

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

To be argued by
RONALD E. STERNBERG

NEW YORK SUPREME COURT
APPELLATE DIVISION : FIRST DEPARTMENT

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

Petitioners-Appellants,

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

-against-

CITY OF NEW YORK BOARD OF STANDARDS AND
APPEALS, NEW YORK CITY PLANNING COMMISSION,

Respondents-Respondents,

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

Respondent,

and CONGREGATION SHEARITH ISRAEL, also
described as the Trustees of Congregation
Shearith Israel,

Respondent-Respondent.

MUNICIPAL RESPONDENTS' BRIEF

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January 13, 2011

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MUNICIPAL RESPONDENTS' BRIEF

PRELIMINARY STATEMENT

In this article 78 proceeding to annul a variance granted by respondent Board of Standards and Appeals ("BSA" or "the Board") to respondent owner, Congregation Shearith Israel ("Congregation"), petitioners appeal from an order and judgment

(one paper) of the Supreme Court, New York County (Lobis, J.), entered October 6, 2009, that confirmed the BSA's determination "in all respects," denied the application, and dismissed the petition (A7-A13).¹ Municipal respondents contend that the Court below correctly determined that "[p]etitioners have failed to demonstrate that the BSA acted illegally and without legal authority in considering the Congregation's application" (A13). For the reasons stated herein and in the municipal respondents' brief filed in the companion appeal,² the order and judgment (one paper) appealed from should be affirmed.

QUESTION PRESENTED

Whether the Court below correctly determined that the BSA had jurisdiction to consider the Congregation's application and did not otherwise proceed illegally.

STATEMENT OF FACTS

In order to avoid unnecessary repetition, the Court is respectfully referred to the Statement of Facts in the brief filed by this office on behalf of municipal respondents-respondents on the companion appeal.

¹ Numbers in parentheses preceded by "A" refer to pages of the Appendix.

² *Kettaneh v. Board of Standards and Appeals of the City of New York*, index no. 113227/08.

ARGUMENT

THE COURT BELOW CORRECTLY DETERMINED THAT PURSUANT TO NEW YORK CITY CHARTER, SECTION 666(5), THE BSA HAD JURISDICTION TO CONSIDER THE CONGREGATION'S VARIANCE APPLICATION.

Petitioners argue that the "BSA lacked jurisdiction to entertain [the Congregation's] Application because it was not based upon an appeal from a determination of either of the City officials specified in [New York City] Charter § 666" (Pets' Br., at 13). Petitioners' contention reflects an imperfect understanding of the BSA's jurisdiction as provided in section 666 of the Charter, and as explained by the BSA in its resolution herein (A275n.2).

As section 666 explicitly provides, the BSA has both appellate and original jurisdiction. Thus, the BSA has the power, *inter alia*, "[t]o hear and decide appeals from and review ... 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." Charter § 666(6)(a); *see, e.g., Matter of New York Botanical Garden v. Board of Standards and Appeals of the City of New York*, 91 NY2d 413 (1998)(opponent of a building permit issued by the Department of Buildings ["DOB"] appealed to the BSA).

It may well be, as petitioners argue, that the BSA's appellate jurisdiction may not be invoked without a determination issued by the DOB Commissioner or a borough superintendent acting under appropriate delegation. However, as such jurisdiction was neither invoked nor exercised in the instant case, such issue need not be determined, and municipal respondents express no opinion in that regard.

Petitioners' contention that the BSA "lacks original jurisdiction" (Pets' Br., at 28) is directly contradicted by section 666(5) of the Charter, that explicitly provides that the BSA "shall have the power ... [t]o determine and vary the application of the zoning resolution." Thus, as occurred herein, a party that is denied a building permit on the ground that the application does not conform to the Zoning Resolution may seek a variance of the Resolution from the BSA, invoking the Board's original jurisdiction under section 666(5).³

While, by its terms, the Charter provides that an appeal to the BSA shall be from a determination of the Commissioner or an authorized borough superintendent (§

³ The distinction is clear. A party that believes that the DOB erred, and that it is entitled to a building permit, may appeal the DOB's determination to the BSA. Or, as was the case in *Botanical Garden*, a party that objects to the granting of the permit may appeal to the BSA. On the other hand, a party that recognizes that a permit was correctly denied may seek to vary the Zoning Resolution by invoking the BSA's original jurisdiction to do just that.

666[6][a]), there is no such stipulation in subsection 5, that states only that the BSA is empowered to "vary the application of the zoning resolution." It follows that the BSA herein reasonably interpreted the Charter as providing that a variance application "does not require a letter of final determination executed by the DOB Commissioner or by an authorized DOB borough commissioner" (A275n.2).

This conclusion is not altered by the BSA's internal policy that it "'cannot grant a variance ... to any property owner who has not first sought a proper permit or approval from an enforcement agency'" (Pets' Br., at 27). Administrative convenience suggests the appropriateness of not considering a variance unless it is apparent why the variance is necessary. In the instant case, such was clear - DOB issued explicit objections to the Congregation's application. The BSA thus had a basis upon which to act. The fact that the objections may not have been signed as may be required in a different situation is, as the BSA rationally concluded, irrelevant.

The Court below also correctly rejected petitioners' argument that the BSA's jurisdiction was "defeat[ed]" because "the plans that were presented to and rejected by the DOB were not the same as the plans that were presented to the BSA" [A12]. The Court below noted that while the plans submitted to the BSA were not identical to the first plans submitted to the DOB, the

"BSA Resolution reflects that the [Congregation's] revised plan was reviewed by the DOB, and that the second review resulted in the elimination of one of the eight [of the DOB's original] objections" (A13; see, A275n.1). "There is no indication in the record," the Court below appropriately concluded, "that the Congregation, bypassed the DOB in any way" (A13).

Finally, as summarized by the Court below, plan changes are a recognized part of the variance process (*id.*):

"Moreover, as set forth more fully in the *Kettaneh* decision, the plans evolved substantially over time, from a proposed fourteen-story structure to an eight-story, plus penthouse structure, which was ultimately approved by the BSA. The fact that the plans changed is something that should come of no surprise, nor is it a matter that defeats the BSA's jurisdiction. Indeed, the *Kettaneh* decision notes that the BSA often has pre-application meetings with applicants for variances. Revisions to proposals may be required to address the DOB's objections. Moreover, revisions occur over time throughout the BSA's review process in an effort to insure that an applicant is meeting the required criteria [*sic*] that the variance is the minimum necessary, which is the fifth required finding under ZR § 72-21."

As noted by the Court below, petitioners' counsel agreed that "the rest of the issues are probably encompassed in [*Kettaneh's*] petition" (A9). Municipal respondents otherwise rely upon, and respectfully refer this Court to, their brief filed on the companion *Kettaneh* appeal.

CONCLUSION

**THE ORDER AND JUDGMENT (ONE PAPER)
APPEALED FROM SHOULD BE AFFIRMED
IN ALL RESPECTS, WITH COSTS.**

Dated: New York, New York
January 13, 2011

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer with Microsoft Word 2003, using Courier New 12. As calculated by that processing system, it contains 1,280 words, exclusive of those parts of the brief exempted by § 600.10(d)(1)(i) of the Rules of this Court.

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