to address 48 BSA objections, including three addressed to objection No. 8 to the First DOB Notice of Objections, two of which were:

> 21. [P]lease clarify that the DOB objection for ZR § 23-711 is due to the lack of distance between the residential portion of the new building and the existing community facility building to remain.

25. It appears that the "as-of-right" scenario would still require a BSA waiver for ZR § 23-711 (Standard Minimum Distance Between Buildings) given that it contains residential use (see Objection # 21). Please clarify.

CSI's September 10, 2007 response [A468] did not address these BSA objections, but stated:

N/A: DOB Objection #8 omitted by DOB upon reconsideration (See, DOB Objection Sheet and Proposed Plans, dated August 28, respectively).

CSI claimed that it had applied to DOB for reconsideration of the First DOB Notice of Objections and had submitted "Proposed Plans, dated August 28, 2007" and, thereafter, DOB issued the Second DOB Notice of Objections, which omitted Objection No. 8.

No evidence was presented that the "Proposed Plans" were revised to comply with the noted provisions of the Zoning Resolution. CSI did not produce to BSA or to Appellants its alleged reconsideration application or the documents submitted therewith, nor are they on file at DOB [A135].

When Appellant raised this issue at the February 12, 2008 BSA public hearing [A632 - 633], the following colloquy took place:

[APPELLANTS' ATTORNEY]: There's been no explanation required as to the difference between the original plans

which formed the basis for the application to this Board and the subsequent plans which they claim were provided to DOB.

VICE-CHAIR COLLINS: I don't understand the relevance of that.

The Buildings Department has given an objection sheet. They told us where these filed plans don't meet the zoning. That's what we're here to rule on.

[APPELLANTS' ATTORNEY]: They're not filed plans.

VICE-CHAIR COLLINS: Now, do you think that there should be further objections based on the plans that you have access to?

[APPELLANTS' ATTORNEY]: As far -- this Board should ask for the answers to its 8th objection that it raised.

VICE-CHAIR COLLINS: But that objection is not before us anymore because revised plans were filed and a new objection sheet was filed. It's a common practice. We see it all the time. I think you're seeing demons where none exist.

[APPELLANTS' ATTORNEY]: No, we haven't been told what the difference is between the revised plans and the original plans, if there is any.

VICE-CHAIR COLLINS: All of our files are completely open. You can make an appointment to come and see them. It's my understanding that they've been made available to you from the beginning. I think it is a bogus issue you're raising.

I don't think there's any legal basis for it.

[APPELLANTS' ATTORNEY]: Well, with all due respect, what is the difference between the original plans and the revised plans?

CHAIR SRINIVASAN: It doesn't matter. We have a set of objections which is what we're reviewing.

CSI's attorney later admitted that the plans which CSI submitted to BSA were not the plans presented to or reviewed by DOB [A635 - 636]:

> [CSI ATTORNEY]: With regard to the issues raised by counsel to the building regarding the objection sheet, I'm prepared to give you an explanation, if you wish now, of what that situation is all about. It's really up to the Board.
>
> CHAIR SRINIVASAN: Why don't you just tell us what the situation is.
>
> [CSI ATTORNEY]: Fine. I would be happy to do so.
>
> CHAIR SRINIVASAN: It seems like you can put it to rest after that.
>
> [CSI ATTORNEY]: The original objection sheet that was obtained at the request of the counsel at the Landmarks Commission when this matter was before the Landmarks Commission, which is kind of unusual, because you're in gross schematics at that stage. You haven't really submitted anything to the Buildings Department but the Landmarks Commission wants to know what the Building Department feels are the zoning waivers requested. We submitted that.
>
> Originally, the building, the tower had a slot between the residential building and the synagogue. There was a physical space there that several of the Landmark's Commissioners wanted us to explore. They thought some separation between the two were important.
>
> That gave rise to an objection regarding the separation of buildings.
>
> Now, that zoning -- that envelope did not emerge from Landmarks, although, by that time, nobody was thinking about the objection sheet that had been asked about in 2003.
>
> So, when we got to the Building's Department and it was submitted for zoning review, we recognized that the zoning objection sheet was in error because the building no longer contained the separation issue between the buildings because the

two buildings were -- now the new and the old were now joined. That was amended.

In other words, until that hearing, CSI had represented that the plans which:

CSI filed to commence its Application; and

CSI represented under penalty of perjury to be the plans which resulted in the First DOB Objections from which BSA's jurisdiction was sought

were not the plans filed at DOB or the ones resulting in the First DOB Notice of but Objections, but were merely "gross schematics" of a different structure prepared five years earlier, in 2003.

(ii) The Supreme Court's Determination

The Judgment ignored these significant omissions and deferred to BSA, noting that "[t]he fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction" [A13]. Once again, the Judgment cited no authority for this incredibly broad conclusion.

(iii) The Supreme Court's Failure To Apply Controlling Law

Since CSI's Application to BSA was premised upon New Building plans which were not reviewed by DOB and not rejected by DOB, they could not serve as a basis for BSA jurisdiction pursuant to Charter § 666.

Nor were the plans which were the basis for CSI's Application to BSA reviewed by the Community Board and other required officials as required by Charter § 668.

BSA's own rules require that the plans which are the basis for such a variance application first must be sent to:

(a) The affected Community Board(s) (or Borough Board);

(b) The affected City Council member;

(c) The affected Borough President;

(d) The administrative official from whose order or determination the appeal is being made; and

(e) The City Planning Commission.

2 RCNY § 1-06.

BSA's Rules further require that it provide 60 days for the Community Board to review the application. *Id.*

The Supreme Court erred in ignoring that BSA's jurisdiction with respect to applications for variances is not original jurisdiction, but solely appellate jurisdiction.

As stated on BSA's website, in describing its authority:

> The Board is empowered by the City Charter to interpret the meaning or applicability of the Zoning Resolution, Building and Fire Codes, Multiple Dwelling Law, and Labor Law. This power includes the ability to vary in certain instances the provisions of these regulations.
>
> The majority of the Board's activity involves reviewing and deciding applications for variances and special permits, as empowered by the Zoning Resolution, and applications for appeals from property owners who proposals have been denied by the City's Departments of Building, Fire or Business Services. The Board also reviews and decides applications from the Departments of Buildings and Fire to modify or revoke certificates of occupancy.
>
> The Board can only act upon specific applications brought by landowners or interested parties who have received prior determinations from one of the enforcement agencies noted above. The Board cannot offer opinions or interpretations generally and it cannot grant a variance or a special permit to any property owner who has not first sought a proper permit or approval from an enforcement agency. . . .

BSA is, as described in its enabling statute, General City Law Article 5-A, a "zoning board of appeals".

As noted previously, General City Law § 81-A limits BSA jurisdiction, unless otherwise provided by a specific law, to appeals:

> Hearing appeals. Unless other provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination, made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board of bureau of the city.

Consistent with this, Charter § 668 limits BSA's jurisdiction to appeals.

Thus, since BSA lacks original jurisdiction, and possesses only appellate jurisdiction to issue variances, it may only act upon the same application previously presented to and denied by DOB. *See, e.g.*, McDonald's Corp. *v.* Kern, 260 A.D.2d 576 (2d Dep't 1999); Gaylord Disposal Source, Inc. *v.* Zoning Board of Appeals, 175 A.D.2d 543, 544 (3d Dep't 1991), *lv. to app. den.*, 78 N.Y.2d 863 (1991); Barron *v.* Getnick, 107 A.D.2d 1017 (4th Dep't 1985), Kaufman *v.* City of Glen Cove, 180 Misc. 349 (1943), *aff'd*, 266 A.D. 870 (2d Dep't 1943); 1962 N.Y. Op. Att'y Gen. 120 (April 23, 1962).

Point II

By Granting Multiple Variances Based Upon The Landmarked Structure On One Of CSI's Parcels, BSA Illegally Usurped The Authority Of The Landmarks Preservation Commission And The City Planning Commission

Zoning Resolution, Section 72-21, requires that a variance applicant satisfy five mandatory findings, the first of which, commonly called the "[a] Finding" requires proof:

> [T]hat there are unique physical conditions, including irregularity, narrowness or shallowness as to size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular zoning lot.

CSI did not, and could not, satisfy this requirement. Instead, CSI argued that the landmark status of its Synagogue adjacent to the proposed New Building constituted a "unique physical condition" which limited its as-of-right development; CSI offered no statutory or decisional support for this claim.

BSA's Resolution accepted CSI's argument [A281 - 282]:

> 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
>
> * * *

> WHEREAS, the Board notes that the . . . location of the landmark synagogue limits the developable portion of the site to the development site; and
>
> * * *
>
> WHEREAS, the Board notes that the Zoning Resolution includes several provisions permitting the utilization or transfer of development rights from a landmark building within the lot on which it is located or to an adjacent lot; and
>
> * * *
>
> WHEREAS, the Board agrees that the unique physical conditions cited above . . . create . . . unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a). . . . [6]

A. BSA Illegally Usurped The Jurisdiction of CPC

The Zoning Resolution provision permitting the "utilization or transfer" of development rights from a landmark building is § 74-711.

Section 74 is entitled "Powers of the City Planning Commission" and § 74-711 states:

> In all districts, for zoning lots containing a landmark designated by the Landmarks Preservation Commission, or for zoning lots with existing buildings located within Historic Districts designated by

[6] BSA also cited "obsolescence of the existing community house building" as a unique physical condition which allegedly satisfied this requirement. Clearly, that is not a physical condition inherent in the Zoning Lot. Although Respondents claimed that additional considerations also factored into this finding, such as division of boundary line and the "sliver law", they were not the basis of the Resolution.

> the Landmarks Preservation Commission, the City Planning Commission may permit modification of the use and bulk regulations.

By its express terms, Zoning Resolution § 74-711 authorizes CPC, not BSA, to modify use and bulk regulations due to the presence of a landmark structure.

CSI initially advised LPC that it would seek relief under Zoning Resolution § 74-711 [A269]. CSI then elected not to do so [*id*.].

Having elected not to seek such relief where statutorily available, CSI could not claim before BSA that it was prejudiced by the landmarked status of the Synagogue.

In reaching its determination to grant extraordinary relief to CSI based upon the presence of the landmarked Synagogue, BSA expressly relied upon the Zoning Resolution rights granted solely to CPC.

No authority justifies this. To the contrary, one agency is prohibited from exercising the jurisdiction and authority of another without an express legislative grant. *See*, Ardizzone *v*. Elliott, 75 N.Y.2d 150, 157 (1989) ("a court should not find that the Legislature intended two separate agencies to exercise concurrent jurisdiction unless no other reading of the statute is possible").

As discussed in the Kettaneh Judgment, those petitioners asserted a different claim [A254, 269]:

> [P]etitioners [in Kettaneh] allege that because [CSI] did not exhaust its administrative remedies provided by 74-711, claiming that [CSI] failed to complete the review process before the LPC, Petitioners contend that the BSA should not have entertained the application, since [CSI] is asserting the same landmark hardships and economic need inherent in a 74-11 application.
>
> * * *
>
> [P]etitioners [in Kettaneh] contend that prior to seeking a variance from the BSA, [CSI] 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 is application to the BSA for a variance.

Contrary to the Supreme Court's apparent misapprehension, Appellants additionally argued BSA lacked any right to consider the landmarked status of the Synagogue structure, not because it failed to exhaust its remedies before CPC, but because the Legislature granted the right to award Zoning Resolution § 74-711 relief solely to CPC, not BSA. *See, e.g.*, Windsor Plaza Co. *v.* Deutsch, 110 A.D.2d 531 (1st Dep't), *aff'd*, 66 N.Y.2d 874 (1985).

B. BSA Illegally Usurped The Jurisdiction of LPC

As Appellants also argued, relief arising from landmarking is available under the Landmarks Law, itself, which specifically provides remedies when a landmarked structure creates hardships for a property owner. Charter,

Ch. 74, § 3021; Penn Central Transportation Co. *v.* New York City, 438 U.S. 104 (1978).

Neither the Judgment nor the Kettaneh Judgment addressed this.

No law, rule or regulation permits BSA to grant a variance due to landmark status of a property.

Since the Resolution was expressly premised on the location of the landmarked CSI Synagogue, it lacked legal basis and should have been annulled. *See generally*, Foy *v.* Schechter, 1 N.Y.2d 604, 612 (1956).

Point III

BSA Applied Unprecedented Standards In Granting CSI's Application

A. BSA Improperly Relied Upon CSI's Claimed Programmatic Needs In Granting Variances To Be Used Solely For Income Generation

As previously explained, the great bulk of the variances sought and obtained by CSI were to permit it to construct the Luxury Condominium Development and to sell the apartments to wealthy individuals.

CSI argued that it needed to undertake this project solely to produce income to fund the construction of the New Building and its other activities [A280, 295, 300].

BSA's Resolution conceded that this was not a legitimate basis for a variance [A280]:

> New York law does not permit the generation of income to satisfy the programmatic need requirement of a not-for-profit organization [even where there is] an intent to use the revenue to support a school or worship space.

BSA then created a new test for determining mixed purpose variance applications by considering the Luxury Condominium Development separately from the Synagogue Annex portion of the New Building to satisfy the requirements for a variance [A277] ("[T]he Board subjected this application to the standard of review required under ZR § 72-21 for the discrete community facility and residential uses, respectively. . . notwithstanding [the residential development's sponsorship by a not-for-profit religious institution]").

BSA, itself, previously rejected such a formula in connection with another not-for-profit religious institution. In Yeshiva Imrei Chaim Viznitz, Calendar No. 290-05-BZ, a Jewish religious school sought a variance to operate a catering establishment to serve its religious community and to generate income

to support its school and synagogue. As noted by BSA, in rejecting the application [p. 5]:

> [W]ere [BSA] to adopt Applicant's position and accept income generation as a legitimate programmatic need sufficient to sustain a variance, then any religious institution could ask the Board for a commercial use variance in order to fund its schools, worship spaces, or other legitimate accessory uses. . . .

See also, BSA decision in 739 East New York Avenue, Brooklyn, BSA Calendar No. 194-03-BZ [p. 2], discussed in 290-05-BZ.

BSA's conclusion in Yeshiva Imrei Chaim Viznitz applies equally here. Since BSA did not establish any basis for departing from its own prior determinations, the trial court should have found the Resolution invalid as a matter of law. *See, e.g.*, Cornell University *v.* Bagnardi, 68 N.Y.2d 583 (1986) (zoning board determination was improper where board applied wrong legal standard or criteria to determination).

B. BSA Was Not Permitted To Ignore Its Own Precedent

In permitting CSI to violate multiple zoning restrictions and construct the five floor Luxury Condominium Development on top of, and through, the Synagogue Annex, BSA's Resolution violated BSA's own precedents, described above.

As held by the Court of Appeals in Knight *v.* Amelkin, 68 N.Y.2d 975, 977 (1986):

> We have recently held that "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious" *(Matter of Field Delivery Serv. [Roberts]*, 66 N.Y.2d 516, 517). Inasmuch as a zoning board of appeals performs a quasi-judicial function when considering applications for variances and special exceptions (see, *Matter of Cowan v Kern*, 41 NY2d 591, 598-599, *rearg denied* 42 NY2d 910; *Holy Spirit Assn. v Rosenfeld*, 91 AD2d 190, *lv denied* 63 NY2d 603), and completely lacks legislative power" (2 Anderson, New York Zoning Law and Practice § 23,59, at 251; 6 Rohan, Zoning and Land Use Controls § 43.01 [2] [b], at 43-8 – 43-9), a zoning board of appeals must comply with the rule of the *Field* case.

See also, Lyublinskiy *v.* Srinivasan, 65 A.D.2d 1237 (2d Dep't 2009); Menachem Realty, Inc. *v.* Srinivasan, 60 A.D.2d 854 (2d Dep't 2009).

The Supreme Court's Kettaneh Judgment discussed the five part test under Zoning Resolution § 72-21 [A256 - 268], but did not offer any justification for BSA's substituted standard, merely reciting that [A257]:

> 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.

Neither the Kettaneh Judgment nor the Judgment here provide any legal authority for this new non-statutory standard.

C. BSA Erred As A Matter of Law In Applying The Wrong Legal Standard In Finding An Inability To Realize A Reasonable Return

As acknowledged by BSA in its Resolution, a not-for-profit institution is not required to establish an inability to achieve reasonable financial return to obtain a variance [A282]:

> [U]nder 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. . . .

Conversely, the inability to realize reasonable return does not warrant the issuance of a variance for a not-for-profit institution. *See, e.g.,* Pine Knolls Alliance Church *v.* Zoning Board of Appeals, 5 N.Y.3d 407, 804 N.Y.S.2d 708 (2005) (examining programmatic needs of church in determining special permit request to expand for these purposes); Society for Ethical Culture in the City of New York *v.* Spatt, 51 N.Y.2d 449 (1980) (noting, in the landmark regulation context, that "because charitable organizations are not created for financial return in the same sense as private businesses, for them the standard is [whether they are able to carry] out [their] charitable purpose").

In separately analyzing the revenue generating potential of the Luxury Condominium Development, but not doing so with respect to the

Synagogue Annex, BSA created separate tests for the same building. The proper inquiry for a not-for-profit applicant is whether "unique physical conditions" create a hardship impairing its ability to meet its programmatic needs, not whether it can make a profit on a speculative real estate venture unrelated to those programmatic needs. *See*, Pine Knolls, *supra* (examining programmatic, and not economic, needs of religious institution in determining special permit request for expansion for non-profit purposes); Foster *v.* Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (4th Dep't 1981) (applying reasonable return test to variance request for property owned by school, but leased to commercial entity).

By limiting the inquiry to whether a portion of an as-of-right development would have been capable of yielding a reasonable return, BSA skewed the calculation creating a new test standard not permitted by the Zoning Resolution. *See*, Citizens for Ghent, Inc. *v.* Zoning Board of Appeals of Town of Ghent, 175 A.D.2d 528 (3rd Dep't 1991) (since appraisal report provided dollars and cents evaluation of only a portion of property, there was no proof that the entire property could not allow a reasonable return); Concerned Residents of New Lebanon *v.* Zoning Board of Appeals of Town of New Lebanon, 222 A.D.2d 773 (3rd Dep't 1995) (rate of return analysis limited to leasehold portion of property of owner was deficient).

D. BSA's Flawed Conclusion That Seven Major Variances Were The Minimum Necessary

Zoning Resolution § 72-21(e) (one of the five requirements for a variance) directs that any variance granted be "the minimum necessary to afford relief."

CSI claimed, and BSA accepted, that the seven variances granted to allow CSI to construct the five floor Luxury Condominium Development on top of the four floor Synagogue Annex was the minimum necessary to alleviate hardship to CSI.

Consistent with its conclusion that the Luxury Condominium Development was not required to meet CSI's programmatic needs, BSA should have rejected it. By BSA's own calculations, this would add over 2,000 square feet of space within the Synagogue Annex otherwise required solely for the Luxury Condominium Development (approx 1,018 square feet of first floor lobby and elevator space, approximately 325 square feet of elevator, stair and core building space on each of the second, third and fourth floors, and an undefined amount of cellar level mechanical space and accessory storage space [A280]).

The Luxury Condominium Development was not necessary for CSI to meet its programmatic needs. Had it been eliminated, the New Building would have been materially smaller.

It does not take an expert zoning legal analysis to understand this. Even a child would comprehend that the Luxury Condominium Development was not essential to satisfy CSI's programmatic needs. Thus, the variances granted to construct it were not the minimum necessary.

As explained by the Court of Appeals:

> Absent a uniform and rigorous standard, it is apparent that even a well-intentioned zoning board by piecemeal exemption which ultimately changes the character of the neighborhood * * * may create far greater hardships than that which a variance may alleviate. Unjustified variances likewise may destroy or diminish the value of nearby property and adversely affect those who obtained residences in reliance upon the design of the zoning ordinance.

Village Board of the Village of Fayetteville *v*. Jarrold, 53 N.Y.2d 254, 260, 440 N.Y.2d 908, 911 (1981).

While the Supreme Court acknowledged the lack fo support for this and other bases of the Resolution, it apparently felt compelled to defer to BSA's judgment.

As demonstrated, the Supreme Court's deference was neither justified nor legally required.

CONCLUSION

For each of the foregoing reasons, the Judgment should be reversed, and the Petition should be reinstated and matter should be remanded to the Supreme Court to issue a judgment annulling the Resolution.

Dated: New York, New York
November 5, 2010

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Petitioners-Appellants

By: _____
David Rosenberg
Pamela D. Evans
488 Madison Avenue
New York, New York 10022
(212) 755-7500

Printing Specifications Statement

As a member of Marcus Rosenberg & Diamond, counsel to Plaintiffs-Appellants, I hereby certify that this brief is in compliance with § 600.10(d)(1)(v); the brief was prepared using WordPerfect; the typeface is Times New Roman; the main body is in 14 pt.; footnotes and point headings are in compliance with § 600.10(d)(l)(I); and the brief contains 7,994 words counted by the word-processing program.

Dated: New York, New York
November 5, 2010

David Rosenberg

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

LANDMARK WEST! INC., 91 CENTRAL PARK WEST CORPORATION AND THOMAS HANSEN,	**INDEX NO. 650354/08**
Petitioners,	
-against-	**PRE-ARGUMENT STATEMENT**
CITY OF NEW YORK BOARDS OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel,	
Respondents.	

Petitioners by their attorneys Marcus Rosenberg & Diamond LLP, as their Pre-Argument Statement, state as follows:

1. The title of this action is as set forth in the caption above.

2. The full name of the original parties is set forth above.

3. Counsel for appellants is:

Marcus Rosenberg & Diamond LLP
488 Madison Avenue
New York, New York 10022
(212) 755-7500

4. Counsel for respondents are:

Michael A. Cardozo
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 788-0461

Proskauer Rose LLP
Attorneys for Respondent
Congregation Shearith Israel
1585 Broadway
New York, New York 10036
(212) 969-3000

5. This appeal is taken from a decision, order and judgment of the Honorable Joan B. Lobis dated August 4, 2009, and entered October 6, 2009 in the office of the Clerk of the Court, Supreme Court of the State of New York, County of New York.

6. The underlying action seeks to annul and vacate the New York Boards of Standards and Appeals' determination and for other relief.

7. Appellant seeks reversal because, inter alia, the Court erred in dismissing the petition, and failing to annul and vacate BSA's determination granted to the Congregation Shearith Israel.

8. The only related action pending is Nizam Peter Kettaneh and Howard Lepow v. Board of Standards and Appeals of the City of New York, Index No. 113227/08, Supreme Court of the State of New York, County of New York, which was also before the Honorable Joan B. Lobis, which resulted in a decision, order and judgment, dated July 10, 2009. Petitioners in that case have served a notice of appeal to the Court.

Dated: New York, New York
October 20, 2009

MARCUS ROSENBERG & DIAMOND LLP
Attorneys for Petitioners

By:_____
David Rosenberg
488 Madison Avenue
New York, New York 10022
(212) 755-7500

TO: Michael A. Cardozo
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 788-0461

Proskauer Rose LLP
Attorneys for Respondent
Congregation Shearith Israel
1585 Broadway
New York, New York 10036
(212) 969-3000